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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

PRIVATE HEALTH INSURANCE (PRUDENTIAL SUPERVISION) BILL 2015
PRIVATE HEALTH INSURANCE (PRUDENTIAL SUPERVISION)
(CONSEQUENTIAL AMENDMENTS AND TRANSITIONAL PROVISIONS)
BILL 2015
PRIVATE HEALTH INSURANCE SUPERVISORY LEVY IMPOSITION
BILL 2015
PRIVATE HEALTH INSURANCE (RISK EQUALISATION LEVY) AMENDMENT
BILL 2015
PRIVATE HEALTH INSURANCE (COLLAPSED INSURER LEVY)
AMENDMENT BILL 2015

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Treasurer, the Hon J. B. Hockey MP)

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Glossary

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

<i>Abbreviation</i>	<i>Definition</i>
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>
Collapsed Insurer Levy Act	<i>Private Health Insurance (Collapsed Insurer Levy) Act 2003</i>
Collapsed Insurer Levy Amendment Bill	Private Health Insurance (Collapsed Insurer Levy) Amendment Bill 2015
Consequential Amendments and Transitional Provisions Bill	Private Health Insurance (Prudential Supervision) (Consequential Amendments and Transitional Provisions) Bill 2015
Corporations Act	<i>Corporations Act 2001</i>
CRC	Convention on the Rights of the Child
Criminal Code	<i>Criminal Code Act 1995</i>
Crimes Act	<i>Crimes Act 1914</i>
CRPD	Convention on the Rights of Persons with Disabilities
FISLC Act	<i>Financial Institutions Supervisory Levies Collection Act 1998</i>
FS(CoD) Act	<i>Financial Sector (Collection of Data) Act 2001</i>
ICCPR	International Covenant on Civil and Political Rights
Insurer	Registered Private Health Insurer
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
Legislative Instruments Act	<i>Legislative Instruments Act 2003</i>
Life Insurance Act	<i>Life Insurance Act 1995</i>
PHI Act	<i>Private Health Insurance Act 2007</i>

<i>Abbreviation</i>	<i>Definition</i>
Prudential Supervision Bill	Private Health Insurance (Prudential Supervision) Act Bill 2015
Regulatory Powers Act	<i>Regulatory Powers (Standard Provisions) Act 2014</i>
Risk Equalisation Levy Act	<i>Private Health Insurance (Risk Equalisation Levy) Act 2003</i>
Risk Equalisation Levy Amendment Bill	Private Health Insurance (Risk Equalisation Levy) Amendment Bill 2015
SIS Act	<i>Superannuation Industry (Supervision) Act 1993</i>
SISs	Standard Information Statements
SRC Act	<i>Safety, Rehabilitation and Compensation Act 1998</i>
Supervisory Levy Imposition Bill	Private Health Insurance Supervisory Levy Imposition Bill 2015
the Committee	The United Nations Committee on Economic, Social and Cultural Rights
the Council	Private Health Insurance Administration Council

General outline and financial impact

General outline and financial impact

The Private Health Insurance (Prudential Supervision) Bill 2015 (Prudential Supervision Bill) creates a regime for the prudential regulation of private health insurers by the Australian Prudential Regulation Authority (APRA).

The Private Health Insurance (Prudential Supervision) (Consequential Amendments and Transitional Provisions) Bill 2015 (Consequential Amendments and Transitional Provisions Bill) makes consequential amendments to relevant legislation including the repeal of the provisions relating to the formation of the Private Health Insurance Administration Council (the Council) in the *Private Health Insurance Act 2007* (PHI Act). It also provides for necessary transitional arrangements to facilitate the transfer of the Private Health Insurance Administration Council's (the Council) prudential functions to APRA from 1 July 2015.

The Private Health Insurance Supervisory Levy Imposition Bill 2015 (Supervisory Levy Imposition Bill), the Private Health Insurance (Risk Equalisation Levy) Amendment Bill 2015 (Risk Equalisation Levy Bill) and the Private Health Insurance (Collapsed Insurer Levy) Amendment Bill 2015 (Collapsed Insurer Levy Amendment Bill) provide for the continued imposition of levies upon the private health insurance industry to fund APRA's supervision of the industry, the Risk Equalisation Trust fund and a levy to fund should there be a collapsed insurer.

Date of effect: The Prudential Supervision Bill comes into effect on 1 July 2015 or, if the Bill does not receive Royal Assent before 1 July 2015, on a date fixed by proclamation. The Consequential Amendments and Transitional Provisions Bill has multiple commencement dates, some provisions commence on Royal Assent or the day after, others commence at the same time or immediately after the commencement of the Prudential Supervision Bill.

Proposal announced: The proposal was announced as part of the 2014-15 Budget.

Financial impact: Nil

Human rights implications: These Bills are compatible with human rights. To the extent that they may limit human rights, those limitations are reasonable, necessary and proportionate. See *Statement of Compatibility with Human Rights* — Chapter 15.

Compliance cost impact: Nil, no compliance cost assessment.

Summary of regulation impact statement

As the policy involves a machinery of government change, the Office of Best Practice Regulation considered that a Regulation Impact Statement was not required.

The measure will not change the regulatory costs on business, community organisations or individuals and the compliance costs under the package are substantively the same as the costs under the PHI Act.

Chapter 1

General introduction

Context of amendments

1.1 The Council 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 PHI Act.

1.2 The Council is responsible for monitoring the prudential performance of registered private health insurers. The Council'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, the Council will cease as a separate body, and its prudential supervisory functions will be transferred to APRA.

1.4 The *Smaller Government Reform Agenda* will streamline government bodies and reduce duplication of Government agencies as statutory bodies will be abolished and rationalised where activities are no longer needed or can be managed within existing departmental resources. The abolition and merger of statutory bodies, including the Council, is expected to improve coordination and accountability and reduce the costs associated with separate governance arrangements.

Summary of new law

1.5 The transfer of the Council's prudential supervisory functions will be given effect by this package of Bills, which transfers the regime for the prudential regulation of private health insurers to be administered by APRA.

1.6 The package of Bills 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.

1.7 Opportunities to harmonise legislation and eliminate duplication within the private health insurance regulatory framework is consistent with the Government's deregulation agenda.

1.8 The amendments will have effect from 1 July 2015 (if the Prudential Supervision Bill receives Royal Assent before 1 July 2015) or a single day to be fixed by proclamation (if the Prudential Supervision Bill receives Royal Assent on or after 1 July 2015).

1.9 The Consequential Amendments and Transitional Provisions Bill includes amendments to:

- the *Australian Prudential Regulation Authority Act 1998* (APRA Act) to provide for matters relating to secrecy of information concerning private health insurers, and to provide for the administration of industry levies;
- the *Financial Institutions Supervisory Levies Collection Act 1998* (FISLC Act) to cater for the collection of private health insurance supervisory levy and the collection of collapsed insurance levy;
- the *Financial Sector (Collection of Data) Act 2001* (FS(CoD) Act) to facilitate the collection of data relating to private health insurers by APRA;
- the *Income Tax Assessment Act 1997* (ITAA 1997) to update or replace references to the PHI Act;
- the *Life Insurance Act 1995* (Life Insurance Act) to replace a reference to the PHI Act;
- the *Medibank Private Sale Act 2006* (Medibank Private Sale Act) to include references to the Prudential Supervision Bill in certain provisions that currently refer to the PHI Act;
- the *Ombudsman Act 1976* to enable the sharing of information with APRA; and

- the PHI Act to remove the prudential supervision powers, remove references to the Council and to repeal the provisions creating the Council.

1.10 A number of transitional provisions have been provided for relating to the repeal of the provisions establishing the Council and the transfer of functions to APRA. Such transitional provisions will ensure that legal actions taken prior to the transfer day, such as the registration of private health insurers, and other processes, such as legal proceedings, will continue under the Prudential Supervision Bill. Finally, there are machinery transitional provisions for the transfer of the Council staff, assets, liabilities and records from the Council to APRA.

1.11 The Risk Equalisation Levy Amendment Bill amends the *Private Health Insurance (Risk Equalisation Levy) Act 2003* (Risk Equalisation Levy Act), and the Collapsed Insurer Levy Amendment Bill amends the *Private Health Insurance (Collapsed Insurer Levy) Act 2003* (Collapsed Insurer Levy Act), to replace references to the Council with references to APRA. Both of these Bills also repeal redundant provisions. The *Private Health Insurance (Council Administration Levy) Act 2003* is being repealed as it is redundant and the Supervisory Levy Imposition Bill is being introduced.

1.12 The PHI Act will retain provisions relating to private health insurance policies such as the establishment and administration of the premiums reduction scheme (the Private Health Insurance Rebate) 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.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Establish APRA as the prudential regulator of the private health insurance industry.	The Council is the prudential regulator for the private health insurance industry.
The main provisions of the Prudential Supervision Bill: <ul style="list-style-type: none"> • provide for registration of private health insurers and prohibit entities, that are not registered, from carrying on a health related business (Part 2); 	The main provisions in the PHI Act that relate to the Council and its supervisory role include the: <ul style="list-style-type: none"> • registration of private health insurers and the prevention of entities not registered from carrying on a health insurance

<i>New law</i>	<i>Current law</i>
<ul style="list-style-type: none"> • require private health insurers to have health benefits funds, and outline obligations relating to the operation of such funds (Part 3, Divisions 2 and 3); • provide for APRA to approve restructures, mergers, acquisition and termination of health benefits funds (Part 3, Divisions 4 and 5); • give APRA power to appoint an external manager of a health benefit fund and outline the powers and duties of external managers and terminating managers (Part 3, Divisions 6, 7 and 8); • outline duties and liabilities of directors (Part 3, Division 9); • allow APRA to establish prudential standards and exercise powers under the standards, and give directions and require health benefits funds to comply with such standards and directions (Part 4); • outline obligations of private health insurers such as the appointment of actuaries and reporting and notification requirements (Part 5, Divisions 2, 3 and 4); • provide for the monitoring and investigation of private health insurers (Part 6); • provide that APRA can obtain an enforceable undertaking from a person in connection with a matter in relation to which APRA has a power or function under the Act or the risk equalisation legislation (Part 7); • provide that APRA may seek remedies for a contravention of an enforceable obligation (Part 8); • provide for a review of APRA’s decisions by the Administrative 	<ul style="list-style-type: none"> business (Parts 4-2 and 4-3); • prevention of private health insurers from offering or advertising health insurance business other than as a complying health insurance product (Part 3-3); • requirement for private health insurers to have health benefits funds and obligations relating to the operation of such funds (Part 4-4); • establishment of solvency and capital adequacy standards and directions by the Council and the requirement for health benefits funds to comply with such standards and directions (Part 4-5); • establishment of prudential standards and directions for private health insurers and the requirement for insurers to comply with such standards and directions (Part 4-4); • restructure, merger, acquisition and termination of health benefit funds (Part 4-4 and 6-5); • outline of duties and liabilities of directors (Part 4-4); • obligations of private health insurers such as the appointment of actuaries and reporting and notification requirements (Part 4-5); • the Council’s ability to supervise compliance by private health insurers with their obligations with respect to matters regulated by the Council (‘Council-supervised obligations’) (Parts 5-2 and 5-3); • the Council’s general enforcement powers including the ability to seek remedies for a contravention of a Council-supervised obligation

<i>New law</i>	<i>Current law</i>
<p>Appeals Tribunal (AAT) (Part 9); and</p> <ul style="list-style-type: none">• set out matters in relation to approvals, determinations and rules (Part 9).	<p>(Part 5-2);</p> <ul style="list-style-type: none">• appointment of an external manager of a health benefits fund and the powers and duties of external managers (Parts 5-3 and 6-5);• continuation, purpose, functions and administration of the Council (Part 6-3);• review of the Council's decisions by the AAT (Part 6-9); and• ability of the Council to make certain Private Health Insurance Rules, via legislative instrument (Part 6-10).

Chapter 2

Introduction

Outline of chapter

- 2.1 Part 1 deals with the preliminary provisions. This includes:
- the short title and commencement;
 - an outline of the Prudential Supervision Bill;
 - the definition of terms used; and
 - the constitutional basis and application.
- 2.2 Unless otherwise stated, all references in this Chapter relate to the Prudential Supervision Bill.

Detailed explanation of new law

Part 1 – Introduction

Division 1 - Preliminary

Short title

2.3 This Bill may be cited as the Private Health Insurance (Prudential Supervision) Bill 2015. *[Part 1, Division 1, section 1]*

Commencement

2.4 The Prudential Supervision Bill commences from 1 July 2015 (if the Bill receives Royal Assent before 1 July 2015) or a single day to be fixed by proclamation (if the Bill receives Royal Assent on or after 1 July 2015). *[Part 1, Division 1, section 2]*

2.5 If the Prudential Supervision Bill does not commence by 1 July 2015 and if the Bill does not commence within the period of six months of Royal Assent, the Bill commences on the day after the end of that period.

Simplified outline of this Bill

2.6 Only a private health insurer may carry on health insurance business. A private health insurer is a company that is registered under Part 2. *[Part 1, Division 1, section 3]*

2.7 A private health insurer must have at least one health benefits fund. There are regimes governing:

- how health benefits funds are operated;
- changing the health benefits fund to which a policy of insurance is referable;
- terminating health benefits funds; and
- external management of health benefits funds. *[Part 1, Division 1, section 3]*

2.8 Private health insurers must comply with prudential standards made by APRA, and (in an enforcement context, usually where a significant prudential concern exists) with directions given by APRA. Private health insurers and their appointed actuaries also have various other obligations. APRA has monitoring and investigative powers in relation to private health insurers. APRA may accept enforceable undertakings, and may seek remedies in the Federal Court in relation to contraventions of enforceable obligations. *[Part 1, Division 1, section 3]*

2.9 The PHI Act defines the key concepts of health insurance business and health benefits funds as well as other concepts that relate to health benefits funds. That Act also sets out rules governing private health insurance products and provides incentives to encourage people to have private health insurance. *[Part 1, Division 1, section 3]*

Interpretation

2.10 The dictionary provides definitions of terms used in the Prudential Supervision Bill. In some cases, the definitions are signposts to other provisions within the Bill 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 Bill

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

Division 2 - Constitutional matters

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

Bill binds the Crown

2.13 The Bill binds the Crown in each of its capacities. This section is subject to section 7. *[Part 1, Division 2, section 6]*

Bill not to apply to State insurance within that State

2.14 The Prudential Supervision Bill does not apply to State insurance that does not extend beyond that State. *[Part 1, Division 2, section 7]*

Compensation for acquisition of property

2.15 If the operation of the Prudential Supervision Bill would result in an unjust acquisition of property for a person otherwise than on just terms (within the meaning of paragraph 51(xxxi) 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]*

Legal professional privilege

2.16 There is no specific reference to legal professional privilege applying to this Bill, and therefore the common law principle of legal professional privilege will apply.

Chapter 3

Registration of private health insurers

Outline of chapter

3.1 Part 2 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, changes in registration status and cancellation of registration; and
- APRA’s powers to grant or refuse applications and cancel a private health insurer's registration.

3.2 Unless otherwise stated, all references in this Chapter relate to the Prudential Supervision Bill.

Summary of new law

3.3 Part 2 is largely based on the existing registration provisions currently provided 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>
The new law mirrors the current law.	There is a prohibition against carrying on health insurance business without registration and injunctions to enforce this prohibition.

<i>New law</i>	<i>Current law</i>
Certain bodies may apply to APRA for registration as a private health insurer (section 12).	Certain bodies may apply to the Council for registration as a private health insurer (section 126-10 of the PHI Act).
The new law mirrors the current law.	Arrangements for applying for registration and changes in registration status and the Council's powers to grant or refuse an application and cancel a private health insurer's registration

Detailed explanation of new law

Part 2 – Registration of private health insurers

Division 1 - Introduction

Simplified outline of this Part

3.4 Only a private health insurer may carry on health insurance business. A private health insurer is a company that is registered under this Part. Part 4-2 of the PHI Act defines the concept of health insurance business. *[Part 2, Division 1, section 9]*

3.5 There are two kinds of special status that some private health insurers may have. They are:

- a for profit insurer; and
- a restricted access insurer. *[Part 2, Division 1, section 9]*

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

Carrying on health insurance business without registration

3.6 It is an offence for a person to carry on a health insurance business without being registered. The penalty for this offence is two years imprisonment or 120 penalty units, or both. *[Part 2, Division 2, subsection 10(1)]*

3.7 The penalty for such an offence has been increased from 40 penalty units under subsection 118-1(1) of the PHI Act, to two years imprisonment or 120 penalty units, or both. The increase in penalty is to deter people from operating private health insurance businesses without registration and to allow APRA to regulate private health insurance businesses (unregistered private health insurers would not be regulated by APRA).

3.8 A note is inserted beneath subsection 10(1) to clarify that if a body corporate is convicted of an offence under subsection 10(1), it may be subject to a penalty of up to five times the penalty stated in subsection 10(1). This is imposed by subsection 4B(3) of the *Crimes Act 1914* (Crimes Act), as the offence can apply to a natural person or a body corporate. This note has been inserted for every offence provision to assist the reader. Whilst it may appear that some offences only apply to body corporates or natural persons, the operation of Part 2.4 of the *Criminal Code Act 1995* (Criminal Code) applies where a person aids, abets, counsels or procures the commission of an offence, the offence provision can apply to that person whether they are a natural person or a body corporate. *[Part 2, Division 2, subsection 10(1)]*

3.9 If a person commits such an offence, the offence period is from the first day the offence and each day thereafter (including the day of conviction or later day). *[Part 2, Division 2, subsection 10(2)]*

3.10 All offences in the (Prudential Supervision Bill) will be fault liability offences. Therefore a relevant fault element (such as intention, knowledge or recklessness, depending on the operation of the Criminal Code), is required to commit the offence and this is also a requirement for prosecution.

Injunctions

3.11 If the Federal Court is satisfied that a person has, or will, carry on health insurance business without registration under section 10 of the Prudential Supervision Bill, it may, on the application of APRA, grant an injunction. *[Part 2, Division 2, subsection 11(1)]*

3.12 Pending the determination of APRA's application, the Federal Court may grant an interim injunction to stop or prevent the possible offence in section 10, but must not require the applicant to give an undertaking as to damages as a condition of granting the interim injunction. *[Part 2, Division 2, subsections 11(2) and (3)]*

3.13 The Federal Court may discharge or vary an injunction granted under subsection 11(1) or (2). *[Part 2, Division 2, subsection 11(4)]*

3.14 The Federal Court's power to grant an injunction to restrain a person from engaging in conduct may be exercised whether or not it appears that the person intends to engage in, continue to engage in or has previously engaged in such conduct. *[Part 2, Division 2, subsection 11(5)]*

3.15 The Federal Court is able to grant an injunction requiring a person to do an act or thing whether or not it appears to the Court that the person intends to refuse, fail again or continue to fail or refuse to do the act or thing. This includes 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

3.16 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 registered private health insurer. *[Part 2, Division 3, subsection 12(1)]*

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

3.18 Section 12 is based on section 126-10 of the PHI Act. However insurers will no longer be obligated to provide their proposed fund rules to the Secretary of the Department of Health. Fund rules will be provided by APRA to the Department of Health through an inter-departmental administrative arrangement.

Requiring further information

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

Criteria for registration

3.20 APRA may make rules setting out criteria for registration as a private health insurer. *[Part 2, Division 3, section 14]*

3.21 Section 14 is based on subsection 12(1B) of the *Insurance Act 1973* and is similar to a number of provisions in current Acts administered by APRA (for example, subsection 9(2A) of the *Banking Act 1959*). As is the case under other APRA administered Acts, the criteria will be matters to which APRA have regard, rather than a

check list of preconditions that automatically determine whether an application will be granted or refused.

Deciding the application

3.22 APRA may grant the application to be registered as a private health insurer, subject to any terms and conditions it deems appropriate. *[Part 2, Division 3, subsection 15(1)]*

3.23 A decision to refuse or to apply terms and conditions is reviewable under section 168.

3.24 If APRA grants the application then:

- the applicant is taken to have been registered as a private health insurer from the date specified in the instrument granting the application; 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 granting of the application; 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 and its constitution or rules satisfy subsection 15(3), it is taken to be registered as such. *[Part 2, Division 3, subsection 15(2)]*

3.25 The Consequential Amendments and Transitional Provisions Bill provides that after the transition time, private health insurers may request APRA to amend or revoke one or more terms and conditions imposed upon existing registrations. The purpose of this is to allow APRA to ‘clean up’ obviously redundant or out-of-date conditions. Requests must be made in writing. *[Schedule 2, Part 2, subitem 3(3) of the Consequential Amendments and Transitional Provisions Bill]*

3.26 Subsection 15(3) applies to restricted access insurers only. An applicant’s constitution or business rules satisfy subsection 15(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)*]

3.27 An insurer's registration status as being, or not being, a for profit insurer or a restricted access insurer may change after the insurer's initial registration, but only as provided for in section 19.

3.28 Subsection 15(3) is intended to act as a precondition that the initial constitution or rules must satisfy in order for the insurer to be registered as a restricted access insurer. It is not intended to have the effect that, if the insurer ceases to have such provisions in its constitution or rules, it will automatically cease to be registered as a restricted access insurer. The insurer's actual registration status will only change if and when its status is changed under section 19.

3.29 If a restricted access insurer ceases to adequately comply with subsection 15(3), a direction will be able to be given under section 200-1 of the PHI Act to modify its constitution or rules in order to comply with subsection 15(3).

3.30 The requirements for what an insurer has to do if it changes, or proposes to change, its rules will continue to be dealt with under sections 169-10, 93-20 and 93-25 of the PHI Act.

3.31 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; or
- employed by a particular employer or employer belonging to a particular class of employers; or
- 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 made for the purpose of paragraph 4(e). 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)*]

3.32 A partner or dependent children of a person who belongs to such a group is also considered as belonging to the group. *[Part 2, Division 3, subsection 15(4)]*

3.33 Section 15 is based on an amalgamation of section 126-20 of the PHI Act and sections 12 and 13 of the *Insurance Act 1973*. There has been no change to the definition of a restricted access group.

Notifying the decision

3.34 If APRA grants the application for registration as a private health insurer, it must:

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

3.35 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

3.36 APRA is taken to have refused the application for registration as a private health insurer (allowing merits review under section 168, if requested) if it does not notify the applicant of its decision by the later 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.

3.37 APRA must publish on its website an up-to-date record of private health insurers. The records must contain the insurer's name, registration status, which States and Territories it operates in and contact details such as address, telephone number and website. *[Part 2, Division 3, section 18]*

Changing registration status

For profit insurer

3.38 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

3.39 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(3)). *[Part 2, Division 3, subsections 19(4) and (5)]*

3.40 APRA must notify changes of for profit or not for profit status to the Health Secretary, the Private Health Insurance Ombudsman and the Commissioner of Taxation. Changes of restricted access registration should also be notified to the Health Secretary and the Private Health Insurance Ombudsman. *[Part 2, Division 3, subsections 19(3) and (6)]*

Conversion to for profit status

3.41 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)]*

3.42 APRA must approve the application within 30 days after the application was made if it is satisfied that the application has been made in the approved form and the conversion scheme does not in substance involve the demutualisation of the insurer. *[Part 2, Division 3, subsection 20(3)]*

3.43 If the scheme does in substance involve the demutualisation of the insurer then the processes in subsections 20(4) and (5) will apply.

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

3.45 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)]*

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

3.47 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)]*

3.48 APRA must provide written notice to the insurer on the outcome of the application, however, this approval is not a legislative instrument. The statement that the approval is not a legislative instrument is included to assist readers, as the instrument is not a legislative instrument under general principles, therefore does not constitute a substantive exemption from the definition of a legislative instrument in the *Legislative Instruments Act 2003* (Legislative Instruments Act), but is a statement of the 'status quo'. *[Part 2, Division 3, subsection 20(7)]*

3.49 APRA is required to notify the insurer of its decision in writing as currently required under subsection 126-42(7) of the PHI Act. *[Part 2, Division 3, subsection 20(8)]*

3.50 Refusals of applications are reviewable under section 168.

Example 3.1

CALM Health Insurance applies to APRA to change its status to for profit from 7 October. To do so, CALM Health Insurance provides APRA with the approved form on 3 July – more than 90 days in advance of when the conversion is to take effect. In considering the application, APRA sought further information from CALM Health Insurance as to whether the conversion scheme involved a demutualisation. After considering the information, APRA is satisfied that it is not a demutualisation, approves the conversion and notifies CALM Health Insurance in writing within 30 days of lodgement.

Cancellation of registration

3.51 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 5 of Part 3; or

- the insurer is no longer a company within the meaning of the Corporations Act. *[Part 2, Division 3, subsection 21(1)]*

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

3.53 APRA will advise the Department of Health of any cancellation of registration through an inter-departmental administrative arrangement.

Chapter 4

Health benefits funds

Outline of chapter

- 4.1 Part 3 relates to 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.
- 4.2 Unless otherwise stated, all references in this Chapter relate to the Prudential Supervision Bill.

Summary of new law

4.3 Divisions 2 (requirement to have at least one health benefits fund), 3 (operating of health benefits funds), 4 (restructure, merger and acquisition of health benefits funds), 5 (termination of health benefits funds) and 9 (duties and liabilities of directors) of Part 3 are based on Part 4-4 of the PHI Act. However, the Prudential Supervision Bill does not include 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.

4.4 Divisions 6 (external management of health benefits funds), 7 (court-ordered terminating management of health benefits funds), and 8 (general provisions relating to external and terminating management) are based on provisions in Parts 4-4 and 5-3 of the PHI Act. The Prudential Supervision Bill will simplify the legislative regime by co-locating into Part 3 all the provisions relating to the operation, merger

and acquisition, external management and termination of health benefits funds that are currently located in different parts of the PHI Act.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<u>Establishment and operation of health benefits funds</u>	
The new law substantively mirrors the current law. Insurers are required to set up health benefits funds. The assets of the fund are kept separate from those of the insurer. APRA rules govern the operation of health benefits funds.	Insurers are required to set up health benefits funds. The assets of the fund are kept separate from those of the insurer. The operation of health benefits funds are governed by the Private Health Insurance (Health Benefits Fund Administration) Rules.
<u>Restructure, merger and acquisition of health benefits funds</u>	
The new law substantively mirrors the current law. Insurers must apply to APRA for approval restructure, merger or acquisition of a fund. A restructure, merger or acquisition must be in the interests of policy holders. APRA rules may govern a restructure, merger or acquisition	Insurers must apply to the Council for approval restructure of a fund, merger of a fund with another health benefits fund or acquisition of a fund. Private Health Insurance (Health Benefits Fund Administration) Rules may govern a restructure, merger or acquisition.
<u>Termination and external management of health benefits funds</u>	
The new law substantively mirrors the current law. Insurers may apply to APRA for termination of a health benefits fund (additionally the Federal Court can order the appointment of a terminating manager). APRA can appoint an external manager in certain circumstances. The termination/external management must be conducted in accordance with the Act, rather than any other state or federal law. Officers are liable for losses caused by contraventions of the Act.	Insurers may apply to the Council for termination of a health benefits fund. The Council can appoint an external manager in certain circumstances. The external management must be conducted in accordance with the PHI Act, rather than any other state or federal law. Officers are liable for losses caused by contraventions of the Act.
<u>Notices and Remedies for non-compliance</u>	
The new law substantively mirrors the current law. APRA can issue the insurer a notice to remedy a contravention of the Act. Directors are liable for losses caused by a failure to remedy a contravention.	The Council can issue the insurer a notice to remedy a contravention of the Act. Directors are liable for losses caused by a failure to remedy a contravention.

Detailed explanation of new law

Division 1 – Introduction

Simplified outline of this Part

4.5 A private health insurer must have at least one health benefits fund. Part 4-4 of the PHI Act defines the concept of a health benefits fund as well as other key concepts related to health benefits funds. *[Part 3, Division 2, section 22]*

4.6 There are regimes governing:

- how health benefits funds are operated; and
- changing the health benefits fund to which a policy of insurance is referable; and
- terminating health benefits funds; and
- external management of health benefits funds. *[Part 3, Division 2, section 22]*

4.7 APRA may require private health insurers to remedy contraventions of this Part. *[Part 3, Division 2, section 22]*

Division 2 – The requirement to have health benefits funds

Private health insurers must have health benefits funds

4.8 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)]*

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

4.10 A private health insurer may have multiple health benefits funds, but no more than one in respect of a risk equalisation jurisdiction, subject to certain exceptions. *[Part 3, Division 2, subsection 23(2)]*

4.11 Section 4 provides that ‘risk equalisation jurisdiction’ has the meaning in the PHI Act. Section 131-20 of the PHI Act, as inserted by item 45 of Part 1 of Schedule 1 to the Consequential Amendments and Transitional Provisions Bill, 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.

4.12 An exception to subsection 23(2) is provided if each fund in a risk equalisation jurisdiction (or each fund other than a single fund established through a restructure under Division 4) is a fund that existed on 1 April 2007 and was conducted by a registered organisation under the *National Health Act 1953*. This exception grandfathers certain pre-PHI Act arrangements, including where there has been a subsequent restructure under Division 4. *[Part 3, Division 2, subsection 23(3)]*

4.13 Additional exceptions 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

4.14 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

4.15 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)]*

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

4.17 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)]*

4.18 Sections 98 (power to comply with a direction), 101 (direction not a ground for denying an obligation), 102 (supply of information about directions) and 103 (secrecy requirements) 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

4.19 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

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

- the balance of money credited to the fund under section 27 (payments to health benefits funds);
- 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)]*

4.21 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)]*

4.22 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 a restructure or arrangement approved under Division 4. *[Part 3, Division 3, subsection 26(5)]*

4.23 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, including prudential standards). *[Part 3, Division 3, subsection 26(6)]*

The Bill does not have effect of making insurer etc. a trustee of assets of a health benefits fund

4.24 For the avoidance of doubt, it is clarified that nothing in the Prudential Supervision Bill 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

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

4.26 A private health insurer may make a capital payment to a health benefits fund, being an amount that is not required, under subsection 27(1), to be paid to the fund. Assets of another health benefits fund cannot be credited to a fund without APRA's written approval. Approvals under section 27 are only ever given on a case by case basis and standing approvals are not given. Therefore, an approval would not be a legislative instrument on general principles. The statement that an approval is not a legislative instrument in subsection 27(4) therefore does not constitute a substantive exemption from the definition of a legislative instrument in the Legislative Instruments Act, but is a statement of the 'status quo'. A refusal to approve the crediting of an amount to a fund is a reviewable decision under section 168. *[Part 3, Division 3, subsections 27(2), (3) and (4)]*

Expenditure and application of health benefits funds

4.27 A private health insurer must not apply or deal with the assets of a health benefits fund except in accordance with Division 3. Subsection 28(2) provides that the assets of a fund must not be applied for a purpose other than:

- meeting liabilities or expenses incurred for the purpose of the business of the fund; or
- making investments under section 30 (which relates to the investment of health benefits funds); 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)]*

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

4.29 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)]*

4.30 Subsection 28(2), which imposes limits on the application of assets of a health benefits fund, 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 under section 96. *[Part 3, Division 3, subsection 28(5)]*

4.31 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

4.32 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 29(2);
or
- it is included in a class of transactions specified in the APRA rules (subject to any court orders under subsection 29(6) – see below). *[Part 3, Division 3, subsection 29(1)]*

Order declaring the transaction to be effective

4.33 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)]*

4.34 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

4.35 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)]*

4.36 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

4.37 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 Prudential Supervision Bill 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)]*

4.38 A transaction is not ineffective merely because it contravenes paragraph 30(2)(c) (relating to investments prohibited by the APRA rules). *[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

4.39 A private health insurer must not change the health benefits fund to which a policy is referable except under Division 4. Division 4 governs the restructure of funds (transferring policies between health benefits funds of the one insurer) and merger or acquisition of funds (transferring groups of policies between two or more insurers). *[Part 3, Division 3, subsection 31(1)]*

When an insurer may restructure its health benefits funds

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

- the effect of a restructure is that all insurance policies relating to one or more policy groups (groups comprising policy holders from the same risk equalisation jurisdiction) 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

4.41 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 ('net asset position' is defined in section 4, subject to a modification described below that applies where not all policy groups are transferred); and
- the assets and liabilities would be fairly distributed amongst those funds if there is more than one receiving fund; and
- the restructure will not result in a breach of prudential standards. *[Part 3, Division 4, subsection 32(2)]*

4.42 In working out the net asset 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)]*

4.43 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. An approval is not a legislative instrument as it would only be given on a case by case basis, therefore the statement in subsection 32(6) does not constitute a substantive exemption, but is a statement of the 'status quo'. A refusal to approve a restructure is reviewable under section 168. *[Part 3, Division 4, subsections 32(4) and (6)]*

APRA rules may provide for various matters

- 4.44 APRA rules may provide for:
- criteria for approving or refusing to approve applications under subsection 32(1);
 - calculating reasonable estimates of the net asset position 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 connected with how the restructure is to proceed; and
 - requirements for insurers to provide information to APRA following restructures. *[Part 3, Division 4, subsection 32(5)]*

Definitions

4.45 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. APRA rules may provide for a definition where policy holders' addresses are not in the same risk equalisation jurisdiction. *[Part 3, Division 4, subsection 32(7)]*

Merger and acquisition of health benefits funds

When an arrangement may be entered into

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

- 4.47 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 relevant requirements in APRA rules. *[Part 3, Division 4, subsection 33(2)]*

How APRA decides whether to approve the arrangement

4.48 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) (again, the concept of the net asset position is modified when not all policy groups are being transferred – see below);
- 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 a prudential standard. *[Part 3, Division 4, subsection 33(3)]*

4.49 A refusal to approve a transfer is reviewable under section 168. It is not a legislative instrument, as decisions are made on a case by case basis. Therefore the statement in section 33(8) is not a substantive exemption from the Legislative Instruments Act, but a statement of the ‘status quo’.

4.50 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

4.51 APRA rules may provide for:

- criteria for approving or refusing to approve applications under subsection 33(2);
- 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 connected with the arrangement;
- 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

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

Effect of arrangement

4.53 If an insurance policy becomes referable to a fund conducted by an insurer other than the insurer that issued the policy as a result of a merger or acquisition, it is treated, after the arrangement takes effect, as if the policy were issued by the transferee insurer, for both the purposes of the Prudential Supervision Bill and the PHI Act. *[Part 3, Division 4, subsection 33(7)]*

Consent of policy holders not required

4.54 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

4.55 A private health insurer may apply to APRA in the approved form for approval of the termination of each of its health benefits funds. Terminations may also occur under Federal Court orders as set out in Division 7. *[Part 3, Division 5, Subdivision A, section 35]*

Requiring further information

4.56 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

4.57 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 relating to capital adequacy or solvency that apply in relation to the fund, the termination will not result in unfairness to the policy holders of the fund or funds, and APRA is satisfied as to any matters specified in the APRA rules. *[Part 3, Division 5, Subdivision A, subsection 37(1)]*

4.58 If APRA grants the application it must do so 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. Approvals are only ever given on a case by case basis and standing approvals are not given. An approval would therefore not be a legislative instrument on general principles. Therefore the statement in subsection 37(4) is not an exemption from the Legislative Instruments Act, but is a statement of the 'status quo'. *[Part 3, Division 5, Subdivision A, subsections 37(2) and (4)]*

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

4.60 A refusal to approve a termination is reviewable under section 168.

APRA can be taken to refuse application

4.61 APRA is taken to have refused the application for the purposes of section 168 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 (whichever is the later). *[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

4.62 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 Part 3. *[Part 3, Division 5, Subdivision B, section 39]*

Conduct of funds during termination process

4.63 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 (distribution of assets remaining after termination is completed); or
- changing its registration status from not for profit to for profit. *[Part 3, Division 5, Subdivision B, subsection 40(1)]*

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

4.65 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)]*

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

4.67 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

4.68 The terminating manager or the insurer (if there is no terminating manager) 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

4.69 If a terminating manager has been appointed to a health benefits 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

4.70 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)]*

4.71 The Federal Court, before making an order, may direct the terminating manager or private health insurer (if there is no terminating manager) to provide a report on a relevant fact or matter. *[Part 3, Division 5, Subdivision C, subsection 43(3)]*

4.72 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

4.73 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 assistance payments 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

4.74 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 (paragraph 40(1)(b) ceases to apply); and
- a not for profit insurer is liable to pay APRA an amount equal to the assets. This amount would then be credited to the Risk Equalisation Special Account under section 318-5 of the PHI Act, as amended, and returned to private health insurance industry members through adjustments to risk equalisation payments. *[Part 3, Division 5, Subdivision D, section 45]*

Liability of officers of insurers for loss to terminated funds

4.75 If an insurer contravenes the Prudential Supervision Bill 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)]*

4.76 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. A separate exoneration provision, in section 166 will also apply. *[Part 3, Division 5, Subdivision D, subsection 46(2)]*

4.77 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

4.78 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)]*

4.79 The manager may recommend, in their final report 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

4.80 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)]*

4.81 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 health benefits funds. *[Part 3, Division 5, Subdivision D, subsection 48(3)]*

4.82 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

4.83 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]*

4.84 This Division, and the other provisions in the Prudential Supervision Bill 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.

4.85 The Prudential Supervision Bill does not alter the essential structure of these provisions, which provide for an external management and terminating management of health benefits funds (rather than of the entire private health insurer) and apply certain provisions of Part 5.3A of the Corporations Act by reference, with modifications to external management of health benefits funds.

4.86 However the Prudential Supervision Bill arranges the provisions to set them out 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, for example, 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. There have also been amendments to clarify the way in which the provisions governing terminating management in Division 5 (previously Division 149 of the PHI Act) may apply in relation to a court-ordered termination under Division 7 (previously Division 220 of the PHI Act).

The basis of the law relating to external management

4.87 The external management of a health benefits fund is regulated by Division 6 and by various provisions in the Corporations Act applying subject to modifications set out in the Prudential Supervision Bill or APRA rules. *[Part 3, Division 6, Subdivision A, subsections 50(1), (4) and (5)]*

4.88 The ability of APRA rules, under subparagraph 50(1)(b)(ii) of the Prudential Supervision Bill, to modify the provisions of the Corporations Act listed in paragraph 50(1)(b) is consistent with the ability of the Minister to modify these provisions under subparagraph 217-5(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 paragraph 50(1)(b) as these provisions change or as external management practices change. It is proposed that APRA's initial rules will replicate the existing PHI Act subparagraph 217-5(1)(b)(ii) rules, with some updating to cater for where the Corporations Act provisions were amended after the making of the current rules under subparagraph 217-5(1)(b)(ii).

4.89 A health benefits fund cannot be placed under external administration (which will be defined broadly in section 4 to include a range of different forms of external administration, including control by a liquidator or voluntary administrator under the Corporations Act) except in accordance with Part 3 of the Prudential Supervision Bill. *[Part 3, Division 6, Subdivision A, subsections 50(2) and (3)]*

4.90 A provision of the Corporations Act listed in subsection 50(1) applies 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 Prudential Supervision Bill; 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

4.91 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)]*

4.92 The person appointed must be an official liquidator under the Corporations Act and must not be a person related to the fund (for example, they cannot be a policy holder, auditor or actuary in relation 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

4.93 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)]*

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

- APRA is satisfied 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 under section 96; 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

4.95 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

4.96 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;
- 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);
- 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, subsection 54(1)]*

4.97 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, subsection 54(2)]*

Additional powers of external managers

4.98 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 the application of inapplicable powers or provisions and in part to avoid duplication as section 70 in Division 8 of Part 3 of the Prudential Supervision Bill separately confers certain powers. Subsection 442D(1) of the Corporations Act also does not apply to the external manager's powers, meaning that that the external manager's power prevails over the power of secured parties and receivers. *[Part 3, Division 6, Subdivision C, subsection 55(1)]*

4.99 For the purpose of the protection of people dealing with an external manager under section 442F of the Corporations Act (as it applies through the operation of section 50 of the Prudential Supervision Bill), the assumptions contained in sections 128 and 129 of the Corporations 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 Prudential Supervision Bill, 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

4.100 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, are not taken to 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)]*

4.101 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 Prudential Supervision Bill, including subsections 50(2) and (3). 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)]*

4.102 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 (external manager’s) written consent or the leave of the Federal Court. Where an external manager or the 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 does, or does not, relate 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, subsection 56(2)]*

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

4.103 The provisions of Division 7 of Part 5.3A of Chapter 5 of the Corporations Act (conferred under section 50) 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, subsection 57(1)]*

4.104 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 441D is consequential upon the ‘disapplication’ of section 441A. It should be noted that, under subsection 28(3) of the Prudential Supervision Bill, it will continue to only be possible to give charges over fund assets in very limited circumstances. *[Part 3, Division 6, Subdivision C, subsection 57(1)]*

4.105 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, subsection 57(2)]*

Subdivision D – Procedure relating to voluntary deeds of arrangement

Matters that may be included in the APRA rules

- 4.106 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 matters that may be decided;
 - the kind of recommendations that made be made to APRA by the external manager; and

- the actions APRA may take in response to such recommendations. *[Part 3, Division 6, Subdivision D, subsection 58(1)]*

4.107 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.

4.108 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

4.109 An external manager must, as soon as practicable but in any event within three months or such longer time as APRA determines in writing, 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)]*

4.110 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)]*

4.111 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 funds of the insurer; 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)]*

4.112 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)]*

4.113 Without limiting what a scheme or arrangement ordered by the Federal Court may provide for, the scheme 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 any 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

4.114 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 and projections relied upon 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

4.115 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 to that effect. If the recommended course of action is the external management cease, the external management ends when notice is given under subsection 60(2) (see paragraph 62(2)(c)). *[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

4.116 If APRA is satisfied that a scheme of arrangement (as specified in paragraph 59(4)(a)) is the appropriate course of action (approach the court for an order implementing a scheme of arrangement), APRA must direct the external manager to apply under subsection 61(1) to the Federal Court to give effect to that. If the course of action is termination of the funds of the private health insurer, APRA must direct the external manager to apply under subsection 66(1) for a terminating manager's appointment. *[Part 3, Division 6, Subdivision E, subsections 60(3) and (4)]*

4.117 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, subsection 60(5)]*

If APRA is not satisfied with a recommended course of action

4.118 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 (but are not limited to) 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

4.119 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)]*

4.120 On an application by the external manager 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

4.121 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

4.122 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. This applies in addition to section 80, which relates inter alia to irregularities and defects in the appointment process. *[Part 3, Division 6, Subdivision E, section 63]*

Disclaimer of onerous property

4.123 For the purpose of determining the power of an external manager to disclaim onerous property (certain encumbered or problematic property that a liquidator can set aside or ignore when assessing assets) under the provisions of Division 7A of Part 5.6 of Chapter 5 of the Corporations Act (as applied by section 50), 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)]*

4.124 A disclaimer by an external manager has the same effect and the external manager is under the same obligations, for the purposes of the Prudential Supervision Bill, as if the disclaimer had been made under Division 7A of Part 5.6 of Chapter 5 of the Corporations Act. This means an external manager is able to set aside certain property whose value is difficult to realise when managing the insurer's assets and liabilities. *[Part 3, Division 6, Subdivision F, subsection 64(2)]*

Application of provisions of Corporations Act

4.125 The application under the Prudential Supervision Bill 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)]*

4.126 APRA rules made under the Prudential Supervision Bill may, for the purposes of the application of a provision of the Corporations Act, also modify regulations and other instruments made under the modified provision of the Corporations Act. *[Part 3, Division 6, Subdivision F, subsection 65(4)]*

4.127 The fact that the Prudential Supervision Bill provides for a specific modification of a provision in the Corporations Act does not imply that further modifications to that provision cannot be made by APRA rules, provided the modifications made by the APRA rules are consistent with those made by the Prudential Supervision Bill. *[Part 3, Division 6, Subdivision F, subsection 65(5)]*

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

4.129 Rules made by APRA 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

4.130 An external manager is required to apply to the Federal Court for an order appointing a terminating manager, under subsection 60(4), if directed to do so by APRA. *[Part 3, Division 7, subsection 66(1)]*

4.131 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

4.132 The Federal Court may, on an application by the external manager under subsection 66(1), or by 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

4.133 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. Section 69 of the Prudential Supervision Bill provides that, subject to any other orders made by the Court, the provisions relating to terminating management in Subdivisions B, C and D of Division 5 apply as if APRA had approved the termination of the health benefits funds, and as if the notice given under section 68 were a notification under subsection 37(2). This clarifies

the relationship between Division 5 of the Prudential Supervision Bill (currently Division 149 of the PHI Act) and Division 7 of the Prudential Supervision Bill (currently Division 220 of the PHI Act), in relation to which there has been some uncertainty. *[Part 3, Division 7, sections 68 and 69]*

Division 8 – External managers and terminating managers

Subdivision A – Powers of managers

Powers of managers

4.134 Division 8 of the Prudential Supervision Bill sets out general provisions that apply to both external managers and terminating managers and is based on Part 6-5 of the PHI Act. While a health benefits fund is under external management or terminating management, the external or terminating 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 70(1)]*

4.135 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. This will also be the case if there is an external administrator of one or more assets of the fund. *[Part 3, Division 8, Subdivision A, subsection 70(2)]*

4.136 Nothing in Division 8, or sections 42 and 53, implies that an officer or employee of the insurer, or an external administrator, is removed from office. For example an officer or employee may continue to have functions in relation to business of the insurer that falls outside the health benefits funds. *[Part 3, Division 8, Subdivision A, subsection 70(3)]*

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

4.137 If a health benefits fund is under external or terminating management, an individual (other than the manager) commits an offence with a penalty of 60 penalty units, or imprisonment for 12 months, or both if:

- the person performs or exercises, or purports to perform or exercise, any function or power of an officer of the responsible insurer for the fund or an external manager of any assets of the fund; and
- 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 8, Subdivision A, section 71]*

Managers act as agents of private health insurers

4.138 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, section 72]*

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

Directors etc. to help managers

4.139 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; and
- tell the manager of the location of other records known to the director. *[Part 3, Division 8, Subdivision B, subsection 73(1)]*

4.140 The above does not apply to the extent that 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 73(6)]*

4.141 The directors and officers 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 73(2) and (3)]**

4.142 A director or officer of the responsible insurer must attend on the manager and give her or him information about the business, property, affairs and financial circumstances of the fund as the manager reasonably requires. **[Part 3, Division 8, Subdivision B, subsection 73(4)]**

4.143 An individual commits an offence with a penalty of 30 penalty units if the person does not comply with the requirements of this section. **[Part 3, Division 8, Subdivision B, subsection 73(5)]**

Managers' rights to certain records

4.144 A person 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). An exception is where a secured creditor is entitled to retain possession of the records other than by way of a lien. However, the manager will still be entitled to inspect and make copies of the documents. The manager is entitled to inspect and copy such records held by a secured creditor at any reasonable time. **[Part 3, Division 8, Subdivision B, subsections 74(1) and (2)]**

4.145 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 74(3) and (4)]**

4.146 An individual commits an offence with a penalty of 30 penalty units 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 74(5) and (6)]**

Only manager can deal with property of fund under management

4.147 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 (subject to a Federal Court order) 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, subsections 75(1) and (3)]*

4.148 Subsection 75(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 75(2)]*

4.149 An individual commits an offence with a penalty of 60 penalty units or imprisonment for 12 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 75(4)]*

Order for compensation where officer involved in void transaction

4.150 If a court finds a person guilty of an offence against subsection 75(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 76(1) may be enforced as a judgement of the court. The exoneration provision in section 166 of the Prudential Supervision Bill applies in relation to subsection 76(1). *[Part 3, Division 8, Subdivision B, subsections 76(1) and (2)]*

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 the Federal Court has made such an order under section 67. 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 77]

Directions to managers

4.152 APRA may give a manager, other than a terminating manager appointed in accordance with an order of the Federal Court under Division 7, written directions concerning the exercise of their powers. While the directions may be general, depending on the circumstances 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. If the terminating manager was appointed by the court (and not by APRA under subsection 37(2)), then the Federal Court may give directions concerning the exercise of the powers vested in the manager or the provision to APRA of reports. *[Part 3, Division 8, Subdivision C, subsections 78(1), (2), (3) and (4)]*

4.153 The manager must comply with written direction. *[Part 3, Division 8, Subdivision C, section 78(5)]*

Termination of appointments of managers

4.154 APRA may terminate the appointment of a manager with effect from the date specified in the instrument. This includes a terminating manager appointed by the Federal Court under Division 7. APRA would require this capability in certain circumstances, such as when the external or terminating management has been completed or it emerges that a manager, including a terminating manager appointed by the court, has a conflict of interest, or is not conducting their functions in a competent manner or in accordance with the law.

4.155 In that event the manager is divested of the functions and powers set out in subsection 70(1) and all the other functions and powers of the manager in relation to the health benefits fund(s) cease. *[Part 3, Division 8, Subdivision C, subsection 79(1)]*

4.156 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 79(2) and (4)]*

4.157 If the appointment of a terminating manager is terminated, APRA must appoint a replacement manager to carry on the terminating management, subject to two exceptions. The first exception is where the Federal Court has ordered an end to the termination of the funds under section 43. In that event the power to control, carry on and manage any remaining business, affairs and property of the health benefits fund vests again in the officers of the responsible insurer, subject to any order of the court under subsection 43(4). The second is where the termination is complete and the manager has reported to APRA under section 47. In all other circumstances (for example where the terminating manager has been removed under the section because they cannot continue to perform the functions of terminating manager, or it is inappropriate that they continue to do so) APRA must appoint another terminating manager. *[Part 3, Division 8, Subdivision C, subsections 79(3) and (4)]*

Act of managers valid etc.

4.158 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 80(1)]*

4.159 Persons dealing with the fund in good faith without any knowledge of any defect or irregularity in the appointment of the manager are protected from the invalidity of certain transactions. *[Part 3, Division 8, Subdivision C, subsection 80(2)]*

4.160 Persons making or permitting any payment or disposition of assets of the fund without any knowledge of the defect or irregularity in the appointment of the manager are protected and indemnified. *[Part 3, Division 8, Subdivision C, subsection 80(3)]*

Indemnity

4.161 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 Prudential Supervision Bill. *[Part 3, Division 8, Subdivision C, section 81]*

Qualified privilege

4.162 A manager of a health benefits fund is conferred qualified privilege in respect of any statement made by him or her in the course of performing the duties of a manager. *[Part 3, Division 8, Subdivision C, section 82]*

Subdivision D – Miscellaneous

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

4.163 If Divisions 5, 6 or 8 prevent an act from being done, the time for doing any act that must be done by a certain time is extended by the time that those divisions prevented it from being done. *[Part 3, Division 8, Subdivision D, section 83]*

Continued application of other provisions of the Prudential Supervision Bill

4.164 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 Prudential Supervision Bill or the PHI Act other than:

- in the case of external management, the provisions of Division 6 (which relate to external managers); or
- in the case of terminating management, the provisions of Divisions 5 or 7 (which relate to terminating managers).
[Part 3, Division 8, Subdivision D, section 84]

Modifications of the Prudential Supervision Bill in relation to health benefits funds under management

4.165 APRA rules may set out modifications of the Prudential Supervision Bill or the PHI Act relating to how Chapter 3 of the PHI Act (which relates to community rating and complying health policies, among other things) applies where the health benefits funds are 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 Prudential Supervision Bill and the PHI Act operate subject to such modifications. *[Part 3, Division 8, Subdivision D, subsections 85(1), (2), (3) and (5)]*

4.166 This modification power will allow APRA to ensure that the requirements of Chapter 3 of the PHI Act can, if necessary, be appropriately adjusted to the context of external or terminating management and, if necessary, can be appropriately tailored to those health benefit funds concerned. This power would only be exercised in limited circumstances, such as where strict compliance with a provision in the PHI Act, for example community rating requirements, would be difficult to achieve in the content of terminating a health benefits fund.

4.167 APRA must consult with the Health Secretary prior to making any rules under this section. *[Part 3, Division 8, Subdivision D, subsection 85(4)]*

Order of Federal Court to be binding on all persons

4.168 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 86]*

APRA rules dealing with various matters

4.169 This clause provides that the APRA rules may:

- provide for a range of administrative and procedural matters in relation to meetings required or permitted to be held under Division 6 (external management); 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 (terminating management) or 6 (external management). *[Part 3, Division 8, Subdivision D, section 87]*

Division 9 – Duties and liabilities of directors etc.

Notices to remedy contravention

4.170 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 and failure to comply is an offence under section 148. *[Part 3, Division 9, subsection 88(1)]*

4.171 The specified 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 ends, for a period as APRA thinks fit. *[Part 3, Division 9, subsection 88(2)]*

4.172 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 88(3)]*

Liability of directors in relation to non-compliance with notices

4.173 If a private health insurer has been notified by APRA under section 88 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 89(1)]*

4.174 A person is not liable under subsection 89(1) if they can prove they exercised due diligence to ensure that the insurer complied with the notice. *[Part 3, Division 9, subsection 89(2)]*

4.175 An action to recover an amount under subsection 89(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 subject to conditions as to the persons or number of persons who may join the action as plaintiffs. This approval is not a legislative instrument, as it is done on a case by case basis, and is therefore an administrative decision. Therefore the statement in subsection 89(5) is not a substantive exemption from the Legislative Instruments Act but a statement of the 'status quo'. A separate exoneration provision, in section 166, will also apply. *[Part 3, Division 9, subsections 89(3), (4) and (5)]*

APRA may sue in the name of private health insurers

4.176 APRA may bring an action in the name of a private health insurer to recover an amount the insurer is entitled to recover under Division 9. *[Part 3, Division 9, section 90]*

Chapter 5

Prudential standards and directions

Outline of chapter

5.1 Part 4 establishes the prudential supervision of the private health insurance industry, in particular, prudential standards 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 that is not minor or technical in nature, and of certain financial matters;
- how APRA may vary or revoke prudential standards and directions; and
- certain other matters and arrangements relating to directions.

5.2 Unless otherwise stated, all references in this Chapter relate to the Prudential Supervision Bill.

Summary of new law

5.3 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 the ADIs, life insurers, general insurers and superannuation trustees.

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

- solvency directions under section 140-20;
- capital directions under section 143-20;
- directions under section 163-15 to comply with all or part of a prudential standard, or take specified action within a specified time, where the Council is satisfied that an insurer has breached a prudential standard or is likely to do so in a way that is likely to give rise to prudential risk; and
- general directions the Council can give under section 200-1 to require a private health insurer to modify its day to day operations (among other things).

5.5 The directions power in the (Prudential Supervision Bill) is based on directions powers APRA has in the 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>
APRA has the power to make prudential standards regarding prudential matters, which private health insurers must comply with.	The Council had the power to make prudential standards (Division 163 of the PHI Act), as well as solvency standards (Division 140 of the PHI Act) and capital adequacy standards (Division 143 of the PHI Act).

<i>New law</i>	<i>Current law</i>
APRA may (on certain grounds) give a private health insurer a direction.	<p>The Council was able to issue:</p> <ul style="list-style-type: none"> • solvency directions (under section 140-20 of the PHI Act); • capital directions (under section 143-20 of the PHI Act); • directions (under section 163-15 of the PHI Act) to comply with all or part of a prudential standard, or take specified action within a specified time, where the Council is satisfied that an insurer has breached a prudential standard or is likely to do so in a way that is likely to give rise to prudential risk; and • general directions the Council can give (under section 200-1 of the PHI Act) to require a private health insurer to modify its day to day operations (among other things).

Detailed explanation of new law

Division 1 – Introduction

Simplified outline of this Part

5.6 Private health insurers must comply with prudential standards made by APRA. A private health insurer must notify APRA if it becomes aware of a contravention by it of a prudential standard (other than a contravention that is merely of a minor or technical nature) or any other matter or occurrence that materially affects its financial position. APRA may, on certain grounds, give a private health insurer a direction that the insurer must comply with. *[Part 4, Division 1, section 90]*

Division 2 – Prudential standards

Prudential standards

APRA may make prudential standards

5.7 APRA may make **prudential standards** in writing relating to prudential matters. The standards must be complied with by private health insurers, or in relation to insurers. *[Part 4, Division 2, subsection 92(1)]*

5.8 The reference to the standards being complied with ‘in relation to private health insurers’ recognises that actuaries are required, under subsections 107(2) and 109(1), to perform ‘statutory functions and duties’ which include functions and duties under prudential standards.

5.9 **Prudential matters** is defined as matters relating to the conduct of the affairs of a private health insurer so as to keep the insurer in a sound financial position and not cause or promote instability in the Australian private health insurance system, and the conduct of the affairs of the insurer with integrity, prudence and professional skill. *[Part 4, Division 2, subsection 92(2)]*

The private health insurers to which a prudential standard applies

5.10 A prudential standard may impose requirements for all private health insurers, a specified class of insurers or one or more specified insurers. *[Part 4, Division 2, subsection 92(3)]*

Prudential standards may provide for APRA to exercise powers and discretions

5.11 APRA may exercise discretions under a standard, including in relation to approving, imposing, adjusting or excluding specific prudential requirements for particular insurers. As is the position under other legislation administered by APRA, the exercise of such discretion under a prudential standard will not be merits reviewable, although it will be reviewable in the Federal Court for an error of law. It will often be the case that, in exercising the power, APRA will adjust or exclude a provision of the standard to ensure that it applies in a way that is appropriate to the particular circumstances of that entity, and this will often facilitate the entity’s business processes. In other cases an adjustment or exclusion may be necessary to give APRA certainty that the prudential requirements apply appropriately to protect policy holders, for example where there are prudential concerns, and such action may need to be taken urgently and with certainty that the insurer will comply with the adjusted requirements. *[Part 4, Division 2, subsection 92(4)]*

Variation and revocation of prudential standards

5.12 A standard can be varied or revoked by APRA in writing.
[Part 4, Division 2, subsection 92(5)]

Prudential standards are legislative instruments (other than standards that apply to one or more specified insurers)

5.13 A prudential standard referred to in paragraph 92(3)(a) or (b) (that is, one applying to all, or a class of, private health insurers) or an instrument varying or revoking such a standard, is a legislative instrument. A standard or an instrument varying or revoking such a standard under paragraph 92(3)(c), is not a legislative instrument because it only applies to a specified insurer, or specified insurers. Therefore the statement that the standard is not a legislative instrument is not a substantive exemption from the Legislative Instruments Act but a statement of the ‘status quo’. A decision to make, vary or revoke such a standard will be merits reviewable under section 168 of the Prudential Supervision Bill. *[Part 4, Division 2, subsection 92(6)]*

Prudential standards may provide for a matter by adopting etc. material from another instrument

5.14 A prudential standard may deal with a matter by referring to (with or without modification) another instrument or writing as in force or existing from time to time, whether or not the other instrument comprises a legislative instrument or provision of another Act. This is despite section 46AA of the *Acts Interpretation Act 1901* and section 14 of the Legislative Instruments Act. *[Part 4, Division 2, subsection 92(7)]*

5.15 This will enable APRA’s prudential standards to refer to and incorporate guidance and standards published by professional bodies as updated from time to time where appropriate, such as professional standards issued by the Actuaries Institute, even though these are not themselves legislative instruments. For example, the Council’s current Appointed Actuaries Standard provides that an appointed actuary must prepare a financial condition report in accordance with *Professional Standard 600: Financial Condition reports for Private Health Insurers*, made by the Institute of Actuaries of Australia in June 2011, as in effect immediately before the commencement of this paragraph’. APRA’s power to incorporate material will mean that APRA will not need to remake a prudential standard each time the Actuaries Institute updates its standard on financial condition reports for private health insurers.

Prudential standards may not do certain things

5.16 Prudential standards may not:

- create an offence or civil penalty;
- provide for powers of arrest, detention, entry, search or seizure;
- impose a tax;
- set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation under the Prudential Supervision Bill; or
- amend the text of the Prudential Supervision Bill. *[Part 4, Division 2, subsection 92(8)]*

Delegation of power to make etc. prudential standards

5.17 Section 15 of the APRA Act allows APRA to delegate its powers to an APRA member or APRA staff member. However, in relation to the power to make, vary or revoke prudential standards, a delegation can only be to an:

- APRA member (within the meaning of the (APRA Act)); or
- APRA staff member (within the meaning of the APRA Act) who is an executive general manager (or equivalent), executive general manager being the highest level of management within APRA other than the APRA members. *[Part 4, Division 2, subsection 92(9)]*

5.18 The delegation of powers is to an APRA Member or an APRA staff member who is an Executive General Manager level, which is the highest level within APRA below an APRA member. In practice, all prudential standards will ordinarily be considered in detail at meetings of APRA's executive group, which includes all APRA members and Executive General Managers, prior to being finalised. The ability to delegate to an Executive General Manager gives APRA some administrative flexibility, as there are only three APRA members, and the members are often required to travel overseas, and therefore delegation to an Executive General Manager may be required.

Additional matters in relation to standards that are not legislative instruments

5.19 A prudential standard under paragraph 92(3)(c) relating to one or more specified private health insurers, or a determination varying or revoking such a standard, applies from the day it is made or from a day it specifies. *[Part 4, Division 2, subsection 93(1)]*

5.20 If APRA makes, varies or revokes a prudential standard relating to one or more specified private health insurers, it must, as soon as practicable give a copy of the standard or variation, or notice of the revocation to each insurer to which it applies or will apply. *[Part 4, Division 2, subsection 93(2)]*

Compliance with prudential standards

5.21 Private health insurers must comply with prudential standards to the extent they apply to the insurer. *[Part 4, Division 2, section 94]*

Notice of breach of prudential standards or of other matters that materially affect financial position

5.22 A private health insurer commits an offence if it fails to notify APRA, in writing and as soon as practicable, if it becomes aware of a breach (other than a contravention that is merely of a minor or technical nature) of a prudential standard or anything that materially affects its financial position. The relevant penalty is 30 penalty units. *[Part 4, Division 2, subsection 95(1)]*

5.23 An insurer's notification to APRA must not include personal information about a person insured under a complying health insurance product referable to a health benefits fund conducted by the insurer, unless it relates to prudential matters about the insurer. *[Part 4, Division 2, subsection 95(2)]*

Division 3 – Directions

APRA's power to give directions

5.24 APRA may give a private health insurer a direction of a kind specified under section 97 if APRA reasonably believes that:

- the insurer has contravened an enforceable obligation within the meaning of the Prudential Supervision Bill, or a provision of the FS(CoD) Act (or direction or condition given under that Act – see subsection 4(2) of the Prudential Supervision Bill); or

- the insurer is likely to contravene an enforceable obligation or the FS(CoD) Act, in a way likely to create a prudential risk; or
- the direction is necessary in the interests of policy holders or prospective policy holders of the private health insurer.
[Part 4, Division 3, paragraphs 96(1)(a), (b) and (c)]

5.25 APRA's decision to give a direction under section 96 is reviewable under section 168 if it is given on the basis of ground (a), (b) or (c) in subsection 96(1), which relate to contraventions or likely contraventions of relevant legislation or the direction being necessary in the interests of policy holders or prospective policy holders of the insurer.

5.26 APRA may also give a private health insurer a direction for a range of specific reasons related to preserving the interests of policy holders and the insurer's financial position, including:

- the insurer is, or is about to become, unable to meet its liabilities; or
- there is, or there might be, a material risk to the security of the insurer's assets; or
- there has been, or there might be, a material deterioration in the insurer's financial condition; or
- the insurer is conducting its affairs in an improper or financially unsound way; or
- the failure to issue a direction would materially prejudice the interests of policy holders or prospective policy holders of the insurer; or
- the insurer is conducting its affairs in a way that may cause or promote instability in the Australian private health insurance system. *[Part 4, Division 3, paragraphs 96(1)(d) to (i)]*

5.27 A direction would generally only be given to address a significant concern of a prudential nature affecting a private health insurer as a whole and not, for example, to address a concern of a consumer nature that has no prudential impact.

5.28 APRA's direction to a private health insurer must be in writing and specify the ground for which it is given. It may also specify the time or period during which it must be complied with. *[Part 4, Division 3, subsections 96(2) and (3)]*

The kinds of directions that may be given

5.29 The kinds of directions APRA may give a private health insurer are directions to do one or more of a range of specified activities. [*Part 4, Division 3, subsection 97(1)*]

5.30 These actions are specified in paragraphs 97(1)(a) to (v) and are:

- compliance with all or specified enforceable obligations or with the FS(CoD) Act (this includes directions or conditions given under that Act – see subsection 4(2) of the Prudential Supervision Bill);
- to remove an officer of the insurer;
- to ensure an officer of the insurer does not take part in the management or conduct of the business of the insurer except as permitted by APRA;
- to appoint a person as an officer of the insurer for such term as APRA directs;
- to terminate the appointment of the appointed actuary of the insurer and to appoint another actuary to hold office for such term as APRA directs;
- not to give financial accommodation to any person;
- not to issue or renew any policy, undertake any liability under any policy or collect any premium;
- not to issue or renew any policy, undertake any liability under any policy or collect any premium;
- not to borrow any amount;
- not to accept any payment on account of share capital, except payments in respect of calls that fell due before the direction was given;
- not to repay any amount paid on shares, and not to pay any dividends;
- not to discharge any policy or other liability;
- not to transfer any asset;

- not to pay or transfer any amount to any person, or create an obligation (contingent or otherwise) to do so;
- not to undertake any financial obligation on behalf of any other person;
- to hold, or otherwise deal in a specified way, with a specified amount of capital;
- to provide, or further provide, in its accounts for the purposes of the Prudential Supervision Bill, a specified amount or an amount determined in a specified way in respect of its liabilities or the value of a specified asset of the insurer;
- to order an actuarial investigation of the affairs of the insurer, at the expense of the insurer, by an actuary chosen by APRA;
- to do, or to refrain from doing, an act that relates to the way in which the affairs of the insurer are to be conducted or not conducted;
- to modify the rules of the insurer;
- to take specified action to ensure, as far as practicable, that the insurer will be able to meet the liabilities of a health benefits fund conducted by the insurer out of the assets of the fund as they become due;
- to take specified action to ensure, as far as practicable, that assets of a health benefits fund conducted by the insurer will provide adequate capital for the conduct of the business of the fund in accordance with the Prudential Supervision Bill and in the interests of the policy holders of the fund. *[Part 4, Division 3, subsection 97(1)]*

5.31 A direction may deal with only some of the matters in paragraphs 97(1)(a) to (v), a particular class of matters or make different provision with respect to different matters, or classes of matters. *[Part 4, Division 3, subsection 97(3)]*

5.32 A direction related to the transfer or payment of money under paragraph 97(1)(m) and (n) does not apply to the payment or transfer of money under a court order or a process of execution. *[Part 4, Division 3, subsection 97(2)]*

5.33 As noted above, APRA would generally only give a direction in response to a serious prudential concern. The kinds of directions that may be given need to be seen in this light. For example, a direction not to issue a policy or to refrain from providing financial accommodation would normally only be given to prevent the insurer from increasing its exposures where there is a serious financial concern that affects the interests of policy holders. For example, the financial position of the health benefits fund(s) may be such that APRA may be considering the appointment of an external manager, with the direction being an interim step to halt any further exposures and protect the interest of existing policy holders. It is not intended that the power to give a direction not to issue a policy or grant financial accommodation, or any similar power, be used to micromanage the business of the insurer or address issues of a consumer nature. The concern would need to be general and relate to the overall position or management of the insurer or a health benefits fund.

Power to comply with a direction

5.34 A private health insurer may comply with a direction under section 96 despite anything in its constitution or business rules, or contract or arrangement to which it is a party. *[Part 4, Division 3, section 98]*

Varying or revoking a direction

5.35 If APRA considers it is no longer necessary or appropriate, APRA may, by notice in writing, vary or revoke a direction given under section 96 to a private health insurer. *[Part 4, Division 3, section 99]*

When a direction ceases to have effect

5.36 A direction under section 96 ceases to have effect if APRA revokes it under section 99. *[Part 4, Division 3, section 100]*

Directions not grounds for denial of obligations

5.37 If a private health insurer is subject to an APRA direction, and is party to a contract (whether the contract is subject to Australian or foreign law), neither the insurer, nor another party to the contract, may:

- deny obligations under the contract or accelerate any debt under the contract; or
- close out any transaction relating to the contract. *[Part 4, Division 3, subsections 101(1) and (2)]*

5.38 If APRA's direction prevents the insurer fulfilling its obligations under the contract (other than a direction referred to in paragraph 97(1)(l) not to discharge any policy or other liability) the other party is relieved from contractual obligation owed to the insurer (subject to any orders made under subsection 101(4)). *[Part 4, Division 3, subsection 101(3)]*

5.39 A party to such as contract may apply to the Federal Court for an order relating to a direction's effect on the contract. The order may deal with the requirement of a party to fulfil a contractual obligation or to take some other action, considering any contractual obligations performed before the order was made. The Federal Court's order must not require a person to take any action that would contravene the direction, or another direction made under section 96. *[Part 4, Division 3, subsection 101(4)]*

Supply of information about directions

Power to publish notice of directions in Gazette

5.40 APRA may publish notice of any direction given under section 96 in the Gazette. If it does, the notice must include details of the insurer and the direction. *[Part 4, Division 3, subsection 102(1)]*

Requirement to publish notice of variation or revocation of certain directions in Gazette

5.41 If APRA publishes notice of a direction which it later varies or revokes, APRA must publish in the Gazette notice of the variation or revocation as soon as practicable. *[Part 4, Division 3, subsection 102(2)]*

Requirement to provide information about directions to Minister

5.42 APRA must comply with a request from the Minister to provide information about a direction to a particular insurer or any directions made in a specific period. *[Part 4, Division 3, subsection 102(3)]*

Power to inform Minister of directions

5.43 At any time, APRA may provide the Minister with any information it considers appropriate about any directions, or variations to or revocations of directions. *[Part 4, Division 3, subsection 102(4)]*

Requirement to inform Minister of revocation of direction if informed of making direction

5.44 If APRA informs the Minister about a direction which it later varies or revokes, APRA must notify the Minister of this as soon as practicable after the revocation. *[Part 4, Division 3, subsection 102(5)]*

Failure to comply with this section does not affect the validity of directions etc.

5.45 A failure to comply with a requirement in section 101 does not affect the validity of a direction, or revocation of a direction. *[Part 4, Division 3, subsection 102(6)]*

Secrecy requirements

5.46 Information about directions and revocations of directions is subject to secrecy requirements in Part 6 of the APRA Act, unless the information has been published in the Gazette under section 102 of the Prudential Supervision Bill. *[Part 4, Division 3, section 103]*

Non-compliance with a direction

5.47 It is an offence for a private health insurer to fail to comply with a direction given to the insurer with a penalty of 30 penalty units for an individual. *[Part 4, Division 3, subsection 104(1)]*

5.48 If a private health insurer commits such an offence, it does so in respect of the first day the offence was committed and each subsequent day the insurer continues to commit the offence. *[Part 4, Division 3, subsection 104(2)]*

5.49 If an officer commits such an offence, and their duties include ensuring compliance with APRA directions, the officer does so in respect of the first day the offence was committed and each subsequent day the insurer continues to commit the offence. *[Part 4, Division 3, subsection 104(3)]*

Chapter 6

Other obligations of private health insurers

Outline of chapter

6.1 Part 5 to the Prudential Supervision Bill governs the additional obligations of private health insurers, including requirements relating to actuaries and disqualifications. Part 5 provides for:

- the requirement to appoint an actuary and process for appointing and terminating the appointment of an actuary;
- the powers and obligations of actuaries;
- the prohibition on employing disqualified persons as officers and actuaries;
- the automatic disqualification of certain persons from being an officer or actuary;
- the Federal Court's power to disqualify and revoke or vary a disqualification;
- how a disqualification proceeding interacts with the privilege against self-incrimination;
- restrictions on insurers paying penalties on behalf of officers; and
- giving reports and details about officers APRA.

6.2 Unless otherwise stated, all references in this Chapter relate to the Prudential Supervision Bill.

Summary of new law

6.3 Part 5 largely replicates existing Part 4-5 of the PHI Act, but amends the provisions to align the language around powers and obligations of actuaries with the Life Insurance Act. This Part requires insurers to appoint certain persons as actuaries and governs the powers

and obligations of actuaries. These include provisions around appointing and removing actuaries, the actuary’s role, their reporting obligations, and their qualified privilege. Separately, the Part prohibits the appointment of disqualified persons and governs which persons are disqualified, and the removal of the privilege against self-incrimination during disqualification proceedings.

6.4 The Part also replicates provisions around restricting payment of penalties on behalf of officers of the insurer, to ensure that officers are duly penalised if they commit an offence. The Part also includes the insurer’s requirement to give copies of reports to APRA, and to notify APRA of the name and contact details of the insurer’s officers.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<u>Appointment of an actuary</u>	
Insurers must appoint an actuary within six weeks of an actuary ceasing. The actuary must meet the eligibility criteria set in prudential standards, and not be disqualified.	Insurers must appoint an eligible actuary within six weeks of an actuary ceasing. Eligibility criteria are set out in the Private Health Insurance (Insurer Obligations) Rules.
<u>Terminating an actuary</u>	
An insurer must terminate an actuary if the actuary does not meet eligibility criteria, or the insurer reasonably believes the actuary has failed to perform their statutory duties and functions, or the actuary is disqualified.	The cessation of an actuary is dealt with by the eligibility criteria as set out in the Private Health Insurance (Insurer Obligations) Rules.
<u>Notification of appointment</u>	
The Prudential Supervision Bill mirrors the current law: insurers must notify APRA of an appointment, and the ceasing of an appointment.	Insurers must notify the Council of an appointment, and the ceasing of an appointment.
<u>Role of an appointed actuary</u>	
The actuary must perform their statutory functions and duties and the insurer must assist the actuary to do this.	The actuary must perform their statutory functions and duties and the insurer must assist the actuary to do this. It is an offence for the insurer not to assist the actuary.

<i>New law</i>	<i>Current law</i>
<u>Actuary's obligation to report</u>	
The Prudential Supervision Bill is similar to the current law, an actuary must report to an insurer if there is a risk the insurer will breach the Prudential Supervision Bill, or report to APRA if the contravention would significantly affect the financial interests of policy holders.	An actuary must report to an insurer if there is a risk the insurer will breach the Act, or report to the Council if the contravention would significantly affect the interests of policy holders.
<u>Actuary may give information to the regulator</u>	
A person who is or was the appointed actuary of a private health insurer may give information or produce documents relating to the insurer to APRA and is protected if they do so in good faith and without negligence.	No equivalent in the PHI Act.
<u>Actuary's requirement to give information to the regulator</u>	
APRA may require an actuary to give APRA certain information.	Unless the requirement for an actuary to give the Council's information is specified in the Private Health Insurance (Insurer Obligations) Rules, the actuary is not required to do so.
<u>Qualified privilege</u>	
The Prudential Supervision Bill mirrors the current law: an actuary receives qualified privilege.	An actuary receives qualified privilege.
<u>Referral to a professional association</u>	
If APRA considers that an actuary has failed to adequately and properly perform their statutory functions and duties, or their functions and duties under other Australian laws, or otherwise not fit and proper, APRA may refer this to the professional association.	The Council does not have an express power to refer an actuary to a professional association.

<i>New law</i>	<i>Current law</i>
<u>Disqualified persons</u>	
<p>Disqualified persons must not act as officers or actuaries for insurers, and insurer must not employ disqualified persons as officers or actuaries. These are offences with penalties of 12 months imprisonment and/or 60 penalty units.</p> <p>The Federal Court can disqualify or revoke a disqualification. Certain person are automatically disqualified.</p>	<p>Disqualified persons must not act as directors or senior management for insurers, and insurer must not allow them to do so. The penalty is two years imprisonment or 120 penalty units for disqualified persons, and 250 penalty units for the insurer.</p> <p>The Council can disqualify a person or revoke a disqualification. Certain persons are automatically disqualified.</p>
<u>Restriction of payment of behalf of officers</u>	
<p>The Prudential Supervision Bill mirrors the current law: insurers cannot pay penalties or amounts officers are liable for on behalf of officers.</p>	<p>Insurers cannot pay penalties or amounts on behalf of officers that those officers are liable for under the PHI Act.</p>
<u>Providing details to the regulator</u>	
<p>Insurers must give certain reports and contact details of officers to APRA.</p>	<p>Insurers must give certain reports and contact details of the Chief Executive Officer to APRA.</p>

Detailed explanation of new law

Division 1 – Introduction

Simplified outline of this Part

6.5 The obligations of a private health insurer include requirements to have an appointed actuary, to not allow disqualified persons to act as officers or actuaries, and to not use the insurer’s money to meet certain liabilities of officers. The appointed actuary of a private health insurer also has obligations, including requirements to draw certain matters to the attention of the insurer’s directors, and to provide information to APRA. *[Part, 5 Division 2, section 105]*

Appointment

6.6 An insurer must appoint an actuary. If an actuary ceases to work for the insurer, the insurer must appoint another actuary within six weeks. This requirement ensures that the insurer has an actuary to carry out an actuary's statutory functions and duties in relation to the insurer *[Part 5, Division 2, subsections 106(1) and (2)]*

6.7 A private health insurer can only appoint an actuary that the insurer is satisfied meets the eligibility criteria, which are set out in APRA's prudential standards. This requirement ensures the actuary is appropriately qualified and fit for appointment. *[Part 5, Division 2, subsection 106(3)]*

6.8 A private health insurer must not appoint an actuary who is disqualified. This protects the insurer from an actuary who is not fit or proper. *[Part 5, Division 2, subsection 106(4)]*

6.9 If there is already an appointed actuary another actuary cannot be appointed. *[Part 5, Division 2, subsection 106(5)]*

Ending an appointment as actuary

6.10 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 person is subject to a disqualification order under section 119; or
- the insurer reasonably believes that the person has failed to adequately and properly perform their statutory functions and duties under the Prudential Supervision Bill. *[Part 5, Division 2, subsection 107(1)]*

6.11 The test for whether an insurer has failed to adequately perform their duties has both subjective and objective elements. That is, the insurer must subjectively believe that the actuary has failed to perform their duties, but this belief must be objectively reasonable. The intention here is to prevent a situation where an insurer is being badly managed, and the actuary brings that bad management to the insurer's attention, and the insurer responds by forming an unreasonable view that the actuary has failed to perform their duties adequately and properly.

Example 6.1

Laura is the appointed actuary of an insurer, TIM Health Co. a private health insurer. Laura identifies a large and significant exposure relating to a health benefits fund of the insurer. She informs APRA that, in her assessment, this has caused TIM Health Co. to breach the Prudential Supervision Bill. The directors of TIM Health Co. are displeased that Laura has informed APRA of the breach and decide to terminate Laura's appointment as actuary. They form the view that Laura has failed to perform adequately her statutory functions and duties; however this is not a reasonable view. Therefore, TIM Health Co. cannot use section 107 to terminate Laura's appointment.

6.12 An actuary's statutory functions and duties include obligations under the Prudential Supervision Bill, the PHI Act and the FS(CoD) Act, including any relevant regulations, prudential standards and rules under that Bill or those Acts. *[Part 5, Division 2, subsection 107(2)]*

6.13 The Prudential Supervision Bill allows directors of an insurer to temporarily appoint another actuary even where the appointment is not in accordance with the insurer's constitution or the insurer's rules (this is where the power to appoint is not vested in the directors or the directors alone), where an insurer has terminated an actuary under subsection 107(1). The appointment must still be consistent with subsection 106(3), which requires the appointment to meet the eligibility criteria in the prudential standards. This power ensures that the insurer can temporarily appoint an actuary pending an appointment in accordance with the insurer's constitution or business rules. *[Part 5, Division 2, subsection 107(3)]*

Notification of appointment etc.

6.14 An insurer that appoints an actuary must, within 14 days, provide APRA with certain details about the appointed actuary and their appointment. This requirement assists APRA to ensure the actuary is duly qualified and allows APRA to regulate the actuary's conduct. *[Part 5, Division 2, subsections 108(1) and (2)]*

6.15 If an actuary's appointment ends, the insurer has 14 days to notify APRA in writing that the actuary's appointment has ceased. This requirement ensures APRA's records of actuaries are up-to-date for the purpose of regulating actuaries and their appointment. *[Part 5, Division 2, subsection 108(3) and (4)]*

Role of appointed actuary

6.16 An appointed actuary must perform the statutory functions and duties set out in the prudential standards (some of which apply directly to appointed actuaries). This ensures that the actuary fulfils the regulator's requirements, and that (amongst other things) the insurer appropriately provisions for claims. *[Part 5, Division 2, subsection 109(1)]*

6.17 The private health insurer must enable the appointed actuary to perform their functions, including by providing actuaries with documents, requiring officers and employees to answer questions and allowing actuaries to attend and speak at meetings. The requirement is to ensure that an actuary is capable of performing their role. *[Part 5, Division 2, subsection 109(2)]*

Actuary's obligation to report

6.18 If the actuary considers that action must be taken to avoid contravention of the Prudential Supervision Bill, the PHI Act or the FS(CoD) Act, the actuary must bring this to the attention of the insurer, the directors or an officer of the insurer. The intention here is to assist insurers to avoid contraventions of the law. *[Part 5, Division 2, paragraph 110(1)(a)]*

6.19 If an actuary considers that action must be taken to avoid prejudicing the interests of policy holders of a health benefits fund, the actuary must bring this to the attention of the insurer or the directors of an insurer. In this context 'the interests of policy holders' means their interest in the insurer being prudentially sound, including being able to pay out future claims (rather than, for example, the interest that a policy holder might have as a consumer in having a lower premium or different policy terms). *[Part 5, Division 2, paragraph 110(1)(b)].*

Example 6.2

Ryan is the appointed actuary of EA Health Insurance Co (EA), a private health insurer. He has an obligation to report any matter to EA or its directors that Ryan considers would prejudice the interests of the policy holders. Ryan notices that EA is about to enter into a financial transaction that may risk EA's ability to pay out policy holders in the future. Ryan must report his concern to the director of EA or EA itself (this might be by reporting to an officer of EA whose position and role means that he or she has authority to receive the report and take the matter further within EA).

Example 6.3

Shane is the appointed actuary of IM Health, a private health insurer. Shane is aware that the directors of IM Health wish to raise the premiums that policy holders pay. Shane does not need to report the risk of a rise in premiums to IM Health or an officer, as a rise in premiums does not ‘prejudice the interest of policy holders’ in the relevant sense.

6.20 If an actuary considers the insurer or an officer of the insurer may have contravened the Prudential Supervision Bill or other law and that the contravention is of such a nature that it may significantly affect policy holders’ interests, the actuary must notify APRA. The intention is to warn APRA so that APRA can intervene to prevent a situation where insurers are not able to fulfil their financial promises to policy holders. *[Part 5, Division 2, paragraphs 110(2)(a) and (b)]*

6.21 The notification must be in writing and inform APRA of the actuary’s opinion and the information on which the opinion is based. *[Part 5, Division 2, paragraphs 110(2)(c) and (d)]*

6.22 However, an actuary does not have an obligation to notify APRA if an officer of the insurer has informed the actuary that the insurer has already notified APRA in writing and the actuary has no reason to disbelieve the officer. *[Part 5, Division 2, subsection 110(3)]*

6.23 It is an offence for an officer of the private health insurer to deceive an actuary and tell an actuary that the APRA is informed about a contravention if APRA has not been informed. For an offence to occur the officer must know that there are reasonable grounds for believing that the insurer has contravened the Prudential Supervision Bill or another law, and the contravention is of such a nature that it may significantly affect the interests of policy holders. The maximum penalty for this offence is 60 penalty units or 12 months imprisonment or both. This penalty is appropriate given the offence involves deliberate deception which could significantly risk the interests of policy holders. The severity of the penalty is analogous to the offences with the same penalty in the Attorney-General’s Department’s *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* such as making false statements in notices. *[Part 5, Division 2, subsection 110(4)]*

6.24 If an actuary has drawn a matter to the insurer’s attention, and the actuary is satisfied that 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 110(5)]*

6.25 An actuary is still subject to an obligation to inform APRA as above even if the actuary's appointment ceases before the actuary has informed APRA. *[Part 5, Division 2, subsection 110(6)]*

Appointed actuary may give information to APRA

6.26 A current or former actuary may give information, books, accounts or documents about the private health insurer to APRA if the actuary considers this will assist APRA in performing its functions under the Prudential Supervision Bill, the FS(CoD) Act or the PHI Act. If an actuary does this in good faith and without negligence, the actuary is not liable for any claim or demand in respect of the information or document. This provision ensures that actuaries do not refrain from giving APRA useful information for fear of liability, for example in defamation. *[Part 5, Division 2, section 111]*

Duty of appointed actuary to give information when required

6.27 APRA may give written notice to a current or former actuary requiring the actuary to give APRA information, books, accounts or documents relating to the insurer, if APRA considers it will assist in performing APRA's functions under the Prudential Supervision Bill or the FS(CoD) Act. The actuary has seven days or a reasonable period (whichever is greater) to comply with APRA's notice *[Part 5, Division 2, subsection 112(1) and (2)]*

Example 6.4

APRA requests large amount of documents from a former actuary, Simon. Simon reasonably requires 14 days to respond to APRA's request. Therefore Simon will have 14 days to respond.

6.28 Failure to comply with a notice under subsection 112(1) is an offence, with a maximum penalty of 30 penalty units. However, to commit the offence the actuary or former actuary must be capable of complying with the notice. *[Part 5, Division 2, subsections 112 (3) and (4)]*

6.29 An actuary or former actuary must comply with a notice to give information even if that information may incriminate them. However, the information given in accordance with the notice is not admissible in proceedings against the actuary or former actuary, except in a proceeding for 137.1 and 137.2 of the Criminal Code (providing false or misleading information or documents). That is, whilst an actuary cannot claim privilege against self-incrimination in order to avoid complying with the notice, the information provided in response to the notice cannot be used in criminal proceedings or proceedings for a penalty (other than disqualification). This ensures that APRA receives information which it can use to protect the interests of policy holders and prudentially regulate.

However if an actuary/former actuary deliberately attempts to deceive APRA by placing misleading or false information in the notice, then the notice can still be used to prosecute the actuary/former actuary. *[Part 5, Division 2, subsections 112(2), (3) and (4)]*

6.30 This provision provides ‘use immunity’ but not ‘derivative use immunity’, that is, immunity in relation to anything obtained as a direct or indirect consequence of the production of the information, document or thing. In this respect the provision is consistent with self-incrimination provisions in the other legislation administered by APRA, including 156F of the Life Insurance Act. A difficulty with derivative use immunity is that it means that further evidence obtained through a chain of inquiry resulting from the protected evidence cannot be used in relevant proceedings even if the additional evidence would have been uncovered by the regulator through independent investigation processes. A related issue is that it can be very difficult and time-consuming in a complex investigation to prove whether evidence was obtained as a consequence of the protected evidence or obtained independently. *[Part 5, Division 2, subsections 112(2), (3) and (4)]*

Qualified privilege of appointed actuary

6.31 A current or former actuary of an insurer has a qualified privilege in relation to any statement made for the purposes of their statutory functions and duties. That is, the actuary will have a defence in defamation proceedings in relation to a communication made in relation to their statutory functions or duties. *[Part 5, Division 2, sections 113]*

Referring matters to professional associations for actuaries

6.32 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 or functions or is not a fit and proper person to be an actuary. This is another mechanism for APRA to ensure an actuary fulfils their statutory requirements, which is important given the actuary’s unique role in overseeing the insurer. *[Part 5, Division 2, subsection 114(1)]*

6.33 If APRA refers such a matter, APRA must also give written notice of this to the actuary. *[Part 5, Division 2, subsection 114(2)]*

APRA may direct removal of actuary

6.34 If an actuary is disqualified, is not a fit and proper person to be an appointed actuary or has failed to adequately perform their duties or functions under the Prudential Supervision Bill 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 115(1) and (2)]*

6.35 Before making such a direction, APRA must give a written notice to the insurer and the actuary and give the actuary and the insurer a reasonable opportunity to make submissions. The notice must include a statement that APRA may discuss any submission with other persons that APRA considers appropriate. *[Part 5, Division 2, subsections 115(3) and (4)]*

6.36 If a submission is made, APRA must consider the submission and may discuss it with any persons APRA considers appropriate. *[Part 5, Division 2, subsection 115(5)]*

6.37 A direction ending an actuary's appointment takes effect on the day the direction specifies, which must be at least seven 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)]*

6.38 It is an offence with a penalty of 30 penalty units for a private health insurer to fail to comply with a direction given under section 115. *[Part 5, Division 2, subsection 115(8)]*

Division 3 – Disqualified persons

6.39 The Prudential Supervision Bill allows the Federal Court to disqualify an officer or appointed actuary of an insurer, on application by APRA. By contrast, the PHI Act gives the Council an administrative power to make a determination that a person is disqualified. The disqualification regime in the Prudential Supervision Bill therefore differs by requiring APRA to approach a court for a determination that a person is disqualified. This approach gives officers and actuaries the benefit of having a disqualification order made by an independent judicial body. As with the PHI Act, the Prudential Supervision Bill stipulates grounds upon which a person is automatically disqualified, although the Prudential Supervision Bill allows APRA or a disqualified person 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

6.40 An insurer commits an offence if the insurer allows a disqualified person to act as an officer or appointed actuary. The offence carries a maximum penalty of 12 months imprisonment or 60 penalty units or both. The penalty is set so that an insurer does not knowingly or recklessly appoint someone who could risk the insurer's solvency and the interests of policy holders. *[Part 5, Division 3, subsection 116(1)]*

6.41 An insurer does not commit an offence if APRA has told the insurer that the disqualified person is not disqualified. *[Part 5, Division 3, subsection 116(2)]*

Disqualified persons must not act for private health insurers

6.42 A disqualified person commits an offence, with a penalty of 12 months imprisonment or 60 penalty units or both, if they act as an appointed actuary or officer of a private health insurer. This penalty reflects the penalty for the equivalent offence in section 116. *[Part 5, Division 3, section 117]*

Effect of non-compliance

6.43 The transactions and appointment of disqualified persons not invalid because of the disqualification. *[Part 5, Division 3, section 118]*

Who is a disqualified person?

- 6.44 A person is a disqualified person if:
- the person has been convicted of an offence against or arising out of the Prudential Supervision Bill, the FS(CoD) Act, the PHI Act, the Corporations Act or former Corporations Law, or to the corporations law of a foreign country; or
 - the person has been convicted of an offence under Australian law, or any corresponding law of a foreign country, and the offence involves dishonest conduct or an offence relating to a financial sector company, a private health insurer or a superannuation entity; or

- the person has been or becomes bankrupt, applies for relief under a bankruptcy law or ‘compounds’ (enters into a multi-party agreement in order to settle) with all of their creditors; or
- the person has been disqualified by the Federal Court under section 120. *[Part 5, Division 3, subsection 119(1)]*

6.45 The policy intent is that dishonest persons, persons who have been bankrupt and persons who breach corporations law are not appropriate persons to occupy the position of an officer or be actuaries.

6.46 A disqualified person includes a person who has been relieved of a conviction due to section 19B of the Crimes Act or the corresponding law of a foreign country. Section 19B of the Crimes Act allows a court to discharge a person charged with a federal offence without proceeding to a conviction where the charge is proved but the court considers it is inexpedient to inflict punishment by reason of the nature of the offence or extenuating circumstances. *[Part 5, Division 3, subsection 119(2)]*

6.47 The Prudential Supervision Bill does not affect the operation of Part VIIC of the Crimes Act relating to spent convictions. *[Part 5, Division 3, subsection 119(3)]*

Court power of disqualification

6.48 Upon APRA’s application, the Federal Court may disqualify a person from being an officer or appointed actuary of an insurer, if the Court is satisfied that the person is both not a fit and proper person and the disqualification is justified. *[Part 5, Division 3, subsection 120(1)]*

6.49 The disqualification can be for all private health insurers, or a particular private health insurer, or a particular class of insurer. *[Part 5, Division 3, subsection 120 (2)]*

6.50 Prudential standards may set out criteria for whether a person is fit and proper, which the Court may take into account, along with any other matters in the prudential standards or any other matter the Court considers relevant. *[Part 5, Division 3, subsection 120(3)]*

6.51 In deciding whether 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;

- if the application relates to an actuary – the person’s conduct in relation to their functions or duties under the Prudential Supervision Bill, the PHI Act, FS(CoD) 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 120(4)]*

6.52 After the Federal Court disqualifies a person under section 120, APRA must give details of the disqualification to the private health insurer the disqualified person is working for and publish details of the disqualification in the Gazette. *[Part 5, Division 3, subsection 120(5)]*

Court power to revoke or vary a disqualification etc.

6.53 Either the disqualified person, or APRA, can apply to the Federal Court to vary or revoke a disqualification order or be deemed not to be a disqualified person. APRA and the disqualified person must inform the other if either makes such an application. The Court can put conditions and exceptions on an order deeming a person not disqualified. *[Part 5, Division 3, section 121]*

Privilege against exposure to penalty – disqualification under section 120

6.54 The Prudential Supervision Bill specifies a person cannot refuse to give evidence in proceedings arising under the Prudential Supervision Bill or refuse to do something that is a requirement under the Prudential Supervision Bill on the grounds that doing so would lead to a disqualification order being made against the person. This means that a person does not receive the benefit of ‘use immunity’ in subsections 112(6) and 149(2) in relation to a disqualification order. Accordingly, the evidence given may be used in disqualification proceedings. This is reasonable because a disqualification order is not a criminal penalty, and it is important to ensure that the policy holders’ interests are not risked by an insurer employing an inappropriate officer or actuary. An insurer must not reimburse such an officer in relation to such an amount. *[Part 5, Division 3, subsections 122]*

Restrictions on payment of pecuniary penalties etc.

6.55 The Prudential Supervision Bill prohibits insurers from paying out pecuniary penalties for criminal offences or other liabilities under the Prudential Supervision Bill for which an officer is personally liable. This ensures that officers have financial incentives to avoid contravening the law or causing harm to policy holders. *[Part 5, Division 4, section 123]*

Giving APRA copies of reports made to policy holders

6.56 APRA rules may require insurers to give to APRA the reports it provides to policy holders. This enables APRA to receive more information which assists APRA to prudentially regulate. Reports under this section will be consistent with Rule 5 of the Private Health Insurance (Insurer Obligations) Rules 2009, made under section 169-1 of the PHI Act. *[Part 5, Division 4, section 124]*

Notifying APRA of name and contact details of officers

6.57 APRA may also require a private health insurer to give the names and contact details of its officers to APRA. This requirement may assist APRA to prudentially regulate insurers. *[Part 5, Division 4, section 125]*

Chapter 7

Monitoring and investigation

Outline of chapter

7.1 Part 6 of the Prudential Supervision Bill provides for monitoring and investigation provisions, including:

- power for APRA to request information and documents for general supervisory purposes; 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.

7.2 Unless otherwise stated, all references in this Chapter relate to the Prudential Supervision Bill.

Summary of new law

7.3 These provisions draw on provisions from a number of different pieces of legislation, including Divisions 194 and 214 of the PHI Act, certain provisions from the SIS Act and the Regulatory Powers Act.

7.4 In general, the Regulatory Powers Act is intended to provide a framework of standard powers for monitoring and information gathering provisions. However, certain provisions in the Regulatory Powers Act, in particular the investigation provisions in Part 3 of that Act, only apply where there has been a breach of an offence provision or a civil penalty provision.

7.5 The monitoring provisions are designed to ensure that APRA has the power to require an insurer to provide information and documents for general supervisory purposes without the need for suspecting the contravention of a provision. Similar provisions exist in APRA's current legislation (for example, sections 254(2) and 255 of the SIS Act and section 62 of the *Banking Act 1959*). The inclusion of these provisions will enable APRA to obtain information, where appropriate, for routine monitoring purposes and for other purposes. There is no equivalent in the Prudential Supervision Bill of section 191-1 of the PHI Act (which

provides that the Council may seek an explanation from a private health insurer), as that capacity will be covered by the monitoring provisions.

7.6 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 (for example, in relation to warrants, obtaining consent to entry and identity cards) will bring the investigation powers more into line with the 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).

7.7 APRA will be able to conduct an investigation where APRA reasonably suspects that the affairs of an insurer are, or are about to be, carried on in a way that is not in the interests of policy holders of a health benefits fund, mirroring the trigger for an investigation by the Council under section 214-1(1)(a) of the PHI Act. APRA will also have power to investigate a contravention, or suspected contravention, of an enforceable obligation, which is similar to the Council's power in section 194-1 of the PHI Act to investigate where an insurer might have contravened a Council-supervised obligation.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
APRA the power to require information and reports from insurers in order to regulate.	The Council has the power to request an explanation from an insurer about its operations, and the insurer must respond.
APRA can appoint an inspector to carry on an investigation of an insurer. With consent or with a warrant an inspector can access the insurer's premises.	Either the Health Minister or the Council could conduct an investigation, and require a person to give evidence. The Health Minister or the Council could appoint someone to access records, books etc of an insurer.

Detailed explanation of new law

Part 6 – Monitoring and investigation

Division 1 – Introduction

Simplified outline of this Part

7.8 APRA may, for the purposes of the Prudential Supervision Bill or the risk equalisation levy legislation, require insurers to provide information, reports or documents, and may require officers of insurers to provide documents. *[Part 6, Division 1, section 126]*

7.9 APRA may appoint an inspector to investigate the affairs of a private health insurer in certain circumstances. The powers of an inspector include power to require a person to provide documents or to appear for examination, and power to enter premises (either with consent or under a warrant) and exercise search powers. *[Part 6, Division 1, section 126]*

Division 2 – Monitoring

Purposes for which powers may be exercised etc.

7.10 The monitoring powers in Division 2 may be exercised for the purposes of the Prudential Supervision Bill or the risk equalisation levy legislation. Section 4 of the Prudential Supervision Bill defines ‘risk equalisation levy legislation’ to mean the Risk Equalisation Levy Act 2003 and the provisions of the PHI Act that apply in relation to the Risk Equalisation Levy Act 2003 and the Risk Equalisation Special Account. The powers cannot be exercised for another purpose. *[Part 6, Division 2, subsection 127(1)]*

7.11 The monitoring 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 127(2)]*

7.12 All information and reports provided to APRA by private health insurers under sections 128 and 129 will be covered by the secrecy provisions in section 56 of the APRA Act (as amended by the Consequential Amendments and Transitional Provisions Bill) as well as the *Privacy Act 1988*, unless the information is already in the public domain.

Power to require private health insurer to provide information and reports

7.13 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. The period specified in the notice must be reasonable, and must end at least seven days after the day on which the notice is given. *[Part 6, Division 2, section 128]*

7.14 A refusal or failure to comply with the notice is an offence under section 148 of the Prudential Supervision Bill with a maximum penalty of 30 penalty units for an individual.

Power to require production of documents

7.15 APRA may give a written notice requiring a private health insurer or an officer of the insurer to produce to APRA any documents relating to the insurer's affairs at a reasonable time and place. APRA, or an APRA staff member, may inspect, take extracts or make copies of such a document. The time specified in the notice must be reasonable, and must be at least seven days after the day on which the notice is given. The place specified in the notice must also be reasonable. *[Part 6, Division 2, subsections 129(1), (2) and (4)]*

7.16 APRA may require any such produced document which is not in English to be produced in written English. *[Part 6, Division 2, subsection 129(3)]*

7.17 Refusal or failure to comply with this requirement is an offence under section 148 of the Prudential Supervision Bill with a maximum penalty of 30 penalty units for an individual.

Division 3 – Investigation

Investigation of private health insurers by inspectors

7.18 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 not be, carried on in the interests of the policy holders of a health benefits fund of the insurer (this reflects paragraph 214-1(1)(a) of the PHI Act); or

- a contravention of an enforceable obligation (this reflects section 194-1(2) of the PHI Act. *[Part 6, Division 3, subsection 130(1)]*)

7.19 The first test (affairs of the insurer not being carried on in interests of policy holders of a health benefits fund) is intended to focus on concerns of a general or prudential nature, for example a concern about the ability of the insurer to meet its obligations to policy holders.

7.20 APRA must not appoint an APRA staff member to be an inspector unless APRA is satisfied that the staff member has suitable qualifications and experience to exercise properly the powers of an inspector. The inspector's instrument of appointment must specify:

- what APRA suspects and why; and
- the matters the investigation will relate to. *[Part 6, Division 3, subsection 130(2) and (3)]*

7.21 APRA may, in writing, at any time terminate an investigation; or terminate the appointment of a person as an inspector; or appoint another APRA staff member to be an inspector for the purposes of an investigation. *[Part 6, Division 3, subsection 130(4)]*

Identity cards for inspectors

7.22 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, subsections 131(1) and (2)]*. An inspector must carry the card at all times when exercising their powers under the Prudential Supervision Bill. *[Part 6, Division 3, subsection 131(5)]*

7.23 It is an offence 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, subsection 131(3) and (4)]*

Power of inspectors

7.24 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

- to appear before the inspector for examination concerning relevant matters within the knowledge of the person. *[Part 6, Division 3, subsection 132(1)]*

7.25 The period specified in the notice must be reasonable, and must end at least seven days after the day on which the notice is given. It is an offence to refuse or fail to comply with a notice (see section 148). *[Part 6, Division 3, subsections 132(1) and (2)]*

7.26 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 132(3)]*

7.27 An inspector must 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 132(4)]*

Person may be represented by lawyer when being examined

7.28 A lawyer acting for a person being examined by an inspector may attend the examination and, to the extent that the inspector allows, address the inspector and examine the person in relation to matters on which the person has been questioned. *[Part 6, Division 3, section 133]*

Access to premises

The functions of an inspector under this section

7.29 An inspector who is empowered to investigate all or part of the affairs of a private health insurer and enters premises under subsections 134(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 134(1) and (2)]*

Entry with consent

7.30 An inspector may enter any premises with the consent of the occupier to carry out their functions. *[Part 6, Division 3, subsection 134(3)]*

Entry under warrant

7.31 An inspector may apply for a warrant to enter premises (see section 135) if the inspector believes, on reasonable grounds, that records are held there relating to the private health insurer whose affairs the inspector is investigating. *[Part 6, Division 3, subsection 134(4)]*

General provisions relating to obtaining consent to enter premises

7.32 Before obtaining an occupiers' consent for the purposes of subsection 134(3), an inspector must tell the occupier they can refuse consent. *[Part 6, Division 3, subsection 135(1)]*

7.33 An occupier's 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 135(2), (3) and (4)]*

7.34 An inspector or authorised person must leave the premises if consent is withdrawn. *[Part 6, Division 3, subsection 135(5)]*

7.35 If an inspector enters premises with consent of the occupier, but the inspector has not shown his or her identity card before entering the premises, the inspector must do so as soon as practicable after entering the premises. *[Part 6, Division 3, subsection 135(6)]*

Investigation warrants

7.36 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 (or may be within the next 72 hours) about the insurer's affairs which the inspector is investigating. *[Part 6, Division 3, subsections 136(1) and (2)]*

7.37 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 magistrates requires about the reasons for the warrant. *[Part 6, Division 3, subsection 136(3)]*

7.38 The warrant must state the details specified in subsection 136(4) which include setting out the legislative power under which the warrant is issued, the name of the inspector who applied for it, what the warrant authorises and when it expires (which must be no later than a week from its issue). *[Part 6, Division 3, subsection 136(4)]*

Announcement before entry under investigation warrant

7.39 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 the occupier the opportunity to provide access. *[Part 6, Division 3, subsection 137(1)]*

7.40 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. *[Part 6, Division 3, subsections 137(2)]*

7.41 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. *[Part 6, Division 3, subsection 137(3)]*

Inspector to be in possession of investigation warrant

7.42 When executing an investigation warrant, the inspector must have the warrant, or a copy of it. *[Part 6, Division 3, section 138]*

Details of warrant etc. to be given to occupier

7.43 An inspector is required to provide a copy of the warrant to the occupier of the premises, or an occupier's apparent representative, if either are present, and to inform the person of their rights and responsibilities under sections 140 (right to observe execution warrant) and 141 (responsibility to provide facilities and assistance). 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 informed about their rights and responsibilities. *[Part 6, Division 3, section 139]*

Right to observe execution of warrant

7.44 The occupier of premises or their representative (or the person is apparently their 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 place an occupier or their representative under an obligation 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, Division 3, subsections 140(1) and (2)]*

7.45 This right does not prevent an execution of warrants in more than one place at the same time. *[Part 6, Division 3, subsection 140(3)]*

Responsibility to provide facilities and assistance

7.46 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, as 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 impeded by lack of reasonable co-operation. The failure of an occupier or their representative to provide reasonable facilities and assistance carries a penalty of 30 penalty units.

[Part 6, Division 3, section 141]

Concealing etc. records

7.47 A person commits an offence with a penalty of 60 penalty units or imprisonment for 12 months or both if the person engages in conduct that results in the concealment, destruction, mutilation or alteration of the documents relating to particular affairs of a private health insurer whose affairs are being investigated. *[Part 6, Division 3, subsection 142(1)]*

7.48 It is a defence if the person did not act with intent to defeat the purposes of this Division or delay or obstruct the investigation. *[Part 6, Division 3, subsection 142(2)]*

Reports of inspectors

7.49 An inspector must report in writing to APRA on completion of the investigation and comply with any directions of APRA to provide reports. The section also allows the inspector to make one or more additional reports, at the inspector's discretion, during the investigation. *[Part 6, Division 3, subsection 143(1)]*

7.50 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 any opinion that criminal proceedings ought to be instituted or that a person has committed a criminal offence, in writing, to APRA, but this must be done separately from the report. *[Part 6, Division 3, subsections 143(2), (3) and (4)]*

Dissemination of reports

7.51 APRA must give a copy of an inspector's report under paragraph 143(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 144(1) and (2)]*

7.52 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 144(3)]*

7.53 A court hearing proceedings under the Prudential Supervision Bill or risk equalisation levy legislation 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 144(4)]*

Liability for publishing reports etc.

7.54 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 144(3) is protected from any action or proceeding. *[Part 6, Division 3, section 145]*

7.55 An action is generally in good faith if the person making it is not actuated by ill will or any other improper motive.

7.56 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

7.57 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. A magistrate is not obligated to accept the power conferred. 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 146]*

Delegation by inspectors

7.58 An inspector may delegate in writing any of their powers under Division 3 to an APRA staff member. *[Part 6, Division 3, subsection 147(1)]*

7.59 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 147(2)]*

Division 4 – Other matters

Refusing or failing to comply with requirements

7.60 A person commits an offence with a penalty of 30 penalty units if the person fails to comply with a requirement under section 128, 129 or 132. The person need only comply with such a requirement to the extent they are capable of doing so. *[Part 6, Division 4, section 148]*

Self-incrimination

7.61 A person is not excused from providing answers, information, or a report or document, in an investigation on the ground that they may be incriminated or liable to a penalty on the ground that this might incriminate them or make them liable to a penalty. In order to protect the integrity of the regulatory regime, and protect the interests of policy holders, it is necessary to override the privilege against self-incrimination so that APRA can acquire all relevant information relating to the financial position of a private health insurer and the insurer's and other relevant persons' compliance with the regulatory regime. This is consistent with the approach taken in the PHI Act (for example, section 214-15, relating to compliance with requirements of inspectors) and other legislation administered by APRA (for example section 287 of the SIS Act). *[Part 6, Division 4, subsection 149(1)]*

7.62 However, if the person is an individual, any information, document or thing obtained because of a person's assistance is 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) or proceedings under section 120 for disqualification (see subsection 122(4)). This provides immunity in relation to direct use of the information, document or thing in other proceedings (except, as noted, where the other proceedings are for disqualification under section 120). It does not provide for derivative use immunity, that is, immunity in relation to anything obtained as a direct or indirect consequence of the production of the information, document or thing. *[Part 6, Division 4, subsection 149(2)]*

7.63 In this respect the provision is consistent with the majority of self-incrimination provisions in the other legislation administered by APRA, including section 287 of the SIS Act. A difficulty with derivative use immunity is that it means that further evidence obtained through a chain of inquiry resulting from the protected evidence cannot be used in relevant proceedings even if the additional evidence would have been uncovered by the regulator through independent investigation processes. A related issue is that it can be very difficult and time-consuming in a complex investigation to prove whether evidence was obtained as a consequence of the protected evidence or obtained independently. In other respects section 149 offers broader protection than similar provisions in other legislation in that it does not require the person to first state that the answer might tend to incriminate them, and the protection applies to civil proceedings (other than for disqualification) as well as criminal proceedings.

Protection from liability

7.64 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]*

Chapter 8

Enforceable undertakings

Outline of chapter

8.1 Part 7 of the Prudential Supervision Bill relates to APRA's ability to accept enforceable undertakings.

8.2 Unless otherwise stated, all references in this Chapter relate to the Prudential Supervision Bill.

Summary of new law

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

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
APRA may accept an enforceable undertaking from a person in connection with a matter in relation to which APRA has a power or function under the Prudential Supervision Bill or the risk equalisation levy legislation.	The Council may accept an enforceable undertaking from a private health insurer if the Council considers that compliance with the undertaking will be likely to improve the insurer's operations in relation to a Council-supervised obligation.

Detailed explanation of new law

Part 7 – Enforceable undertakings

Simplified outline

8.4 APRA may accept an undertaking given by a person in connection with matters relating to the Prudential Supervision Bill or the

risk equalisation levy legislation. APRA may apply to the Federal Court for an order (for example, an order directing compliance) if APRA considers that an undertaking has been contravened. *[Part 7, Division 1, section 151]*

Enforceable undertakings

8.5 APRA may accept a written undertaking from a person in connection with matters in relation to which APRA has a power or function under the Prudential Supervision Bill (which will include prudential standards and APRA rules) or the risk equalisation fund legislation. *[Part 7, subsection 152(1)]*

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

8.7 A decision to consent or not to consent is given on a case by case basis and is therefore not a legislative instrument. Therefore the statement in subsection 152(3) therefore does not constitute a substantive exemption from the Legislative Instruments Act, rather it is a statement of the 'status quo'. This decision is not listed as a reviewable decision in section 168 of the Prudential Supervision Bill. This is to ensure that enforceable undertakings can be used to finalise issues and to avoid ongoing litigation. Furthermore, insurers voluntarily enter into enforceable undertakings. *[Part 7, subsection 152(3)]*

8.8 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(4) and (5)]*

Chapter 9

Remedies in the Federal Court

Outline of chapter

9.1 Part 8 of the Prudential Supervision Bill relates to remedies available in the Federal Court for a private health insurer's non-compliance with an enforceable obligation.

9.2 Unless otherwise stated, all references in this Chapter relate to the Prudential Supervision Bill.

Summary of new law

9.3 The provisions of Part 8 of the Prudential Supervision Bill are based on Division 203 of the PHI Act (other than section 203-20 which relates to an adverse publicity order).

9.4 Division 203 will continue to remain in the PHI Act, but with references to the Council omitted.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
The Health Minister will continue to have powers under Division 203 of the PHI Act, including power to seek an adverse publicity order, but these powers will be confined to enforceable obligations under the PHI Act. They will not extend to the Prudential Supervision Bill. Accordingly there will be no overlap between the Health Minister's powers and responsibilities in this area and APRA's powers. APRA will not have power to seek an adverse publicity order.	The Health Minister has same powers as the Council under Division 203, but the Health Minister's powers extend to all 'enforceable obligations' within the meaning of the PHI Act. They also include power to seek an adverse publicity order and seek a compensation order.

<i>New law</i>	<i>Current law</i>
<p>APRA may apply to the Federal Court for a declaration that a private health insurer has contravened an enforceable obligation within the meaning of the Bill.</p> <p>The application must be brought within four years of the alleged contravention.</p>	<p>The Council may apply to the Federal Court for a declaration that a private health insurer has contravened a Council-supervised obligation with the meaning of the PHI Act.</p> <p>The application must be brought within six years of the alleged contravention.</p>
<p>‘Enforceable obligation’ is defined in section 4 to mean any of the following:</p> <ul style="list-style-type: none"> • a provision of the Prudential Supervision Bill; • a direction given under the Prudential Supervision Bill; • a provision of the risk equalisation levy legislation; • any condition on an insurer’s registration; and • if the insurer is a restricted access insurer, a provision in its constitution or rules in order to comply with the requirements in subsection 15(3). 	<p>‘Council-supervised obligation’ means a provision of the PHI Act, or rules regulations or a direction under the Act, that relate to risk equalisation or health benefits funds or prudential standards.</p>
<p>The new law mirrors the current law.</p>	<p>If the court is satisfied that an officer of the private health insurer failed to take reasonable steps to prevent the insurer contravening the obligation, the declaration of contravention must specify that officer.</p>
<p>The new law mirrors the current law.</p>	<p>If the declaration of contravention specifies an officer, the court may order the officer to pay the Commonwealth a pecuniary penalty.</p>
<p>If the court has made a declaration of contravention, the court may order the private health insurer specified in the declaration to compensate an individual for injury or loss suffered by the individual as a result of the contravention.</p>	<p>Only if the Minister (not the regulator) has applied to the court for a declaration of contravention, if the court has made a declaration of contravention, the court may order the private health insurer specified in the declaration to compensate an individual for injury or loss suffered by the individual as a result of the contravention.</p>

<i>New law</i>	<i>Current law</i>
The new law mirrors the current law. If the court has made a declaration of contravention, the court may make any other order that APRA applies for.	If the court has made a declaration of contravention, the court may make any other order that the Council applies for.
The court must not make a civil penalty order against an officer if the officer has been convicted of an offence based on substantially the same relevant conduct, and proceedings for a civil penalty order against are stayed if there are criminal proceedings based on substantially the same conduct.	This mirrors the new law.
Criminal proceedings may be commenced after civil proceedings under Part 8 even if they relate to substantially the same conduct, but evidence given in the civil proceedings is not admissible in certain circumstances.	This mirrors the new law.
APRA may require a person to assist in relation to proceedings for a declaration of contravention or for a civil penalty order. However, it must appear to APRA that the person from whom assistance is sought is unlikely to have (i) contravened the enforceable obligation to which the application relates or (ii) committed an offence based on the same or substantially the same conduct.	This largely mirrors the new law.
A person against whom an order is sought imposing liability in respect of a contravention of an enforceable obligation may apply to the court for full or partial exoneration (where it appears they have acted honestly and in all the circumstances should be excused from liability).	This largely mirrors the new law

Detailed explanation of new law

Part 8 – Remedies in the Federal Court

Simplified outline of this Part

9.5 If APRA is satisfied that a private health insurer has contravened an enforceable obligation, APRA may apply to the Federal Court for a range of remedies. These may include a civil penalty order against an officer of the insurer who failed to take reasonable steps to prevent the contravention. An enforceable obligation is defined in section 4 of the Prudential Supervision Bill and includes a provision of the Prudential Supervision Bill, rules or standards, a direction under the Act, a provision of the risk equalisation levy legislation, a registration condition or an obligation in the insurer's constitution. *[Part 8, Division 1, section 153]*

APRA may apply to the Federal Court

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

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

9.7 An application must be made within four years of the alleged contravention. *[Part 8, subsection 154(2)]*

9.8 These provisions apply in relation to all enforceable obligations including a contravention of risk equalisation levy legislation. However, these provisions do not apply to a contravention of any of the other APRA-administered levy legislation.

Declarations of contravention

9.9 If the Federal Court is satisfied that a private health insurer has contravened an enforceable obligation it must make a declaration of contravention specifying:

- the enforceable obligation that was contravened;
- the contravening insurer;

- the conduct that constituted the contravention; and
- the officer (only if the Federal Court is satisfied that an officer of the insurer failed to take reasonable steps to prevent the contravention). *[Part 8, subsection 155(2)]*

9.10 The Federal Court's declaration is conclusive evidence of these matters. *[Part 8, subsection 155(3)]*

Civil penalty order

9.11 As currently provided under subsection 203-10(1) of the PHI Act, the Federal Court may order the officer to pay the Commonwealth a pecuniary penalty of up to 1,000 penalty units, if it has made a declaration of contravention that specifies an officer. *[Part 8, subsection 156(1)]*

9.12 An order given under subsection 156(1) is a civil penalty order. *[Part 8, subsection 156(2)]*

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

9.14 An order given under subsection 156(3) is a civil debt payable to the Commonwealth. *[Part 8, subsection 156(4)]*

9.15 The Commonwealth may enforce an order made in civil proceedings against the officer to recover the officer's debt. This debt is taken to be a judgment debt. *[Part 8, subsection 156(5)]*

9.16 The provision allows the Court to impose a large maximum pecuniary penalty. However, civil penalties must be large enough to act as an effective deterrent to the offence and also to reflect the seriousness of the offence. This is because civil penalties do not carry the criminal convictions/the stigma attached to a criminal offence.

Compensation order

9.17 If the Federal Court has made a declaration of contravention under section 155, it may order the private health insurer to compensate an individual for any injury or loss suffered as a result of the contravention. In the PHI Act, this Court could only make this order when the Health Minister had applied to the Court. It is necessary to confer this power on APRA, even though it is not a current Council power, because the Health Minister will not undertake enforcement actions in relation to

contraventions of enforceable obligations under the Prudential Supervision Bill. *[Part 8, subsection 157(1)]*

9.18 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

9.19 If the Federal Court has made a declaration of contravention, it may make any order sought by APRA, which will 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

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

9.21 The standard of proof in civil proceedings is determined under section 140 of the *Evidence Act 1995* as the balance of probabilities.

Civil proceedings after criminal proceedings

9.22 The Federal Court must not make a civil penalty order against an officer of a private health insurer if the officer has been convicted of an offence involving substantially the same conduct to which the court had regard when determining that the officer failed to take reasonable steps to prevent the insurer from contravening the enforceable obligation. *[Part 8, section 160]*

Criminal proceedings during civil proceedings

9.23 Proceedings for a civil penalty order against an officer remain if:

- criminal proceedings are started against the officer for an offence; and
- the offence is constituted by conduct that is substantially the same as the conduct which would led the Federal Court to impose a civil penalty. *[Part 8, subsection 161(1)]*

9.24 The proceedings are dismissed if the officer is convicted of the offence. *[Part 8, subsection 161(2)]*

Criminal proceedings after civil proceedings

9.25 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 under Part 8 or an order for a civil penalty or to pay compensation has been made against the person. *[Part 8, section 162]*

Evidence given in proceedings for penalty not admissible in criminal proceedings

9.26 Evidence of information 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 civil penalty order against the officer (whether or not the order was made); 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 under paragraph 155(2)(d). *[Part 8, section 163]*

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

APRA may require person to assist

9.28 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
- a declaration of contravention that specifies an officer of a private health insurer; or
- a civil penalty order in relation to an officer of a private health insurer. *[Part 8, subsection 164(1)]*

9.29 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(1)]*

9.30 APRA may require a person to assist in connection with an application for a declaration or order under subsection (1) only if:

- it appears to APRA that the person from whom assistance is sought is unlikely to have contravened the enforceable obligation, or committed an offence constituted by the same, or substantially the same, conduct to which the application relates; and
- APRA reasonably suspects or believes the person required to assist can give relevant information. *[Part 8, subsection 164(3)]*

9.31 APRA cannot require a person to assist if the person is, or has been, a lawyer for the person suspected of contravening the enforceable obligation. *[Part 8, subsection 164(4)]*

9.32 APRA may apply to the Federal Court to order the person to comply with the requirement to assist in a specified way. Only APRA may apply for such an order. *[Part 8, subsection 164(5)]*

9.33 It does not matter whether the application mentioned in subsection (1) has actually been made for the purposes of this section. Requirements under subsection 164(1) do not abrogate or affect the law relating to legal professional privilege, or any other immunity, privilege or restriction that applies to the disclosure of information, documents or other things. *[Part 8, subsection 164(6)]*

Chapter 10

Miscellaneous

Outline of chapter

- 10.1 Part 9 of the Prudential Supervision Bill relates to:
- relief from liability;
 - annual publication of information relating to health benefits funds;
 - the decisions of APRA that are internally reviewable and reviewable by the AAT;
 - approvals and determinations by APRA;
 - powers of the Federal Court;
 - approved forms;
 - delegation by the Minister; and
 - APRA rules.
- 10.2 Unless otherwise stated, all references in this Chapter relate to the Prudential Supervision Bill.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
When civil liability is imposed under certain parts of the act, a person who has acted honestly can apply to the Federal Court to seek whole or partial relief.	No right to apply for relief on this basis in relation to the corresponding liability.

<i>New law</i>	<i>Current law</i>
APRA is required to publish information relating to health benefits funds. This will reflect the current requirements applying to the Council in relation to content. Accordingly it will provide for APRA to continue the publication of the annual report on the operations of private health insurers.	The Council is required to produce an annual report on private health insurers to the Minister.
The AAT can review certain decisions.	The AAT can review certain decisions (section 328-5 of the PHI Act).
Affected parties are entitled to internal review of reviewable decisions.	The PHI Act does not provide for an internal review process.
APRA can make certain rules.	Certain Private Health Insurance Rules are made by the Council. The Health Minister has power to make rules, including the registration rules and the enforcement rules, under section 333-20 of the PHI Act.

Detailed explanation of new law

Part 9 – Miscellaneous

Simplified outline of this Part

10.3 Part 9 deals with miscellaneous matters such as relief from liability in certain proceedings under this Act, annual publication of information relating to health benefits funds, review of decisions, approved forms and APRA rules. *[Part 9, section 165]*

Relief from liability

10.4 Part 9 of the Prudential Supervision Bill allows a person, including an officer of an insurer to apply to the Federal Court to grant relief from liability, where the officer has acted honestly and the circumstances are such that the Court decides it would be fair to grant whole or partial relief from liability. The purpose of this provision is to align directors duties with those of the Corporations Act, and to ‘excuse company officers from liability in situations where it would be unjust and oppressive not to do so, recognising that such officers are business men

and women who act in an environment involving risk and commercial decision making.¹ [*Part 9, section 166*]

10.5 A person can apply for relief if there are proceedings underway for liability for losses caused by an insurer contravening the Prudential Supervision Bill (section 46), losses caused by a transaction made while the fund was under management (subsection 76(1)), losses caused a failure to remedy a contravention (section 89) and liability following contravention of an enforceable undertaking. A person can also apply for relief if they consider the proceedings described above will begin. [*Part 9, subsections 166(1) (2) and (3)*].

Annual publication of information relating to health benefits funds

10.6 The Council provided various data and reports to the industry and the public and it is intended that these will continue following transition to APRA. These reports are important to the efficient and effective operation of the industry, and among other benefits, provide transparency around risk equalisation calculations.

10.7 The Prudential Supervision Bill will provide for APRA to continue the publication of the Annual Report on the Operation of Private Health Insurers, currently published by the Council under the PHI Act. Following 30 September each year, APRA will publish the following information on its website, in respect of the operations during that financial year, of each health benefits fund conducted by an insurer:

- premiums payable to the fund;
- other amounts payable to the fund;
- fund benefits payable out of the fund;
- management expenses;
- other amounts payable out to the fund;
- the balance of the fund at the end to that financial year;
- details of how the reserves of the fund have been invested;
and

¹ *Daniels v Anderson* (1995) 37 NSWLR 438 at 525.

- any other information required by APRA rules made for the purpose of section 166A. *[Part 9, subsection 167(1)]*

10.8 None of the information published may be personal information relating to a person insured under a private health insurance policy. *[Part 9, subsection 167(2)]*

10.9 Section 167 of the Prudential Supervision Bill is based on sections 264-15 of the PHI Act and section 348A of the SIS Act.

10.10 The Council also releases data collected, which is distributed and published through a number of mechanisms, to the private health insurance industry. In some cases, the data is released at an aggregate industry level. In other cases, the data is released or published at an individual entity level.

10.11 This data assists with benchmarking and transparency of risk equalisation payments (and the underlying gross deficit and calculated deficit, and movements and trends in these amounts by state and by insurer). The data is also used for various other purposes to assist the industry.

10.12 From commencement, such data will be collected under the FS(CoD) Act (as amended), which will enable APRA to continue to collect information from private health insurers as specified in the reporting standards.

10.13 The Private Health Insurance Ombudsman will continue to publish the State of the Health Funds report on its website, using data collected by APRA.

Review of decisions

10.14 An application may be made to the AAT for review of the decisions set out in the table in section 168. *[Part 9, section 168]*

Reviewable decisions		
Item	Decision	Provision under which decision is made
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

Reviewable decisions		
Item	Decision	Provision under which decision is made
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 92(3)(c)	section 92
9	to give a direction under section 96 on a ground specified in paragraphs 96(1)(a), (b) or (c)	section 96
10	to vary, or to refuse to vary or revoke, a direction that was given under section 96 on a ground specified in paragraphs 96(1)(a), (b) or (c)	section 99
11	to give a direction to end the appointment of a person as appointed actuary	section 115

10.15 The Prudential Supervision Bill establishes an internal review process, and allows a person affected by one of the reviewable decisions in the table above to request APRA to reconsider the decision (within 21 days of receiving notice of the original decision or such further time as APRA allows). This gives insurers an additional opportunity for challenging APRA's decisions. *[Part 9, subsection 168(2)]*

10.16 Persons whose decisions that are confirmed or varied by APRA may then make applications to the AAT to review those decisions. *[Part 9, subsection 168(7)]*

10.17 An application made to the AAT will be subject to section 41 of the *Administrative Appeals Tribunal Act 1975* and its provisions on the operation and implementation of decisions that are subject to review. *[Part 9, Division 1, subsections 168(8) and (9)]*

Statements to accompany notification of decisions

10.18 When a reviewable decision is made and notice of the decision is in writing, APRA must inform the affected party that they can have the decision reconsidered in accordance with subsection 167(8) of the Prudential Supervision Bill and that, if dissatisfied with the reconsideration decision, they may then apply to the AAT for review of that decision. *[Part 9, subsection 169(1)]*

10.19 If APRA confirm or varies a decision under subsection 168(4) and gives a person notice in writing of that decision, the notice must include a statement that a person whose interests are affected by the decision may apply to the AAT for review of the decision. However, a failure to provide a statement under subsection 169(1) or (2) of the Prudential Supervision Bill will not affect the validity of the decision. *[Part 9, subsection 169(2) and (3)]*

Approvals, determinations etc. by APRA

10.20 APRA is authorised to give approval, make a determination or do an act under a provision of the Prudential Supervision Bill, if the Prudential Supervision Bill refers to such actions but does not expressly authorise APRA to take those actions. *[Part 9, section 170]*

Powers of Federal Court

10.21 The powers conferred on the Federal Court by this Prudential Supervision Bill do not affect any other power of the Federal Court. *[Part 9, section 171]*

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

10.22 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 172(1)]*

10.23 Requirements for the giving of forms electronically may be specified in the form or APRA rules. For example, a form may include requirements relating to electronic signatures, or for the use of specified software. *[Part 9, subsection 172(2)]*

10.24 The Prudential Supervision Bill allows APRA to make rules on the manner in which other documents (that are not required to be in approved forms) are to be given. *[Part 9, subsection 172(4)]*

Delegation by Minister

10.25 The Minister may delegate their powers in writing under the Prudential Supervision Bill to an SES employee (or acting SES employee) in the Department. *[Part 9, Division 1, section 173]*

10.26 Section 15 of the APRA Act allows APRA to delegate any functions or powers by any law of the Commonwealth to an APRA member or an APRA staff member. This includes APRA's existing powers to make prudential standards under a range of Acts. Section 15 of the APRA Act will apply to all the powers and functions conferred on APRA by the Prudential Supervision Bill, including APRA's powers to make prudential standards and rules.

10.27 Sections 92 and 174 of the Prudential Supervision Bill limit the delegation of the powers to make prudential standards and rules to senior APRA people.

APRA rules

10.28 APRA may, by legislative instrument, make rules which prescribe matters which the Prudential Supervision Bill requires or permits APRA to make, or is necessary or convenient for APRA to make for carrying out or giving effect to the Prudential Supervision Bill. This power is subject to subsection 174(3) of this Prudential Supervision Bill, which broadly ensures that the APRA rules cannot impose requirements that would normally be in an Act, such as powers of arrest. It is envisaged that the APRA rules will carry over some of the rules which used to be made under the PHI Act, such as rules around the eligibility criteria for registration as a private health insurer and rules governing how a health benefits fund is managed. In particular, APRA proposes to substantially remake current rules under the PHI Act relating to: the expenditure and application of health benefits funds; the restructure of health benefits funds; the merger and acquisition of health benefits funds; notification requirements; registration (including replicating current descriptions of restricted access groups); risk equalisation administration; and enforcement (including external management of health benefits funds). *[Part 9, subsection 174(1)]*

10.29 APRA rules may provide for APRA to exercise powers and discretions under the rules. *[Part 9, subsection 174(2)]*

10.30 APRA's rules may not create an offence or civil penalty, provide powers to arrest, detain, enter, search or seize, impose a tax, appropriate an amount from the Consolidated Revenue Fund or amend this Prudential Supervision Bill. This limits delegation of power to APRA. Paragraph 174(3)(e) prohibits the making of rules that directly amend the text of the Act. 'Directly amend' means make an amendment that would need to be incorporated in any reprint of the Act by the Government Printer (see section 2 of the Acts Publication Act 1905). The paragraph does not prohibit a rule that modifies the effect of a provision, such as by providing that a provision has effect as if it had been amended in a specified way (for example, as permitted by section 85), but does not make a direct amendment of any Act. *[Part 9, subsection 174(3)]*

10.31 Under section 15 of the APRA Act, APRA may delegate its power to make, vary or revoke APRA rules. The delegation of powers is to an APRA Member or an APRA staff member who is an Executive General Manager level, which is the highest level within APRA below an APRA member. In practice, all prudential standards will ordinarily be considered in detail at meetings of APRA's executive group meetings, which include includes all APRA members and Executive General managers, prior to being finalised. The ability to delegate to an Executive General Manager gives APRA some administrative flexibility, as there are only three APRA members, and the members are often required to travel overseas, and therefore delegation to an Executive General Manager may be required. *[Part 9, subsection 174(4)]*

Chapter 11

Consequential Amendments and Transitional Provisions

Outline of chapter

11.1 This Chapter provides an explanation of the Consequential Amendments and Transitional Provisions Bill which forms part of the package that gives effect to the transfer of the Council's functions to APRA.

11.2 Unless otherwise stated, all references in this Chapter relate to the Consequential Amendments and Transitional Provisions Bill.

Context of amendments

11.3 The Prudential Supervision Bill will confer prudential supervision functions relating to private health insurers, currently conferred on the Council under the PHI Act, on APRA. Consequential amendments are required in relation to a number of Acts to facilitate the transfer of functions to APRA and remove duplication of functions between the PHI Act and the Prudential Supervision Bill.

Summary of new law

11.4 The Consequential Amendment and Transitional Provisions Bill includes amendments to:

- the APRA Act to provide for matters relating to secrecy of information concerning private health insurers, and to provide for the administration of industry levies;
- the FISLC Act to cater for the collection of the private health insurance supervisory levy and the collection of the collapsed insurance levy;
- the FS(CoD) Act to facilitate the collection of data relating to private health insurers by APRA;

- the ITAA 1997 to update or replace references to the Prudential Supervision Bill;
- the Life Insurance Act to replace a reference to the PHI Act;
- the Medibank Private Sale Act to include references to the Prudential Supervision Bill in certain provisions that currently refer to the PHI Act;
- the Ombudsman Act to enable the sharing of information with APRA; and
- the PHI Act to remove the prudential supervision powers, remove references to the Council and to repeal the provisions creating the Council.

11.5 In addition, transitional provisions will ensure that legal actions taken prior to the transfer day, such as the registration of private health insurers, and other processes, such as legal proceedings, will continue under the Prudential Supervision Bill. Finally, the Consequential Amendments and Transitional Provisions Bill contains machinery transitional provisions for the transfer of the Council staff, assets, liabilities and records from the Council to APRA.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Part 1 - Amendments	
Divisions 1 – Main amendments	
Subsection 3(2) of the APRA Act will be amended to include private health insurers in the definition of ‘body regulated by APRA’. The Prudential Supervision Bill and the risk equalisation levy legislation will be included in the definition of ‘prudential regulation framework law’ in subsection 3(1) of the APRA Act, which will ensure that a document or information obtained for the purposes of such legislation will be protected under section 56 of the APRA Act.	The APRA Act does not specify private health insurers as bodies regulated by APRA for the purposes of the secrecy provision in section 56 or for the purposes of the FS(CoD) Act.

<i>New law</i>	<i>Current law</i>
<p>The APRA Act will include a new Special Account to administer the Collapsed Insurer Levy, should there be a requirement for it to be levied, and section 50 will be amended to ensure that the Minister’s annual supervisory levy determination works appropriately in relation to the Private Health Insurance Supervisory Levy.</p>	<p>The machinery provisions for levies in the APRA Act do not cater for private health insurance industry levies.</p>
<p>The FISLC Act will provide for the collection of the Private Health Insurer Supervisory Levy and the Collapsed Insurer Levy.</p>	<p>The FISLC Act does not provide for the collection of private health insurance industry levies by APRA.</p>
<p>The inclusion of private health insurers in the definition of ‘body regulated by APRA’ in section 3(2) of the APRA Act will flow through to the definition of ‘regulated entity’ in the FS(CoD) Act and ensure that data can be collected from private health insurers under that Act. An additional amendment to the objects clause in the FS(CoD) Act to put it beyond doubt that APRA can collect data from private health insurers for the purposes of the Risk Equalisation Special Account (as well as prudential supervision purposes).</p>	<p>The FS(CoD) Act does not currently provide for the collection of data from private health insurers by APRA.</p>
<p>The PHI Act will cease to include references to the Council (which will cease to exist) and will no longer include prudential regulation supervision and enforcement functions (as these will move to the Prudential Supervision Bill). The Council’s roles in relation to the collection of the Risk Equalisation Levy and the administration of the Risk Equalisation Special Account (formerly the Risk Equalisation Trust Fund) will be given to APRA.</p>	<p>The PHI Act contains provisions relating to the Council, including its constitution and functions, and confers prudential supervision and enforcement functions on the Council. The PHI Act also contains provisions under which the Council collects the Risk Equalisation, Council Administration and Collapsed Insurer Levies and administers the Risk Equalisation Trust Fund.</p>

<i>New law</i>	<i>Current law</i>
Part 2 – Specific transitional provisions	
A number of transitional provisions have been provided for to ensure that legal actions taken prior to the transfer day and other processes will continue under the Prudential Supervision Bill.	The PHI Act contains provisions relating to: <ul style="list-style-type: none"> • registration of private health insurers; • health benefit funds – restructures, mergers and acquisitions, and terminating and external management; • other obligations of private health insurers; • enforcement; and • financial and other matters.
Part 3 – General transitional provisions	
Machinery transitional provisions that provide for the transfer of the Council staff, assets, liabilities and records from the Council to APRA.	No equivalent provisions in the PHI Act.

Detailed explanation of new law

Schedule 1 – Consequential amendments

Commencement

11.6 The Consequential Amendment and Transitional Provisions Bill has multiple commencement dates. Sections 1 to 3 commence on Royal Assent. Division 1 of Schedule 1 and Part 2 of Schedule 1 commence at the same time as the Prudential Supervision Bill. Items 178-180 of Schedule 1 commence immediately after the commencement certain items of the *Private Health Insurance Amendment Act 2015* or at same time as the Prudential Supervision Bill, whichever is the later date. Item 181 of Schedule 1 (which amends the Prudential Supervision Bill) commences either after the commencement of the *Norfolk Island Legislation Amendment Act 2015* or the commencement of the Prudential Supervision Bill, whichever is the later date. Item 182 of Schedule 1 (which also amends the Prudential Supervision Bill) commences either after the commencement of the *Acts and Instruments (Framework Reform) Act 2015*, or the commencement of the Prudential Supervision Bill, whichever is the later date. Schedule 2 commences the day after Royal Assent.

Division 1 – Main amendments

APRA Act

11.7 The APRA Act establishes APRA, sets out secrecy obligations and provisions concerning certain aspects of the administration of levies, makes provision for other matters relating to the operations of APRA as an organisation, and outlines the broad functions and powers that APRA has as Australia’s prudential regulator. The amendments to the APRA Act will:

- ensure that information relating to private health insurers is subject to APRA’s secrecy provision;
- ensure APRA can collect data in relation to private health insurers under the FS(CoD) Act; and
- contribute to bringing levies relating to private health insurers within APRA’s levy framework.

11.8 The following definition has been inserted into the Dictionary in Schedule 1. [*Schedule 1, Part 1, item 1*]

- ***Collapsed Insurer Special Account:*** see subsection 54F(1) (which establishes that Special Account, and is discussed further below).

11.9 The definition of ‘prudential regulation framework law’ in definitions provision in subsection 3(1) of the APRA Act has been amended to include the Prudential Supervision Bill and the risk equalisation levy legislation (within the meaning of that Bill). The definition has also been amended to remove ‘Acts’. [*Schedule 1, Part 1, items 2 and 3*]

11.10 The definition of ‘body regulated by APRA’ in subsection 3(2) of the APRA Act has also been amended to include a private health insurer, as defined within the Prudential Supervision Bill. This, together with the change noted in the previous paragraph, will ensure that information and documents relating to private health insurers are covered by the secrecy provision in section 56 of the APRA Act and that information and data relating to private health insurers can be collected by APRA under the FS(CoD) Act. [*Schedule 1, Part 1, item 4*]

11.11 There is a minor amendment to section 8 of the APRA Act, which sets out APRA’s purposes, to recognise that the purposes listed in the section are not APRA’s exclusive purposes, having regard to the fact

that APRA will have functions in relation to the risk equalisation Special Account. *[Schedule 1, Part 1, item 5]*

11.12 The definition of a ‘levy’ in subsection 50(6) of the APRA Act has been amended to exclude levies imposed under the Collapsed Insurer Levy Act. This means that the Collapsed Insurer Levy will not be subject to the determination by the Minister, under section 50 of the APRA Act, which allocates the appropriate portion of supervisory levy to APRA. That determination is only intended to apply to APRA supervisory levies. The risk equalisation levy falls outside the definition of ‘levy’ in section 50(6) as it is not collected under the FISLC Act but rather under the PHI Act. *[Schedule 1, Part 1, item 6]*

11.13 The rules regarding debits from the APRA Special Account have been modified to ensure that the Special Account cannot be debited for collapsed insurer assistance payments within the meaning of section 54H (that is, for payments in line with the purposes of the Collapsed Insurer Special Account) or payments described in paragraph 318-10(1)(a) of the PHI Act (that is, payments in line with the purposes of the Risk Equalisation Special Account). *[Schedule 1, Part 1, item 7]*

11.14 New sections 54F, 54G, and 54H will be added to the APRA Act in order to establish and set out the functions and purposes of the Collapsed Insurer Special Account. Section 54F establishes the Collapsed Insurer Special Account and declares it to be a Special Account for the purposes of the *Public Governance, Performance and Accountability Act 2013*. *[Schedule 1, Part 1, item 8]*

11.15 The Collapsed Insurer Special Account does not exist under the current law. Under the current law, if an insurer collapsed and the Minister imposed the Collapsed Insurer Levy, the levy would be paid to the Council and banked by the Council pending the making of payment from that levy to the collapsed insurer or its external manager to help meet policy liabilities. The Council is legally separate to the Commonwealth and has had the capacity to hold money (including moneys related to the Collapsed Insurer Levy) on its own account. APRA holds money on behalf of the Commonwealth. For that reason, and to ensure that there is a clear separation between APRA’s money for general administrative purposes (which is credited to the APRA Special Account) and the Collapsed Insurer Levy, the Consequential Amendments and Transitional Provisions Bill provides for the establishment of the Collapsed Insurer Special Account. *[Schedule 1, Part 1, item 8]*

11.16 A Special Account is a mechanism that provides for appropriations for payments made by the Commonwealth. Under section 80 of the *Public Governance, Performance and Accountability Act 2013*, if an Act (such as the APRA Act) establishes a Special Account,

then the consolidated revenue fund is appropriated for expenditure of the purposes of the Special Account, up to the balance for the time being for the Special Account. In this case, any Collapsed Insurer Levy imposed (see Chapter 14) will be credited to the account, and amounts paid to policy holders of a collapsed insurer will be debited against the Special Account.

11.17 Section 54G provides that amounts collected under Part 3B of the FISLC Act can be credited to the Special Account. That is:

- amounts received by APRA by way of a Collapsed Insurer Levy and late payment penalty in respect of that levy. *[Schedule 1, Part 1, item 8]*

11.18 Subsection 54H(1) establishes the purpose of the Collapsed Insurer Special Account and the purposes for which it can be debited. Specifically, the purposes of the Collapsed Insurer Special Account are:

- for APRA to make payments (collapsed insurer assistance payments) to help meet a collapsed insurer's liabilities to the people insured under its complying health insurance policies (that it cannot meet itself); and
- to meet the costs of administering the Special Account and meeting any costs associated with the making of collapsed insurer assistance payments. *[Schedule 1, Part 1, item 8]*

11.19 These arrangements are similar to the arrangements in place where levy is collected, and amounts expended by APRA, in the event that the Financial Claims Scheme is activated. Money to pay claims is credited to and debited from the Financial Claims Scheme Special Account.

11.20 It is appropriate that collapsed insurer payments be funded by a separate levy (as has been the case under the Council) and accounted for in a separate Special Account because APRA is a cost recovery agency and only recovers through general supervisory levies what it expects to spend on each industry in each year. As a result, unexpected costs due to the activation of the Collapsed Insurer Levy (and likewise, in a banking or general insurance context, the Financial Claims Scheme) are not budgeted for, or collected from industry, in any year.

11.21 To ensure that costs related to one industry (for example, private health insurers in the activation of the Collapsed Insurer Levy) are not subsidised by another industry (for example, the supervisory levies paid by general insurers), it is appropriate that these amounts be recovered

from the private health insurance sector through a separate Collapsed Insurer Levy (as has been the position under the Council).

11.22 Subsection 54H(2) notes that the Minister may, by written notice to the collapsed insurer (or an external manager or terminating manager of a collapsed insurer) specify conditions upon which any collapsed insurer assistance payments are made. This could include repayment conditions for the collapsed insurer. The purpose of this is to ensure that the Commonwealth has a right to require repayment of collapsed insurer assistance payments, or at least partial repayment (for example, via a dividend in the winding up of the private health insurer) in the event of the insolvency of the private health insurer. If amounts are repaid then they will be credited to the Risk Equalisation Special Account, as discussed further below, so that they can be returned to industry via adjustments to risk equalisation payments. The Minister's notice is not a legislative instrument because it is specific to the insurer, therefore the statement in subsection 54H(3) does not constitute a substantive exemption, but is a statement of the 'status quo'. *[Schedule 1, Part 1, item 8]*

11.23 In section 54H, 'collapsed insurer' and 'complying health insurance policy' have the same meanings as used in the Collapsed Insurer Levy Act and the PHI Act respectively. *[Schedule 1, Part 1, item 8]*

Financial Institutions Supervisory Levies Collection Act 1998

11.24 The Consequential Amendments and Transitional Provisions Bill provides for the collection of supervisory and other industry levies by APRA. Part 2 relates to the collection of supervisory levies and is amended to cover the collection of supervisory levies in relation to private health insurers. Parts 3 and 3A relate to levies which in general terms relate to failed superannuation funds, ADIs and general insurers. A new Part 3B will be inserted for the purpose of collecting the Collapsed Insurer Levy (which is currently collected under the PHI Act).

11.25 A definition of 'private health insurer' is inserted into section 6. It has the same meaning as in the Prudential Supervision Bill. *[Schedule 1, Part 1, Item 9]*

11.26 In section 7, the definition of 'leviable body' has been expanded to include private health insurers. The definition of a levy has also been expanded to include (in respect of a private health insurer) a levy imposed by the Supervisory Levy Imposition Bill. *[Schedule 1, Part 1, Item 10 and 11]*

11.27 Subsection 8(4A) has been amended to expand the list of bodies that APRA is liable to levy to include, for 2015-16, private health insurers that are liable to pay a levy in respect of each quarter in that financial year. *[Schedule 1, Part 1, Item 12]*

11.28 This, and the associated definitions in subsection (4B), have been inserted to ensure that in 2015-16, the Private Health Insurance Supervisory Levy is collected in the same way as the Private Health Insurance Council Administration Levy would have been collected had the Council continued to operate. *[Schedule 1, Part 1, Item 12]*

11.29 Subsection 8(4C) has been amended to expand the list of bodies that APRA is liable to levy to include (from 1 July 2016 onwards) entities that are a private health insurer at any time during that financial year or later financial years. This is to harmonise the treatment of private health insurers with other body corporates levied by APRA from 2016-17 onwards. *[Schedule 1, Part 1, Item 12]*

11.30 Subsection 9(1) has been amended to ensure that in 2015-16 private health insurers will not be required to pay the Private Health Insurance Supervisory Levy in the same way as other entities supervised by APRA pay their levy. As noted, the intention is that the supervisory levy for 2015–16 will be paid quarterly, as it would if the Council remained in existence and the related amendments were not made, and not annually in the same way as other APRA supervisory levies. *[Schedule 1, Part 1, Item 13]*

11.31 To this end, subsection 9(3) has been inserted to state that the levy payable by a private health insurer for a quarter under subsection 8(4A) is payable on the 14th day after the liability day. *[Schedule 1, Part 1, Item 14]*

11.32 From 2016-17 onwards, the Private Health Insurance Supervisory Levy will be imposed and payable in the same timeframe as other entities supervised by APRA (except superannuation entities) under section 9(1).

11.33 Section 10 has been amended to ensure that the late payment penalty rate for entities other than private health insurers will remain at 20 per cent, while for private health insurance entities it will be 15 per cent unless the Minister (a Treasury Minister) specifies a lower rate in a legislative instrument. This change aligns the late payment penalty regime for private health insurers with that imposed by the Council. *[Schedule 1, Part 1, Item 15 and 16]*

11.34 Subsection 14(3) has been added to ensure that nothing in a law passed before or (unless the law is explicit) after the commencement of the Supervisory Levy Imposition Bill will exempt a levy paying entity from liability to pay the levy. *[Schedule 1, Part 1, Item 17]*

Part 3B – private health insurance collapsed insurer levy

11.35 Part 3B has been inserted into the FISLC Act to empower APRA to collect and administer any levy payable under the Collapsed Insurer Levy Act. This levy was previously the responsibility of the Council and was collected under Division 307 of the PHI Act. *[Schedule 1, Part 1, Item 18]*

11.36 The following definitions have been inserted into Part 3B:

- ***collapsed insurer levy day*** has the same meaning as in the Collapsed Insurer Levy Act;
- ***late payment penalty*** means penalty payable under section 26M;
- ***levy*** means levy imposed by the Collapsed Insurer Levy Act; and
- ***levy determination***, in relation to a collapsed insurer levy day, means the determination under section 7 of the Collapsed Insurer Levy Act that specifies the day that is a collapsed insurer levy day. *[Schedule 1, Part 1, Item 18]*

11.37 Part 3B also establishes that a private health insurer is liable to pay a levy imposed on the insurer on the collapsed insurer levy day. A collapsed insurer levy day is the day that levy is due and payable as specified in a legislative instrument (the levy determination) issued under the Collapsed Insurer Levy Act. *[Schedule 1, Part 1, Item 18]*

11.38 Section 26M has been inserted to establish that if any levy payable has not been paid by the due date, and remains unpaid after the penalty calculation day, then the insurer is liable to pay a late payment penalty at the applicable rate which will be either 15 per cent, or a lower rate if specified by the Minister in a legislative instrument. *[Schedule 1, Part 1, Item 18]*

11.39 The ***penalty calculation day*** under section 26M is:

- if the levy is paid on or after the first day of a month and before the sixth day of that month—the 20th day of the immediately preceding month; or

- if the levy is paid on or after the sixth day of a month and before the 20th day of that month—the sixth day of that month; or
- if the levy is paid on or after the 20th day of a month and on or before the last day of that month—the 20th day of that month. *[Schedule 1, Part 1, Item 18]*

11.40 The levy and late payment penalty are payable to APRA on behalf of the Commonwealth. However the Minister may waive (or delegate the power to APRA to waive) any levy or late payment penalty payable. If no waiver is given of any levy that is due and payable, and/or any late payment penalty that is due and payable, APRA may bring proceedings, on behalf of the Commonwealth, to recover those amounts. *[Schedule 1, Part 1, Item 18]*

11.41 Section 26R makes clear that no law made before or after the commencement of this section exempts an insurer from the liability to pay a levy, unless the exemption expressly refers to the Collapsed Insurer Levy. *[Schedule 1, Part 1, Item 18]*

11.42 Subsection 27(10) is amended to make clear that the decision maker in relation to a request for waiver of late payment penalty relating to the Collapsed Insurer Levy is the Minister and that a decision of the Minister in relation to the Collapsed Insurer Levy is a reviewable decision. *[Schedule 1, Part 1, Items 19 and 20]*

Financial Sector (Collection of Data) Act 2001

11.43 Under the FS(CoD) Act, APRA has power to make reporting standards requiring financial sector entities to provide information to APRA as specified in the standards.

11.44 The FS(CoD) Act covers *financial sector entities* (subsection 5(2)), which includes both regulated entities (that is, bodies regulated by APRA within the meaning of subsection 3(2) of the APRA Act) and registered entities (these are non-regulated entities that conduct certain forms of financial business, for example finance companies).

11.45 A private health insurer will be a *regulated entity* within the meaning of subsection 5(4) of the Act, consistent with the amendment to subsection 3(2) the APRA Act to include a private health insurer as a *body regulated by APRA*. Accordingly, APRA will have power to collect data from the insurer under the FS(CoD) Act.

11.46 The FS(CoD) Act applies to all other industries regulated by APRA.

11.47 A private health insurer will not be a *registered entity* under the FS(CoD) Act. Therefore, Part 2 of the FS(CoD) Act will not apply to private health insurers.

11.48 The purposes for which APRA may collect information is outlined in the object of the FS(CoD) Act (section 3). Currently, APRA can collect information for the purpose of:

- assisting the prudential regulation or monitoring of bodies in the financial sector;
- enabling APRA to publish information;
- assisting another financial sector agency to perform its functions or exercise its powers; and
- assisting the Minister (a Treasury Minister) to formulate financial policy.

11.49 To put it beyond doubt that APRA can collect information for the purposes of administering the Risk Equalisation Trust Fund, as well as for APRA's core prudential purposes (including supervision of private health insurers), the object of the Act has been amended to enable APRA to perform its functions or exercise its powers under other laws.

[Schedule 1, Part 1, item 21]

11.50 There is also a minor consequential amendment to paragraph 7(2)(d) of the FS(CoD) Act to update the definition of 'private health insurer' to refer to an entity registered under the Prudential Supervision Bill. *[Schedule 1, Part 1, item 22]*

11.51 The power to make reporting standards will replace a range of existing powers used by the Council to impose obligations to report data into a single legislative power.

11.52 A reporting standard is a legislative instrument. Under the FS(CoD) Act, regulated institutions must comply with reporting standards.

11.53 Each reporting standard sets out or states:

- the purpose for which data is being collected;
- the legal authority under which it is collected;

- that specified data in an attached form is to be provided according to prescribed instructions;
- the method and timing for submission;
- the required approach to auditing and quality control; and
- who can authorise the submission of data on behalf of a private health insurer.

11.54 Each reporting standard specifies the information that must be provided, and attaches the related instructions specifying how the form is to be completed.

11.55 Data submitted to APRA under the FS(CoD) Act is protected information under section 56 of the APRA Act. However, APRA can ensure the continued release and publication of data in a number of ways, including:

- APRA can release protected information under subsection 56(4) of the APRA Act, when the person to whose affairs the information or document relates has agreed in writing to the disclosure or production of the information; or
- APRA can determine the data to be non-confidential, following consultation with industry, under the process outlined in section 57 of the APRA Act, to enable the continued release and publication of data; or
- APRA can disclose protected information or the production of a protected document if the publication is to another person and is approved by APRA by an instrument in writing under paragraph 56(5)(b) of the APRA Act.

11.56 Under subsection 56(4) of the APRA Act, APRA would require a one-off written consent from individual insurers. This is broadly consistent with section 323-25 of the PHI Act, which provides that the Council may disclose information to a person(s) who is expressly or impliedly authorised by the person whom the information relates to obtain it.

11.57 If the data is declared non-confidential under section 57 of the APRA Act, all such data would also become available for a third party to make a request under the *Freedom of Information Act 1982* as the data will be non-confidential generally. APRA may then be obliged to release the data in accordance with that Act. Similar situations currently exist in

other industries regulated by APRA where data is non-confidential but not published.

Income Tax Assessment Act 1997

11.58 Consistent with the broader changes, amendments to the ITAA 1997 update existing definitions of ‘private health insurer’ and ‘policy holder’ in the ITAA 1997 to refer to the Prudential Supervision Bill. *[Schedule 1, Part 1, Items 23, 24, 25, 28, 30, 31, 32 and 33]*

11.59 Recognising that APRA will now be approving the demutualisations of not for profit private health insurers additional changes are made to Division 315 ‘Demutualisation of private health insurers’ of the ITAA 1997 to reflect these new processes. *[Schedule 1, Part 1, Items 26, 27, and 29]*

Life Insurance Act 1995

11.60 Section 16ZB of the Life Insurance Act, which relates to friendly societies carrying on health insurance business, has been amended to include a reference to the Prudential Supervision Bill. *[Schedule 1, Part 1, Item 34]*

Medibank Private Sale Act 2006

11.61 Consequential amendments are made to Schedule 2 to the Medibank Private Sale Act. Medibank Private and its Board, among others, may still be required to undertake activities which assist the sale.

11.62 Schedule 2 of the Medibank Private Sale Act contains provisions designed to facilitate the sale. A number of these provisions are expressed to operate despite the PHI Act and have been amended to add a reference to the Prudential Supervision Bill or to replace reference to a specific provision of the PHI Act with an updated reference to the replacement provision in the Prudential Supervision Bill.

11.63 Item 9 of Schedule 2 to the Medibank Private Sale Act is a provision often seen in ‘privatisation’ legislation and provides that Medibank Private, or a member of the Medibank Private Board, may give assistance to the Commonwealth in connection with the sale, either on their own initiative or when requested in writing by the Minister for Finance.

11.64 Subitem 9(7) provides that, to avoid doubt, the giving of that assistance, and certain actions by the Minister under item 9, will not result in liability or remedy under particular Acts, including the PHI Act. The subitem has been amended to add a reference to the Prudential

Supervision Bill so that there will be no liability under that Bill in relation to matters covered by the subitem. This gives the sale company and its board (among others) confidence that acts undertaken in pursuance of the sale do not cause them to breach a law or duty. *[Schedule 1, Part 1, item 35]*

11.65 Item 10 of Schedule 2 to the Medibank Private Sale Act contains ancillary provisions in support of item 9. Subitem 10(7) provides that Medibank Private may make a payment from the Medibank Private fund (which is a health benefits fund) for the purpose of paying expenses incurred by it in relation to giving assistance under item 9 or paying expenses incurred by a member of a Medibank Private Board in relation to giving such assistance.

11.66 Subitem 10(8) provides that this will not breach section 137-10 of the PHI Act, which limits the payment of expenses from a health benefits fund to certain purposes. Given section 137-10 of the PHI Act is being repealed and replaced with section 28 of the Prudential Supervision Bill, the reference has been amended to refer to section 28 of the Prudential Supervision Bill. *[Schedule 1, Part 1, item 36]*

11.67 Assistance provided under item 9 of Schedule 2 to the Medibank Private Sale Act may take the form of the provision of information. Item 14 provides that the fact that particular information was requested or required under item 9 is not a ground on which Medibank (or the holding company) can be required to disclose or notify that or other information under a provision of an Act listed in item 14, which includes the PHI Act.

11.68 The purpose of item 14 is to ensure that disclosure of information under item 9 does not result in the company losing any right, that might otherwise have had, to resist a purported requirement, under one of the listed Acts, to disclose the information (for example, to resist on the basis that the information is subject to legal professional privilege). Item 14 is amended to list the Prudential Supervision Bill and the FS(CoD) Act, which both contain provisions for the submission of information to APRA. *[Schedule 1, Part 1, item 37]* The Prudential Supervision Bill provides APRA with investigatory powers, including a power to require a private health insurer to provide information (section 127) and to produce documents (section 128).

11.69 Item 15 of Schedule 2 to the Medibank Private Sale Act provides that the Minister for Finance may prepare a written statement about the privatisation and give the statement to Medibank, together with a direction to the company to take steps to provide the statement to contributors to the Medibank Private fund and make a copy available on the company's website. Subitem 15(3) provides, for the avoidance of doubt, that complying with such a direction does not result in a contravention of, or liability or a remedy under, various Acts including the

PHI Act. This item has been amended to include a reference to the Prudential Supervision Bill. *[Schedule 1, Part 1, item 38]*

11.70 Item 16 of Schedule 2 to the Medibank Private Sale Act provides that Medibank Private may make a payment from the Medibank Private fund (the health benefits fund) for the purpose of applying expenses incurred by complying with a direction under item 15. Subitem 16(2) provides that such a payment does not contravene section 137-10 of the PHI Act which, as noted above, limits the kinds of expenses to that can be paid out of a health benefits fund. This subitem has been amended to refer to section 28 of the Prudential Supervision Bill, which, as noted, replicates and replaces section 137-10. *[Schedule 1, Part 1, item 39]*

11.71 A similar amendment is made to subitem 21(2), which allows the company to make a payment from the Medibank Private fund for the purpose of paying an expense incurred by modifying its constitution or rules, and providing information to contributors in relation to that, in accordance with a requirement under item 20. *[Schedule 1, Part 1, item 39]*

11.72 Although the Commonwealth will no longer be directing Medibank Private in regards to information statements, subitems 16(2) and 21(2) may both be relevant if a direction has been provided in the past. This is relevant as the Department of Finance is still working with Medibank Private on the reimbursement of Medibank Private's sale costs.

11.73 A similar amendment has also been made to subitem 22(3), which relates to the recovery of expenses of preparing an information statement of the kind referred to in item 22, relating to modifications to rules and the constitution. *[Schedule 1, Part 1, item 40]*

11.74 Subitems 23(2) and 58(8) have been similarly updated to refer to section 28 of the Prudential Supervision Bill. *[Schedule 1, Part 1, item 41]*

11.75 Subitems 58(5) and 58(6) require Medibank Private to pay compensation where the operation of item 20 (change of profit status – modifying Medibank Private's constitution and rules) or item 57 (which provides that an amount shown in the company's account as retained earnings is taken to be profits) results in an acquisition of property from the person on other than just terms. Subitem 58(7) provides that the company may make the compensation payment from the Medibank Private fund. Subitem 58(8) provides that this will not contravene section 137-10 of the PHI Act and, as noted, this will be updated to refer to section 28 of the Prudential Supervision Bill.

Private Health Insurance Act 2007

Chapter 1 – Introduction

11.76 The prudential regulation of the private health insurance industry will be the responsibility of APRA under the Prudential Supervision Bill.

11.77 The whole of the PHI Act will continue to be administered, by the Administrative Arrangements Orders, by the Department of Health (despite APRA's role under some provisions relating to levies). An inter-departmental agreement will be used to deal with APRA's role under the PHI Act.

11.78 The PHI Act has been amended to abolish the Council and repeal provisions relating to the Council and its functions and responsibilities. As a result, a number of amendments have been made to the introductory provisions of the PHI Act to reflect its revised scope.

11.79 Item 1 of the table to subsection 1-10(6) of the PHI Act, which dealt with how references to the Council throughout the PHI Act were identified, has been repealed as they are redundant. *[Schedule 1, Part 1, item 42]*

11.80 Paragraph 3-1(c) has been repealed to reflect that the PHI Act no longer imposes requirements about how insurers conduct health insurance business. These will now be imposed under the Prudential Supervision Bill. A minor technical amendment has been made to paragraph 3-1(b) as a consequence of the repeal of paragraph 3-1(c). *[Schedule 1, Part 1, items 43 and 44]*

11.81 A note is inserted at the end of section 3-1 to signpost to readers that the Prudential Supervision Bill sets out the registration process for private health insurers, imposes requirements about how insurers conduct health insurance business and deals with other matters in relation to the prudential supervision of insurers. *[Schedule 1, Part 1, item 45]*

11.82 A new section 3-15, which gives an overview of Chapter 4 of the PHI Act, is substituted to reflect the revised contents of Chapter 4 following the removal of the functions that were previously performed by the Council. Chapter 4 now defines the concepts of health insurance business and health benefits funds and deals with some related matters. It also imposes a number of miscellaneous obligations on private health insurers. *[Schedule 1, Part 1, item 46]*

Chapter 2 – Incentives

11.83 Chapter 2 establishes the premiums reduction scheme (the Australian Government Rebate on private health insurance) and the lifetime health cover scheme. No amendments have been made to Chapter 2.

Chapter 3 – Complying Health Insurance Products

11.84 Chapter 3 of the PHI Act sets out requirements for complying health insurance products, establishes the principle of community rating, and also includes a number of requirements for insurers to keep consumers and relevant Commonwealth government agencies informed about the health insurance they offer.

11.85 A limited number of amendments have been made to Chapter 3.

11.86 The PHI Act prohibits an insurer from offering health insurance business in any form other than a complying health insurance policy and also from offering or advertising policies including health insurance business that are not in the form of complying health insurance policies. Section 84-10 of the PHI Act deals with the granting of an injunction against an insurer who is contravening, or is proposing to contravene, these prohibitions. Paragraph 84-10(3)(b) has been repealed to remove reference to the Council's power to apply for such an injunction. The Health Minister and other persons retain the capacity to apply for an injunction under section 84-10. *[Schedule 1, Part 1, item 47]*

11.87 Section 90-1, which introduces Part 3-4, has been amended to reflect that insurers no longer have obligations under this Part to provide information to the Council about their health insurance business. *[Schedule 1, Part 1, item 48]*

11.88 Subsection 93-20(4) of the PHI Act sets out an insurer's obligation to notify policy-holders when the health benefits fund to which their policy is referable is changed. One of the reasons a policy may become referable to a new fund is a restructure, merger or acquisition of the fund to which it was originally referable. Division 146 of the PHI Act, which dealt with these matters, has been repealed. The restructure, merger and acquisition of health benefits funds are now dealt with under Division 4 of Part 3 of the Prudential Supervision Bill. The note to subsection 93-20(4) has been amended to refer to Division 4 of Part 3 of the Prudential Supervision Bill. *[Schedule 1, Part 1, item 49]*.

11.89 Division 96 of the PHI Act sets out various obligations on insurers to provide information about their complying health insurance products and policies to a number of Commonwealth Government agencies. A number of amendments to Division 96 have been made:

- Paragraphs 96-1(b), 96-5(b) and 96-10(b) required insurers to give Standard Information Statements (SISs) to the Council on request, when a new complying health insurance product was made available or when a product changed. Insurers will not be required to provide SISs to APRA under the PHI Act and these provisions have been repealed. *[Schedule 1, Part 1, item 51]*
- Paragraph 96-15(1)(b) has been repealed to remove the requirement for insurers to give additional information to the Council regarding complying health insurance products or policies on request. Insurers will not be required to give information to APRA about complying health insurance products or policies under the PHI Act. *[Schedule 1, Part 1, item 51]*
- As a result of the amendments to sections 96-1, 96-5, 96-10 and 96-15, the offence under section 96-20 for failing to give information to a person when required by those provisions will have no application in relation to the Council. The heading to section 96-20 has therefore been amended to remove reference to the Council. *[Schedule 1, Part 1, item 52]*
- Paragraph 96-25(b) provides that the Private Health Insurance (Complying Product) Rules may set out persons to whom information specified in the rules must be given. Reference to the Council has been repealed. *[Schedule 1, Part 1, item 53]*

11.90 No amendments have been made to the requirements for complying health insurance products and policies, including the requirement that policies meet the community rating requirement and the requirement to offer minimum benefits. The Health Minister will also continue to approve increases to insurance premiums.

11.91 An amendment to the heading of Division 96 to reflect that insurers no longer have obligations to provide information to the Council under the Division has also been made. *[Schedule 1, Part 1, item 50]*

Chapter 4 – Private health insurers

11.92 Chapter 4 of the PHI Act defined the concepts of health insurance business, health-related business and a health benefits fund. It is also prohibited for anyone other than a registered private health insurer from carrying on health insurance business and regulated the operation of health benefits funds by insurers, which was overseen by the Council.

Part 4-1 – Introduction

11.93 Chapter 4 still defines the key concepts of health insurance business and a health benefits fund, and imposes miscellaneous obligations on insurers. The heading and introduction to the Chapter in Part 4-1 have been amended to reflect its revised content. *[Schedule 1, Part 1, items 54 and 55]*

Part 4-2 – Health insurance business

11.94 The most significant change to Part 4-2 is the repeal of Division 118, which prohibited insurers from carrying on health insurance business without registration and enabled an injunction to be sought restraining a person from carrying on health insurance business while not registered. *[Schedule 1, Part 1, item 59]*

11.95 Corresponding provisions are now found in Division 2 of Part 2 of the Prudential Supervision Bill.

11.96 Consequential amendments have been made to the heading to Part 4-2 and to sections 115-1 and 115-5 to reflect that Part 4-2 no longer deals with the carrying on of health insurance business. *[Schedule 1, Part 1, items 56 and 57]*

11.97 The definitions of health insurance business, general treatment and hospital treatment in Part 4-2 have not been amended and continue to be found in sections 121-1 to 121-30. There have also been no amendments to requirements for the making of hospital declarations under section 121-5.

11.98 The Health Minister will continue to make Private Health Insurance (Health Insurance Business) Rules for the purposes of Part 4-2. However section 115-5, which deals with the rules, has been repealed and replaced to reflect that the rules will no longer include matters relating to the carrying on of health insurance business such as the operation of health benefits funds. *[Schedule 1, Part 1, item 58]*

11.99 As APRA, the new prudential regulator of private health insurers and health insurance business, sits within a different portfolio, new subsection 115-5(2) provides that before making Private Health Insurance (Health Insurance Business) Rules the Health Minister is to consult with APRA. A failure to consult does not affect the validity of the rules. *[Schedule 1, Part 1, item 58]*

Part 4-3 – Registration

11.100 Part 4-3, which provided for the registration of bodies as insurers has been repealed. Registration of insurers will be managed by

APRA under Division 3 of Part 2 of the Prudential Supervision Bill.
[Schedule 1, Part 1, item 60]

Part 4-4 – Health benefits funds

11.101 Part 4-4 of the PHI Act will contain a single Division 131, which will have the same heading as the Part. This is the same structure as is currently used for Part 4-3 of the PHI Act. Division 131 will also contain an equivalent to current section 137-30 of the PHI Act, which then allows for the whole of Division 137 to be repealed. *[Schedule 1, Part 1, items 61-64]*

11.102 Divisions 134, 137, 146, 149 and 152, which required private health insurers to have health benefits funds, regulated the operation of health benefits funds and their restructure, merger and acquisition and termination, and established special duties and liabilities of directors of insurers in relation to contraventions of the Act in relation to funds. These Divisions have been repealed and these matters will be supervised by APRA under Divisions 2 to 5, 8 and 9 of Part 3 of the Prudential Supervision Bill. *[Schedule 1, Part 1, item 65]*

11.103 Divisions 140, 143 and 163, which enabled the Council to establish solvency, capital adequacy and prudential standards and issue binding directions to insurers on these matters, have also been repealed. APRA's general prudential standard and direction making powers are contained in Part 4 of the Prudential Supervision Bill. *[Schedule 1, Part 1, items 65 and 71]*

11.104 Section 131-5 of the PHI Act will include a requirement for the Health Minister to consult with APRA before making rules for the purposes of section 131-15 of the PHI Act. The only other purposes, in Part 4-4, for which these rules will be able to be made after these amendments commence is to the new subsections 131-20(1) and (2), and new section 131-25 (which is a relocated version of current section 137-30 of the PHI Act). The consultation requirement in subsection (2) above will not apply to rules made for those provisions.

11.105 Sections 131-10 and 131-15 of the PHI Act continue to define a health benefits fund and health-related business, respectively. No amendments have been made to these definitions.

11.106 The Health Minister will continue to make Private Health Insurance (Health Benefits Fund Policy) Rules for the purposes of Part 4-4. However, section 131-5 has been amended to provide that prior to making Private Health Insurance (Health Benefits Fund Policy) Rules relating to the definition of health-related business, the Minister must consult with APRA. However, a failure to consult will not invalidate the rules. *[Schedule 1, Part 1, item 63]*

11.107 A new section 131-20 has been inserted into Part 4-4. Subsection 131-20(1) provides that the Private Health Insurance (Health Benefits Fund Policy) Rules, made by the Health Minister, may specify risk equalisation jurisdictions. *[Schedule 1, Part 1, item 64]*

11.108 The Private Health Insurance (Health Benefits Fund Policy) Rules do not currently specify any circumstances in which a private health insurer may have more than one health benefits fund. The ‘necessary or convenient’ rule making power for the matters dealt with in the above subsections will be provided by the current paragraph 333 20(1)(b) of the PHI Act.

11.109 The risk equalisation jurisdictions were previously specified in the Private Health Insurance (Health Benefits Fund Administration) Rules made by the Council. With the transfer of the Council’s functions to APRA, those rules are no longer made and the matters dealt with in those rules will generally be covered in APRA Rules. However, as the Health Minister retains overall policy responsibility for risk equalisation, the specification of risk equalisation jurisdictions has not been transferred to APRA.

11.110 Subsection 131-20(2) provides that the Health Insurance (Health Benefits Fund Policy) Rules may also set out circumstances in which an insurer may have more than one health benefits fund in respect of a risk equalisation jurisdiction, despite subsection 23(4) of the Prudential Supervision Bill. *[Schedule 1, Part 1, item 64]*

11.111 The power for the rules to allow insurers to have multiple funds per risk equalisation jurisdiction in certain circumstances was previously provided for in subsection 134-1(4) of the PHI Act, which has been repealed. *[Schedule 1, Part 1, item 65]*

11.112 A new section 131-25 has also been added to Part 4-4. Where an insurer has a health benefits fund in respect of both health insurance business and some or all of its health-related business, the insurer must comply with any requirements in the Private Health Insurance (Health Benefits Fund Policy) Rules about the conduct of the health-benefits business. New section 131-25 replaces section 137-30, which was repealed as part of the repeal of Division 137 and was identical in terms to section 131-25. *[Schedule 1, Part 1, item 65]*

11.113 A number of minor technical amendments to the heading to and introduction for Division 131 have also been made to reflect its revised scope. *[Schedule 1, Part 1, items 61 and 62]*

Part 4-5 – Miscellaneous obligations of private health insurers

11.114 Part 4-5 of the PHI Act sets out a number of miscellaneous obligations of insurers.

11.115 The following Divisions have been repealed from the PHI Act:

- Division 160, which dealt with appointed actuaries of private health insurers. Appointed actuaries are now dealt with under Division 2 of Part 5 of the Prudential Supervision Bill. *[Schedule 1, Part 1, item 71]*
- Division 163, which enabled the Council to establish prudential standards and issue binding prudential directions. APRA's general prudential standard and direction making powers are contained in Part 4 of the Prudential Supervision Bill. *[Schedule 1, Part 1, item 71]*
- Division 166, which prohibited insurers from allowing disqualified persons from acting as directors or in senior management positions. This is now dealt with under Division 3 of Part 5 of the Prudential Supervision Bill. *[Schedule 1, Part 1, item 71]*
- Sections 169-1, 169-5 and 169-15, which required insurers to provide the Council with copies of any reports to policy holders and annual financial accounts and statements, and also to keep the Council and the Secretary of the Department of Health informed about the identity of the chief executive officer of the insurer, have all been repealed. *[Schedule 1, Part 1, items 73 and 75]*

11.116 However insurers will still be required to notify the Secretary of the Department of Health about any proposed changes to their rules under section 169-10. If the Health Minister directs an insurer not to make the proposed change the Minister must give a copy of the direction to APRA (rather than the Council). *[Schedule 1, Part 1, item 74]*

11.117 Division 172 sets out a number of miscellaneous obligations on insurers. Rules relating to agreements between insurers and medical practitioners in section 172-5 are unchanged, as is the requirement under section 172-10 for insurers to give the Secretary of the Department of Health certain information specified in the Private Health Insurance (Data Provision) Rules.

11.118 The prohibition in section 172-15 on an insurer using its money to pay a penalty imposed on a director or officer because of an offence under the PHI Act, or an amount that a director or officer is liable to pay

as a result of an order made under Division 203 of the PHI Act, or to reimburse a director or officer in respect of such penalties or liabilities, remains. However, redundant references in the section to provisions of the PHI Act repealed as part of these amendments have been removed.

[Schedule 1, Part 1, item 78]

11.119 A number of minor consequential amendments to Part 4-5 of the PHI Act have been made to reflect the revised contents of the Chapter resultant on the abolition of the Council and the transfer of its functions to APRA. *[Schedule 1, Part 1, items 66 to 70, 72 and 76]*

11.120 With the abolition of the Council and APRA's assumption of the prudential supervision of private health insurers under the Prudential Supervision Bill, the majority of Chapter 4 of the PHI Act became redundant and have been repealed.

Chapter 5 – Enforcement

11.121 Chapter 5 of the PHI Act previously provided for the main enforcement powers of both the Health Minister and the Council. APRA's enforcement powers in relation to prudential supervision of the private health insurance industry are located in the Prudential Supervision Bill. References to the Council's enforcement powers have been repealed from Chapter 5.

11.122 The nature of the Health Minister's current enforcement powers under Chapter 5 is largely unchanged. However some minor amendments to clarify the limits of the enforcement responsibilities of the Minister under the PHI Act have been made, given that APRA will have exclusive responsibility for enforcing the prudential regulation of insurer under the Prudential Supervision Bill.

Parts 5-1 and 5-2 – Introduction and general enforcement methods

11.123 Minor technical amendments have been made to sections 180-1 and 185-1, which provide introductions to the enforcement mechanisms in Chapter 5 and Division 185 of the PHI Act, respectively, to reflect the removal of any enforcement role for the Council. *[Schedule 1, Part 1, items 79 and 80]*

11.124 Section 185-5 defines the 'enforceable obligations' of insurers and other persons under the PHI Act.

11.125 There will be overlap between definitions of enforceable obligation in the Prudential Supervision Bill and the PHI Act.

11.126 The definition of enforceable obligation in the Prudential Supervision Bill will cover 'a provision of the risk equalisation fund

legislation' which is defined in section 4 to include the provisions of the PHI Act as they apply in relation to the Risk Equalisation Levy and the Risk Equalisation Trust Fund.

11.127 The same provisions of the PHI Act, as applying in relation to Risk Equalisation Levy and the Risk Equalisation Trust Fund, will also be covered by the PHI Act under subsection 185(5).

11.128 Restricted access insurer's will be required to comply with their constitution or rules under subsection 15(3), and will be covered by both definitions.

11.129 A Memorandum of Understanding between the Department of Health and APRA will determine the responsible agency for enforcement action in relation to a breach in an area of overlap.

11.130 Paragraph 185-5(b) has been amended to remove reference to provisions of rules made by the Council under section 333-25 of the PHI Act as being enforceable obligations under the PHI Act. *[Schedule 1, Part 1, item 81]*

11.131 Although APRA will take over responsibility for making one of the sets of rules formerly made by the Council, the Private Health (Risk Equalisation Administration) Rules, enforcement powers in relation to those rules will sit exclusively with APRA under the Prudential Supervision Bill.

11.132 The enforceable obligations include, at paragraph 185-5(e), a provision in a restricted access insurer's constitution or rules included to meet requirements for its restricted access status (for example that it will not offer insurance to anyone outside its restricted access group). Paragraph 185-5(e) has been amended to remove the reference to subsection 126-20(6) of the PHI Act and substitute a reference to subsection 15(3) of the Prudential Supervision Bill, which now details relevant requirements for a restricted access insurer's rules or constitution. *[Schedule 1, Part 1, item 82]*

11.133 Whether a restricted access insurer complies with restrictions on the groups to which it offers insurance remains relevant for the community rating provisions in Chapter 3 of the PHI Act.

11.134 Section 185-10 has been repealed, as there will no longer be a concept of 'Council-supervised obligations' under the PHI Act. *[Schedule 1, Part 1, item 83]*

Division 188 – performance indicators

11.135 No changes have been made to the Health Minister’s capacity to set performance indicators for insurers in relation to community rating under Division 188.

Division 191 – explanations from insurers

11.136 Division 191 deals with seeking explanations from insurers about their operations. Section 191-1 has been amended to remove all references to the Council’s power to seek explanations from insurers.
[Schedule 1, Part 1, item 84]

11.137 The Health Minister will retain current powers to ask an insurer for an explanation of its operations if the Minister believes that, having regard to information available to the Minister or performance indicators specified in the Private Health Insurance (Complying Product) Rules, as an insurer might have contravened an enforceable obligation under the PHI Act. The Minister will have no power under Division 191 to ask insurers for an explanation of their operations in respect of their obligations under the Prudential Supervision Bill.

11.138 A number of technical drafting amendments to Division 191 have been made as a result of the removal of references to the Council.
[Schedule 1, Part 1, items 85-87]

Division 194 – investigations

11.139 Division 194 of the PHI Act enables investigations into the operations of private health insurers. An investigation may involve giving officers, employees or agents of an insurer a notice to produce documents, give information or evidence. It may also involve examination of the books of an insurer.

11.140 Section 194-1A has been inserted to establish the circumstances in which the powers under Division 194 may be exercised. It provides that the powers may only be exercised for the purposes of the PHI Act but may not be exercised for the purpose of the PHI Act as it relates to Risk Equalisation Levy or the Risk Equalisation Special Account. APRA will have investigative powers in relation to these matters under the Prudential Supervision Bill. Section 194-1 has been repealed as it is redundant.
[Schedule 1, Part 1, items 88 and 91]

11.141 Subsection 194-30, which expressly enabled the Health Minister to consult the Council and ask it to take over part of an investigation where the Minister believed issues concerning Council-supervised obligations had been raised, has also been repealed. The Health Minister

and APRA will consult more generally under a Memorandum of Understanding. *[Schedule 1, Part 1, item 97]*

11.142 A number of consequential amendments have been made to Division 194 to reflect that the Health Minister is the only person who may now exercise powers to conduct investigations under the Division. *[Schedule 1, Part 1, items 89 and 90, 92 to 96 and 98 to 100]*

11.143 There has been no other change to the powers of the Health Minister under Division 194.

Division 197 – enforceable undertakings

11.144 Division 197 of the PHI Act deals with enforceable undertaking that may be sought from private health insurers. All references to the Council's power to seek and accept an undertaking from an insurer have been repealed. *[Schedule 1, Part 1, items 101-104]*

11.145 The Health Minister will retain the powers to seek and accept undertakings under the PHI Act and to apply to the Federal Court to enforce an undertaking if the Minister considers an insurer has contravened the terms of an undertaking (see sections 197-1 and 197-5). An insurer also retains the capacity to withdraw or vary an undertaking at any time, with the consent of the Minister (see subsection 197-1(3)).

11.146 APRA will have the power to accept undertakings from insurers under Part 7 of the Prudential Supervision Bill in connection with matters in relation to which APRA has powers or functions under the Prudential Supervision Bill or the legislation governing the Risk Equalisation Special Account or Risk Equalisation Levy.

Division 200 – directions

11.147 Division 200 of the PHI Act previously enabled the Health Minister or the Council to give a direction to an insurer requiring the insurer to modify its day to day operations or its rules in a particular respect and, for a restricted access insurer, to modify its rules or constitution in order to comply with requirements relating to its restricted access status.

11.148 All reference to the Council's power to give directions to insurers has been removed by the substitution of new subsections 200-1(1) and (2) and the amendment of subsection 200-1(3). New subsections 200-1(1) and (2) also contain an updated reference to subsection 15(3) of the Prudential Supervision Bill, under which the requirements with which the rules or constitution of a restricted access insurers must comply are set. *[Schedule 1, Part 1, item 107]*

11.149 A number of technical drafting changes to reflect that the Minister now has exclusive power to issue directions under Division 200 have also been made. *[Schedule 1, Part 1, items 105, 106 and 108 to 111]*

11.150 The Health Minister will not be required to provide a copy of any direction to APRA. This is because the Health Minister and APRA will consult more generally under a Memorandum of Understanding.

11.151 APRA's main prudential direction making power, including in relation to enforceable obligations under the Prudential Supervision Bill, is in Division 3 of Part 4 of that Bill.

11.152 There has been no alteration to the grounds on which the Health Minister may issue a direction to an insurer, namely if the Minister considers it will assist in preventing improper discrimination or considers there appears to be a contravention of an enforceable obligation under the PHI Act involving improper discrimination. There has also been no alteration to the nature of the directions that the Minister may give.

Division 203 – remedies

11.153 Division 203 sets out the remedies available in the Federal Court where an insurer has contravened its enforceable obligations under the PHI Act. These remedies were previously available on application to the Federal Court by the Health Minister or the Council.

11.154 The Division has been amended to repeal all references to the Council, including references to the Council's former powers to apply to the Federal Court for declarations and orders and to require a person to give assistance in relation to an application by the Council. *[Schedule 1, Part 1, items 112 to 122]*

11.155 The Health Minister remains able to seek a number of remedies from the Federal Court, specifically a declaration of contravention and one or more of a pecuniary penalty order, a compensation order, an adverse publicity order or any other order the Minister considers appropriate (see section 203-1). There also has been no change to the grounds on which the Minister may seek a remedy, namely where the Minister is satisfied an insurer has contravened an enforceable obligation.

11.156 Under Part 8 of the Prudential Supervision Bill, APRA is able to seek remedies in the Federal Court for breaches of enforceable obligations under that Bill.

Part 5-3 – health benefits fund enforcement

11.157 Part 5-3 of the PHI Act, dealt with the enforcement of health benefits fund requirements, including investigations into the affairs of private health insurers by appointed inspectors and the external management of health benefits funds. Powers under Part 5-3 of the PHI Act were exclusively exercised by the Council and the Part has been repealed in its entirety. *[Schedule 1, Part 1, item 123]*

11.158 APRA has similar powers under Divisions 3 and 4 of Part 6 and Division 6 of Part 3 of the Prudential Supervision Bill to investigate the affairs of insurers and to place health benefits funds into external management where this is in the best interests of policy holders.

Chapter 6 – Administration

Parts 6-1 and 6-3 – Introduction and the Council

11.159 Part 6-1 of the PHI Act sets out the contents of Chapter 6. Paragraphs 203-1(b) and (d), which referred to former functions of the Council have been repealed. *[Schedule 1, Part 1, item 124]*

11.160 A consequential amendment has also been made to change reference in paragraph 203-1(f) to the Risk Equalisation Trust Fund to a reference to the Risk Equalisation Special Account. *[Schedule 1, Part 1, item 125]*

11.161 Part 6-3 of the PHI Act established the Council, provided for its general purposes, functions and powers and set out governance arrangements for the Council and its staff. Part 6-3 has been repealed in its entirety, with the effect of abolishing the Council. *[Schedule 1, Part 1, item 126]*

Part 6-4 – administration of premiums reduction scheme

11.162 No amendments have been made to Part 6-4 and the administration of the premiums reduction scheme by the Department of Human Services will not be affected by the transfer of the Council's functions to APRA.

Part 6-5 – matters incidental to external and terminating management

11.163 Part 6-5 of the PHI Act sets out a number of matters relating to the external management and terminating management of health benefits funds. These included the powers of external and terminating managers, obligations on directors and officers of insurers to deliver certain records to managers and dealing with the property of a fund under management.

11.164 The external management and terminating management of health benefits funds is now regulated under Part 3 of the Prudential Supervision Bill and Part 6-5 of the PHI Act has therefore been repealed in its entirety. *[Schedule 1, Part 1, item 126]*

Part 6-6 – private health insurance levies

11.165 Part 6-6 of the PHI Act deals with matters relating to the collection and administration of private health insurance levies.

11.166 APRA has taken full responsibility for the Collapsed Insurer Levy and the Prudential Supervisory Levy, which replaces the Council Administration Levy. The collection and administration of these two levies by APRA will be in accordance with the relevant levy imposition Acts, including the Supervisory Levy Imposition Bill, and with the FISLC Act.

11.167 While the Health Minister retains overall policy responsibility for the Risk Equalisation Levy, APRA will take over from the Council responsibility for the collection of the levy. APRA will administer the Risk Equalisation Levy in accordance with the Risk Equalisation Levy Amendment Bill and Part 6-6 of the PHI Act.

11.168 The remaining private health insurance levies under the PHI Act, the National Joint Replacement Register Levy and the Complaints Levy, which funds the operation of the Private Health Insurance Ombudsman, will remain under the PHI Act and no amendments have been made to their operation.

Divisions 304 and 307 – Collection and recovery of private health insurance levies

11.169 Divisions 304 and 307 of the PHI Act contain a general introduction to Part 6-6 and set out when private health insurance levies are payable, penalties for late payment of levies and waiver of levies and late payment penalties.

11.170 All references to the Collapsed Insurer Levy and Council Administration Levy and the Council's administration of those levies have

been repealed from Divisions 304 and 307 [*Schedule 1, Part 1, items 127, 129 to 132 and 134 to 136*].

11.171 A note has been added at the end of section 304-10 informing readers that insurers are liable to pay the Collapsed Insurer and Supervisory Levies, that Part 6-6 of the PHI Act does not apply in relation to those levies and that the collection of those levies is dealt with in the FISLC Act. [*Schedule 1, Part 1, item 128*]

11.172 Amendments to Division 307 in relation to the Risk Equalisation Levy are:

- Risk Equalisation Levy, as well as any late payment penalty in respect of the Levy, is to be paid to APRA, on behalf of the Commonwealth, in accordance with subsection 307-10(2), for the purpose of the Private Health Insurance Risk Equalisation Special Account (formerly the Risk Equalisation Trust Fund); [*Schedule 1, Part 1, item 132*]
- subsection 307-15(3) has been amended to allow APRA (as agent of the Commonwealth) to recover a debt to the Commonwealth that is Risk Equalisation Levy that is due and payable or any late payment penalty in respect of the levy; and [*Schedule 1, Part 1, item 133*]
- subsection 307-20(2) has been amended to provide that APRA (rather than the Council) may waive the whole or part of an amount of late payment penalty in respect of an unpaid amount of risk equalisation levy if APRA considers that there are good reasons for doing so. [*Schedule 1, Part 1, items 134 and 135*]

Division 310 – requirements of private health insurers

11.173 Division 310 imposes requirements on private health insurers to lodge returns with the Commonwealth for the purposes of certain private health insurance levies, retain records relating to levies and provide documents relevant to whether the insurer is liable to pay a private health insurance levy or the amount of levy payable.

11.174 Section 310-1 of the PHI Act previously required private health insurers to lodge returns with the Council in respect of the Collapsed Insurer and Council Administration Levies and with the Secretary of the Department of Health in respect of the Complaints Levy. All references to the Council and the Collapsed Insurer and Council Administration Levies have been repealed from Division 310, with consequential technical changes made to reflect that the section now only applies to the Complaints Levy. [*Schedule 1, Part 1, items 137 to 139*]

11.175 Section 310-5 of the PHI Act imposes requirements on insurers to retain records relevant to whether the insurer is liable to pay a private health insurance levy or the amount of levy payable. Insurers will still be required under section 310-5 to keep records relevant to the remaining private health insurance levies remaining under the PHI Act.

11.176 Subsection 310-5(2) of the PHI Act has been amended to allow the Secretary of the Department of Health, rather than the Council, to approve a form of records, other than an electronic form, in which documents relevant to the Complaints Levy may be kept and to allow APRA to do the same in relation to documents relevant to the Risk Equalisation Levy. *[Schedule 1, Part 1, item 140]*

11.177 Subsection 310-10(1) of the PHI Act previously provided for the Council to request information or records from an insurer if it believed that the insurer was capable of giving information relevant to whether the insurer was liable to pay any private health insurance levy (other than the Complaints Levy) or the amount of levy payable. Subsection 310-10(1) of the PHI Act has been amended to give APRA the power to ask insurers for information or records relevant to whether the insurer is liable to pay the Risk Equalisation Levy or the amount of that levy the insurer is liable to pay. *[Schedule 1, Part 1, item 141 and 142]*

11.178 As was the case for the Council, APRA's belief must be on reasonable grounds. The Secretary of the Department of Health has similar powers in relation to the Complaints Levy and these remain unchanged.

11.179 APRA does not have power under section 310-10 to ask insurers for documents or records relating to the Collapsed Insurer or Prudential Supervisory Levies.

Division 313 – Power to enter premises and search for documents

11.180 Division 313 of the PHI Act provides powers to enter premises, either with the consent of the occupier or under a warrant issued by a magistrate, to search for documents containing information relevant to whether an insurer is liable to pay a private health insurance levy or the amount of levy that the insurer is liable to pay. Formerly, either a member of the staff of the Council or a person authorised in writing by the Health Minister could exercise powers under the Division.

11.181 The only levy-related documents that may be searched for now under Division 313 are documents relevant to liability to pay the Complaints Levy or the amount of Complaints levy for which an insurer may be liable.

11.182 All references to the Council have been repealed from Division 313 and APRA will not exercise powers under Division 313. Subsection 313-1(1) has been amended to reflect that only persons authorised in writing by the Health Minister may now enter premises for the purposes of the Division, either with consent or a pursuant to a warrant. *[Schedule 1, Part 1, item 144]*

11.183 Additionally, subsection 313-1(2) has been amended with the effect that the only documents that may be searched for under Division 313 are documents relevant to liability to pay the Complaints Levy or the amount of Complaints Levy for which an insurer may be liable. *[Schedule 1, Part 1, item 145]*

11.184 A consequential amendment to the heading to the section reflecting this has been made. *[Schedule 1, Part 1, item 143]*

11.185 The Secretary of the Department of Health has taken over responsibility for issuing identity cards to authorised officers under section 313-20, formerly the responsibility of the Council. *[Schedule 1, Part 1, item 146]*

Part 6-7 – Private Health Insurance Risk Equalisation Special Account

11.186 Part 6-7 of the PHI Act deals with the Private Health Insurance Risk Equalisation Special Account, the replacement for the Private Health Insurance Risk Equalisation Trust Fund. The Health Minister will retain overall policy responsibility for the Special Account, with APRA having a similar role administering the Account as the Council had administering the Risk Equalisation Trust Fund.

11.187 A Special Account is an appropriation mechanism that notionally sets aside amounts within the Consolidated Revenue Fund for expenditure on specific purposes. The conversion of the Risk Equalisation Trust Fund into a Special Account is required because of the different financial arrangements of APRA and the Council.

11.188 The Council was legally separate to the Commonwealth and could hold money, including the Trust Fund, on its own behalf and separately from the Consolidated Revenue Fund. While APRA is a body corporate legally separate to the Commonwealth, under its establishing legislation it holds all money on behalf of the Commonwealth.

11.189 A new Part 6-7 of the PHI Act has been substituted to effect the conversion. *[Schedule 1, Part 1, item 147]*

11.190 Section 318-1 of the PHI Act establishes the Private Health Insurance Risk Equalisation Special Account Fund and declares it to be a

special account for the purposes of the *Public Governance, Performance and Accountability Act 2013*.

11.191 The conversion of the Risk Equalisation Trust Fund into the Risk Equalisation Special Account is not intended to result in any practical changes for insurers. The same kinds of amounts will be payable into the Special Account under section 318-5 of the PHI Act as were payable into the Risk Equalisation Trust Fund, specifically:

- amounts received by APRA by way of Risk Equalisation Levy and late payment penalty in respect of that levy (subparagraph 318-5(a)(i) and (ii));
- amounts paid to APRA under paragraph 45(b) of the Prudential Supervision Bill by a non-profit insurer where the insurer has assets left in its health benefits funds at the completion of a termination of those funds (subparagraph 318-5(b)(i));
- amounts paid to APRA under section 46 of the Prudential Supervision Bill by the officers of an insurer where the insurer contravenes that Bill in relation to the conduct of a health benefits fund, the contravention resulted in a loss to the fund and the fund has been terminated (subparagraph 318-5(b)(i));
- repayments of collapsed insurer assistance payments (within the meaning of section 54H of the APRA Act (subparagraph 318-5(b)(ii)); and
- amounts paid to the Commonwealth or APRA, by a State or Territory, for crediting to the Risk Equalisation Special Account (paragraph 318-5(c)). Note that the full amount of all risk equalisation levy payments, and related late payment penalty, is to be credited to the Special Account and is based on paragraph 318-5(1)(b) of the PHI Act. [*Schedule 1, Part 1, item 147*]

11.192 A note to section 318-5 provides that an Appropriation Act may contain a provision to the effect that, if any of the purposes of a Special Account is a purpose covered by an item in the Act, then amounts may be debited against the appropriation for that item and credited to the Special Account.

11.193 Subsection 318-10(1) provides that the purpose of the Risk Equalisation Special Account is for APRA to make payments to insurers in accordance with the Private Health Insurance (Risk Equalisation

Policy) Rules to meet the expenses of administering the Account. A statement on the purposes of a Special Account is standard when establishing a statutory Special Account.

11.194 Subsection 318-10(2) provides that the Private Health Insurance (Risk Equalisation Policy) Rules, which will continue to be made by the Health Minister, must specify:

- the circumstances in which funds can be debited from the Account for payment to private health insurers; and
- the methods for working out the amount to be debited from the Account to a private health insurer and the amount of Risk Equalisation Levy that an insurer is liable to pay.

[Schedule 1, Part 1, item 147]

11.195 Subsection 318-10(3) requires the Health Minister to consult with APRA before making changes to the Private Health Insurance (Risk Equalisation Policy) Rules, noting that a failure to consult APRA does not affect the validity of those rules. *[Schedule 1, Part 1, item 147]*

11.196 Section 318-15 provides for the Private Health Insurance (Risk Equalisation Administration) Rules to be made setting out requirements for insurers that are liable to Risk Equalisation Levy to keep particular kinds of records, and also requirements about how records are to be kept.

11.197 Requirements for provision of information to APRA will instead be dealt with by standards to be made under the FS(CoD) Act.

Part 6-8 – disclosure of information

11.198 Part 6-8 of the PHI Act deals with the disclosure of 'protected information'.

11.199 Amendments to the Part are required to:

- enable the disclosure of protected information obtained under the PHI Act to APRA and APRA officers to assist them to carry out their duties, functions and powers in relation to private health insurance;
- ensure that APRA officers performing functions under the PHI Act (in relation to the Risk Equalisation Special Account or Risk Equalisation Levy) are not subject to the secrecy regime in the PHI Act. APRA officers will be subject to the secrecy regime in the APRA Act when performing these functions; and

- repeal redundant provisions from Division 323.

11.200 Under section 323-1 of the PHI Act, a person commits an offence if the person has or had a duty, function or power under the PHI Act, the person discloses 'protected information' to another person and the disclosure is not an 'authorised disclosure'.

11.201 In order to exclude APRA officers from the PHI Act information disclosure regime:

- information obtained by a person in the course of performing an 'APRA duty, function or power' has been excluded from being 'protected information' as defined in paragraph 323-1(2)(a); and *[Schedule 1, Part 1, item 150]*
- the offence for the disclosure of protected information will not apply where a person has or had an APRA duty, function or power. *[Schedule 1, Part 1, item 148]*

11.202 An 'APRA private health insurance duty, function or power' is defined in new subsection 323-1(1A). *[Schedule 1, Part 1, item 149]*

11.203 It is a duty, function or power of APRA, or that a person has as an officer of APRA, under:

- the PHI Act;
- the Prudential Supervision Bill; or
- the FISLC Act as that Act applies in relation to levies imposed on insurers or the FS(CoD) Act as that Act applies to private health insurers.

11.204 A note has been included to new subsection 323-1(1A) providing that the disclosure of information regime for information obtained under APRA private health insurance duties, functions and powers exists in Part 6 of the APRA Act, rather than Division 323 of the PHI Act.

11.205 Section 323-5 of the PHI Act specifies a number of authorised disclosures that may be made in the course of official duties.

11.206 However, a new paragraph, paragraph 323-5(aa), has been inserted in order to provide that a disclosure of information made for the purpose of enabling another person to perform or exercise an APRA private health insurance duty, function or power is an authorised disclosure under section 323-5 of the PHI Act. *[Schedule 1, Part 1, item 153]*

11.207 With the abolition of the Council, references to equivalent authorised disclosures to and by the Council and employees of or consultants to the Council have been removed from section 323-10. *[Schedule 1, Part 1, item 154]*. This is because the disclosure of information by APRA is to be regulated under the APRA Act rather than the PHI Act.

11.208 Section 323-25 of the PHI Act previously provided for the Council or the Secretary of the Department of Health or the Council to disclose information to a person expressly or impliedly authorised to obtain it by the person to whom the information relates. All reference to the Council has been repealed from the section and only the Secretary remains able to make an authorised disclosure under this section. *[Schedule 1, Part 1, items 155 and 156]*

11.209 Section 323-35 previously enabled the Council to make an authorised disclosure of information to the extent necessary to perform its public information function (making statistics and other financial information about an insurer available to the public) and its agency cooperation function (cooperating with other regulatory agencies on matters affecting insurers and the private health insurance industry generally and providing information to the Private Health Insurance Ombudsman for the purposes of the State of the Health Funds Report). Section 323-35 has been repealed in its entirety. *[Schedule 1, Part 1, item 157]*

11.210 As a consequence, reference to disclosure under section 323-35 as a form of authorised disclosure has also been removed from subsection 323-1(3). *[Schedule 1, Part 1, item 151]*

11.211 Section 323-25 is being inserted to ensure that a disclosure of information is an authorised disclosure. *[Schedule 1, Part 1, item 155]*

11.212 Ordinarily, section 323 prohibits disclosure if a person who has a duty, but not an APRA duty, discloses info that was obtained under PHI Act, but not while doing an APRA duty. For transitioning staff, they will have obtained info while doing a PHI Act duty and want to use it.

Part 6-9 – review of decisions

11.213 Part 6-9 of the PHI Act deals with review of decisions made under the Act by the AAT.

11.214 The table in section 328-5 of the PHI Act sets out decisions for which review by the AAT is available. Items 5 to 30 and item 44 of the table, which related to decisions made exclusively by the Council, have been repealed. *[Schedule 1, Part 1, items 158 and 160]*

11.215 AAT review of decisions made by APRA under the Prudential Supervision Bill, is dealt with in section 167 of that Bill. Review of decisions in relation to the waiver of Collapsed Insurer Levy or late payment penalty for made under the FISLC Act are dealt with in section 27 of that Act.

11.216 Item 43 of the table in section 328-5 previously excluded from review decisions not to waive or to only partially waive late payment penalty in respect of the Collapsed Insurer Levy, as review of such decisions was provided for by item 44 of the table.

11.217 As the Collapsed Insurer Levy is no longer administered under the PHI Act this exclusion has become redundant and item 43 has been amended to remove reference to the Collapsed Insurer Levy. Access to AAT review of decisions not to waive or to only partially waive late payment penalty in respect of the Complaints Levy, the Risk Equalisation Levy and the National Joint Replacement Register Levy is still available under this item. *[Schedule 1, Part 1, item 159]*

11.218 Access to AAT review of decisions by the Health Minister not to waive or to only partially waive late payment penalty in respect of the Complaints Levy, the National Joint Replacement Register Levy is still available under this item. AAT review of similar decisions by APRA in respect of the Risk Equalisation Levy will also be available under item 43 of table to section 328-5.

11.219 The general introduction to Part 6-9 in section 328-1 has been amended to remove the reference to the review of decisions made by the Council (among others) and substitute reference to APRA.

Part 6-10 – Miscellaneous

11.220 Part 6-10 of the PHI Act deals with a number of miscellaneous matters, including the delegation of powers, the making of approved forms and Private Health Insurance Rules made under the Act.

11.221 With the abolition of the Council, reference in subsection 333-1(1) to the Health Minister delegating powers to the Council is redundant and has been repealed. *[Schedule 1, Part 1, items 161 and 162]*

11.222 Section 333-10 of the PHI Act provides for the making of approved forms. The Council previously approved a range of forms, mainly forms for applications and notices made under Part 4 of the PHI Act in relation to the operation of health benefits funds. All reference to the Council's power to approve forms for the purposes of the PHI Act

has been removed from section 333-10 by the repeal of item 3 of the table to subsection 333-10(1). *[Schedule 1, Part 1, item 163]*

11.223 Sections 333-20 and 333-25 of the PHI Act empower the making of legislative rules under the Act. With the transfer of the prudential regulation of private health insurers to APRA, some matters dealt with in rules previously made by the Health Minister or the Council are now dealt with in corresponding APRA Rules made under the Prudential Supervision Bill, or have become wholly redundant. As a result, references to the making of following rules have been repealed from sections 333-20 and 333-25 of the PHI Act:

- the Private Health Insurance (Registration) Rules;
- Private Health Insurance (Health Benefits Fund Enforcement) Rules;
- Private Health Insurance (Management) Rules; and
- Private Health Insurance (Council) Rules. *[Schedule 1, Part 1, item 164]*

11.224 A note has been inserted to advise that there are consultation requirements that apply in relation to the making of rules mentioned in items 6, 8 and 15 of the above table: see subsections 115-5(2), 131-5(2) and 318-10(3). *[Schedule 1, Part 1, item 165]*

11.225 Section 333-25, which previously dealt with Private Health Insurance Rules made by the Council, has been replaced with a new section 333-25. The new section provides that APRA may make Private Health Insurance (Risk Equalisation Administration) Rules providing for matters mentioned in section 318-15 (record-keeping for insurers liable for the Risk Equalisation Levy). It also provides that, to the extent that Private Health Insurance (Risk Equalisation Administration) Rules deal with matters dealt with in rules made by the Health Minister under section 333-20, they must not be inconsistent. *[Schedule 1, Part 1, item 166]*

11.226 Section 333-25 enabled the making of Private Health Insurance (Health Benefits Fund Administration) Rules and Private Health Insurance (Insurer Obligation) Rules by the Council. Matters previously dealt with in those rules will be included in APRA Rules made under the Prudential Supervision Bill.

Schedule 1 – Dictionary

11.227 The following definitions are being repealed from the Dictionary in Schedule 1 as they are expressions that will no longer be used in the

PHI Act after it is amended by the Consequential Amendments and Transitional Provisions Bill. *[Schedule 1, Part 1, items 167, 169, 171, 173, and 177]* For example, the definition of policy liability is being repealed because that expression is currently used only in sections 137-10(2), 146-1(4), 146-5(5) and in the dictionary definition of net asset position: all those provisions are being repealed by the Consequential Amendments and Transitional Provisions Bill:

- ADI;
- application provision;
- applied Corporations Act provision;
- appointed actuary;
- assets;
- capital adequacy direction;
- capital adequacy standard;
- census day;
- Chief Executive Officer;
- collapsed insurer levy;
- Commissioner;
- Council;
- Council administration levy;
- Council-supervised obligation;
- Deputy Commissioner;
- disqualified person;
- external management;
- external manager;
- fringe benefit;
- Human Services Department;

- Human Services Minister;
- inspector;
- makes a capital payment;
- manager;
- member;
- net asset position;
- policy group;
- policy liability;
- prudential direction;
- prudential matters;
- prudential standard;
- registered as a for profit insurer;
- responsible insurer;
- restricted access group;
- Risk Equalisation Trust Fund;
- senior manager;
- solvency direction;
- solvency standard;
- terminating management;
- terminating manager;
- termination day; and
- voluntary deed of arrangement.

11.228 The definition of personal information in the PHI Act has been retained. It is noted that after the amendments made by the Consequential Amendments and Transitional Provisions Bill and the Private Health Insurance Amendment Bill (No. 2) 2014, the PHI Act will not actually use

the expression personal information. However, the definition is retained because the Private Health Insurance Amendment Bill (No. 2) 2014 includes a provision inserting into section 3(1) of the Ombudsman Act a definition of ‘personal information’ that cross-refers to the definition of personal information in the PHI Act.

11.229 The definition of ‘private health insurer’ mirrors the definition in the PHI Act in order to reduce the risk of cross-referencing becoming unlinked.

11.230 New definitions for the following terms have been inserted into the Dictionary in Schedule 1 [*Schedule 1, Part 1, items 168 and 176*]:

- **APRA** – defined as meaning the Australian Prudential Regulation Authority;
- ‘APRA private health insurance duty, function or power’ – readers are referred to subsection 323-1(1A). This definition is relevant for identifying the types of information protected under the disclosure of information provisions of the PHI Act in Division 323; and
- ‘Risk Equalisation Special Account’ – readers are referred to subsection 318-1(1) of the PHI Act. The Risk Equalisation Special Account replaces the Risk Equalisation Trust Fund.

11.231 The definition of **private health insurer** in the Dictionary has been amended to ‘**private health insurer** means a body that is registered under Division 3 of Part 2 of Prudential Supervision Bill’ to reflect that APRA has assumed the role of registering insurers under that Bill. [*Schedule 1, Part 1, item 170*]

11.232 The definition of **restricted access insurer** in the Dictionary has also been amended to ‘**restricted access insurer** has the same meaning as in the Prudential Supervision Bill’. That Bill defines a restricted access insurer as an insurer registered under Division 3 of Part 2 of that Bill as a restricted access insurer. [*Schedule 1, Part 1, item 174*]

11.233 The definition of ‘referable’, which specifies the health benefits fund, previously provided that a policy was referable to a fund if:

- it was identified by an insurer as referable to the fund under section 93-15 of the PHI Act when an adult first became insured under the policy and had not been made referable to another fund under a restructure, merger or acquisition of funds under Division 146 of the PHI Act; or

- had been made referable to the fund under Division 146.

11.234 The reference to Division 146 of the PHI Act has been updated to refer to Division 4 of Part 3 of the Prudential Supervision Bill, under which restructures, mergers and acquisitions of health benefits funds are now regulated. *[Schedule 1, Part 1, item 172]*

11.235 The definition of ‘risk equalisation jurisdiction’ has also been amended to refer readers to subsection 131-20(1) of the PHI Act, which provides that an area is a risk equalisation jurisdiction if Private Health Insurance (Health Benefits Fund Policy) Rules so provide. These rules are made by the Health Minister (following consultation with APRA). The jurisdictions were previously set in the Private Health Insurance (Health Benefits Fund Administration) Rules made under subsection 146-1(6) of the PHI Act, which has been repealed. *[Schedule 1, Part 1, item 175]*

Division 2 – Other amendments

Ombudsman Act 1976

11.236 To enable the sharing of information, the secrecy provisions in section 35 of the *Ombudsman Act 1976* have been amended.

11.237 Subsection 35(6D) provides that an officer may, if the disclosure is made in accordance with any requirements of the Private Health Insurance (Information Disclosure) Rules, disclose the information to certain people.

11.238 The Private Health Insurance Ombudsman could previously disclose these categories of information to the same recipients under section 323-10 of the PHI Act, which also provides for the sharing of information about insurers between agencies.

11.239 As the Council will no longer exist, subsection 35(6D) has been amended to repeal:

- a member of the Council (paragraph 35(6D)(d); and
- a person employed, or a consultant engaged, by the Council (paragraph 35(6D)(e)). *[Schedule 1, Part 1, item 178]*

11.240 Instead of the Council, information is now able to be disclosed to:

- an APRA member (within the meaning of the APRA Act); or
- an APRA staff member (within the meaning of the APRA Act);

in addition to the other people listed in subsection 35(6D). *[Schedule 1, Part 1, item 178]*

Private Health Insurance Act 2007

11.241 Section 323-10 of the PHI Act makes the sharing of certain information between specified persons, including the Secretary of the Department of Health, APS employees within the Department of Health, the Private Health Insurance Ombudsman and the Chief Executive Medicare (eligible persons), an authorised disclosure. The information must not be information of a kind specified in the Private Health Insurance (Information Disclosure) Rules as information that may not be shared under the section.

11.242 Section 323-10 has been amended to allow eligible persons to disclose information about private health insurers, applicants to become an insurer, persons carrying on health insurance business and directors and officers of insurers to APRA, an APRA member or APRA staff member as an authorised disclosure. *[Schedule 1, Part 1, item 179]*

11.243 An amendment to new subsection 323-10(1A), as proposed to be inserted by item 17 of Schedule 1 to the Private Health Insurance Amendment Bill (No. 2) 2014 has been made. The current intention is that this Bill be drafted on the assumption that the Private Health Insurance Amendment Bill (No. 2) 2014 will commence on the same day as, or after (but not before) these amendments. The commencement provision ensure that the amendment to subsection 323-10(1A) will commence immediately after item 17 of the Private Health Insurance Amendment Bill (No. 2) 2014. *[Schedule 1, Part 1, item 179]*

11.244 Section 328-1 has been amended to remove reference to the Council and replace it with APRA. The reference to APRA is needed because APRA will, in relation to late payment penalty on the risk equalisation levy, be making decisions which are reviewable because of item 43 of the table in section 328-5. *[Schedule 1, Part 1, item 180]*

Private Health Insurance (Prudential Supervision) Act 2015

11.245 The Prudential Supervision Bill will be extended to Norfolk Island on and after the commencement of Part 1 of Schedule 2 to the *Norfolk Island Legislation Amendment Act 2015 [Schedule 1, Part 1, item 181]*.

11.246 Paragraph 92(7)(b) will be amended to update the reference from the Legislative Instruments Act to the *Legislation Act 2003*. The amendment is contingent on the commencement of the Acts and Instruments (Framework Reform) Bill 2014. *[Schedule 1, Part 1, item 182]*

Part 2 – Repeals

11.247 The Private Health Insurance (Council Administration Levy) Act 2003 has been repealed in its entirety. *[Schedule 1, Part 1, item 183]*

Schedule 2 – Transitional provisions

11.248 A number of transitional provisions have been provided relating to the repeal of provisions establishing the Council and the transfer of functions of the Council to APRA.

11.249 Such provisions are needed to ensure that legal actions undertaken or deemed to be undertaken under the PHI Act immediately before the transition time are taken to be undertaken under equivalent provisions in the Prudential Supervision Bill. This includes certain instruments.

11.250 However, it should be noted that the Council’s capital, solvency and prudential standards are not grandfathered under the transitional provisions. Instead APRA will be making new prudential standards (including prudential standards relating to capital and solvency) under the Prudential Supervision Bill to take effect on commencement of that Bill.

11.251 The new prudential standards will largely replicate the requirements of the Council’s capital, solvency and prudential standards. Accordingly it will not be necessary for the transitional provisions to preserve the Council’s standards

Part 2 – Specific transitional provisions

Division 1 – Registration of private health insurers

Proceedings for injunctions relating to carrying on health insurance business without registration

11.252 If proceedings for an injunction relating to carrying on health insurance business without registration are pending in the Federal Court under section 118-5 of the PHI Act, immediately before the transition time, then these proceedings will continue. If the proceedings were commenced by the Health Minister or Council then they will continue as if the proceedings had been commenced by an application by APRA under section 11 of the Prudential Supervision Bill, therefore APRA will take them over. *[Schedule 2, Part 2, item 2, subitems 1 and 2]*

11.253 If proceedings were initiated by someone else, then the proceedings will continue as if that person had standing to commence the proceedings under section 11 of the Prudential Supervision Bill, therefore that person will continue to bring the proceedings. *[Schedule 2, Part 2, item 2, subitem 3]*

Continuing the registration of private health insurers

11.254 If before transition, an insurer is registered under Part 4-3 of the PHI Act, then from the transition time the registration is taken to be a registration of the body under Division 3 of Part 2 of the Prudential Supervision Bill subject to the same terms and conditions as would have applied immediately before the transition time. *[Schedule 2, Part 2, item 3, subitem 1(a) and (b)]*

11.255 Registrations will also retain the appropriate status as under the PHI Act, whether it be a restricted access insurer or a for profit insurer. *[Schedule 2, Part 2, item 3, subitem 1(c)]*

11.256 At the transition time, an insurer can, in writing, request APRA to vary the body's registration terms and conditions by amending or revoking one or more of the terms and conditions. *[Schedule 2, Part 2, item 3, subitem 3(a) and (b)]*

11.257 This power allows amendment or revocation of one or more conditions, but it does not allow the imposition of additional terms or conditions.

11.258 APRA may, by written notice to the insurer, vary the body's registration terms and conditions, as per the insurer's request. If APRA decides not to agree to the insurer's request, that will not be a reviewable decision. This is because this provision is intended to allow APRA to

‘clean up’ obviously out-of-date registration conditions rather than to allow private health insurers to seek a more fundamental re-examination of existing conditions. This provides industry certainty about the continuation of registration conditions during the transition from regulation by the Council to APRA. *[Schedule 2, Part 2, item 3, subitem 4]*

11.259 This provides insurers with the opportunity to review their registration terms and conditions and seek to update them if they are no longer valid or dated.

Applications for registration as private health insurer

11.260 Registration applications made under section 126-10 of the PHI Act, but not yet decided upon by the transition time, will continue to progress as if the application had been made under section 12 of the Prudential Supervision Bill. *[Schedule 2, Part 2, item 4, subitem 1]*

11.261 For the purposes of whether APRA requires additional information (section 13) or whether APRA can refuse an application (section 17) under the Prudential Supervision Bill, the application is taken to have been made at the transition time. Accordingly, under section 13, APRA will have 90 days from the transition time, rather than the time the application was made, to give the applicant written notice requiring information about the application. Under section 17, deemed refusal of an application will occur 90 days after the transition time or 90 days after the applicant provides information under s 13 (as the case may be). *[Schedule 2, Part 2, item 4, subitem 2]*

11.262 Further, if under section 126-15 of the PHI Act, the Council gave the applicant notice that further information was required for the purposes of the application, but the information has not yet been provided by the transition time, the notice is taken to have been given by APRA under section 13 of the Prudential Supervision Bill at the transition time. *[Schedule 2, Part 2, item 4, subitem 3]*

11.263 These transitional provisions will ensure that APRA has sufficient time to properly assess an application for registration made but not determined before the transition time.

Conversion to for profit status

11.264 If under section 126-42 of the PHI Act, an insurer has been approved to convert to being registered as a for profit insurer, then the approval will continue as if it were made by APRA under section 20 of the Prudential Supervision Bill. *[Schedule 2, Part 2, item 5, subitem 1]*

11.265 If an application made to the Council has not yet been completed by the transition time, then section 20 of the Prudential Supervision Bill will apply as if the application had been made under that section. *[Schedule 2, Part 2, item 5, subitem 2(a)]*

11.266 In addition, acts undertaken by the Council (such as causing a notice to be published or giving an applicant notice requiring further information) will be deemed to have been taken by APRA. *[Schedule 2, Part 2, item 5, subitems 2(b) and 2(c)]*

Division 2 – Health benefits funds – restructures, mergers and acquisitions, and terminating and external management

Restructures of health benefits funds

11.267 If under section 146-1 of the PHI Act an approval was in place for a restructure, then from the transition time the approval has effect as if it were made by APRA under section 32 of the Prudential Supervision Bill. *[Schedule 2, Part 2, item 6, subitem 1]*

11.268 If an application made to the Council before the transition time under section 146-1 of the PHI Act has not yet been decided upon by the transition time, section 32 of the Prudential Supervision Bill applies in relation to the application. *[Schedule 2, Part 2, item 5, subitem 2]*

Mergers and acquisitions of health benefits funds

11.269 If under section 146-5 of the PHI Act an approval was in place for a merger or acquisition, then from the transition time the approval has effect as if it were made by APRA under section 33 of the Prudential Supervision Bill. *[Schedule 2, Part 2, item 7, subitem 1]*

11.270 If an application made to the Council before the transition time under section 146-5 of the PHI Act has not yet been decided upon by the transition time, section 33 of the Prudential Supervision Bill applies in relation to the application. *[Schedule 2, Part 2, item 7, subitem 2]*

Terminating management and external management of health benefits funds

11.271 If under section 149-10 of the PHI Act an approval was in place for a termination of health benefits funds, then from the transition time the approval has effect as if it were made by APRA under section 37 of the Prudential Supervision Bill. *[Schedule 2, Part 2, item 8, subitem 1]*

11.272 If under section 149-1 of the PHI Act an application for approval of a termination of health benefits funds had been made to the Council but not yet decided, then from the transition time the application is taken to have been made to APRA under section 35 of the Prudential Supervision Bill. *[Schedule 2, Part 2, item 8, subitem 2]*

11.273 Further, for the purposes of sections 36 and 38 of the Prudential Supervision Bill, the application is taken to have been made by APRA at the transition time. Section 36 of the Prudential Supervision Bill is based on section 149-5 of the PHI Act and provides that, within 28 days after a termination application is made, APRA may give the applicant written notice requiring the applicant to give such further information relating to the termination application as is specified in the notice. Section 38 of the Prudential Supervision Bill is based on section 149-15 of the PHI Act and provides that an application for termination is taken to have been refused if APRA does not notify the applicant of its decision the application within 90 days of it being made or within 90 days after information has been given in compliance with a notice seeking further information.

11.274 The time limits specified in sections 36 and 38 will start to run from the transition time. This will ensure that, if an application for termination under Division 149 of the PHI Act is made but not determined before the transition time, APRA will have sufficient time to seek information and consider the application.

11.275 In addition, if before the transition time, the Council gave the applicant notice under section 149-5 of the PHI Act requiring the provision of further information, and it has not yet been provided, then the notice is taken to have been given by APRA, under section 36 of the Prudential Supervision Bill, at the transition time. *[Schedule 2, Part 2, item 8, subitems 3 and 4]*

11.276 Appointment of terminating managers that are in force under the PHI Act immediately before the transition time will continue to have effect from the transition time as if it were made under section 37 of the Prudential Supervision Bill (where the original appointment was made by the Council under section 149-10 of the PHI Act) or Division 7 of Part 3 of the Prudential Supervision Bill (where the original appointment was made via the court process in Division 220 of the PHI Act). *[Schedule 2, Part 2, item 8, subitem 5]*

11.277 A health benefits fund that is under terminating management, or external management, immediately before the transition time will continue to be so under the Prudential Supervision Bill. Things done, by or in relation to the Council under the PHI Act will be taken to be done, by or in relation to APRA under the corresponding provision of the Prudential Supervision Bill. Things done by or in relation to the

terminating manager or external manager under a provision of the PHI Act will, likewise, be taken to be done by or in relation to the terminating manager or external manager under the corresponding provision of the Prudential Supervision Bill. *[Schedule 2, Part 2, item 8, subitem 6]*

11.278 The Minister may make rules that relate to how a terminating management or external management is to continue under the Prudential Supervision Bill. *[Schedule 2, Part 2, item 8, subitem 7]*

Division 3 – Other obligations of private health insurers

Directions

11.279 Directions given to a private health insurer that are in force immediately before the transition time will continue in effect as if it were a direction given by APRA under section 96 of the Prudential Supervision Bill. This will apply for directions given under the following provisions of the PHI Act:

- section 140-20 (solvency direction);
- section 143-20 (capital adequacy directions);
- section 163-15 (directions to comply with standards); and
- section 200-1 (other directions). *[Schedule 2, Part 2, item 9, subitem 1]*

11.280 Section 104 of the Prudential Supervision Bill, which sets penalties for non-compliance with an APRA direction under that Bill will not apply in relation to a grandfathered Council direction, unless it was given under section 163-15 of the PHI Act. This is to ensure that the penalty under section 104 only applies to a Council direction to which a criminal penalty already applied (that is, to a direction under section 163-15). *[Schedule 2, Part 2, item 9, subitem 2]*

11.281 If a direction is to apply for a certain period, then the direction will continue to cease to have effect at the end of the specified period. *[Schedule 2, Part 2, item 9, subitem 3]*

Actuaries

11.282 Actuaries of private health insurers that are appointed under section 160-1 of the PHI Act immediately before the transition time will continue as if it were an appointment under section 106 of the Prudential Supervision Bill. *[Schedule 2, Part 2, item 10]*

Disqualified persons

11.283 The definition of ‘disqualified person’ (subsection 119(1)) in the Prudential Supervision Bill also includes a person who was disqualified under section 166-20 of the PHI Act. *[Schedule 2, Part 2, item 11]*

11.284 APRA may revoke a disqualification grandfathered under the above provision upon application by the person or of its own initiative and the revocation will take effect on the day on which it is made. This ensures that a person disqualified by the Council’s administrative processes may seek to have their disqualification revoked by APRA via an administrative process, rather than having to approach the court under the new provisions in the Prudential Supervision Bill. *[Schedule 2, Part 2, item 11]*

11.285 When APRA makes a decision on an application for revocation of a grandfathered Council disqualification, APRA must give the person written notice of a revocation of the disqualification, or of a refusal to revoke the disqualification. APRA may also give notice in any other way that it considers appropriate. *[Schedule 2, Part 2, item 11]*

11.286 An application regarding a refusal of revocation of a grandfathered disqualification may be made to APRA for internal review and then, if dissatisfied with the decision on internal review, to the AAT for a review of a decision made by APRA.

Division 4 – Enforcement

Investigations

11.287 Investigations that the Council had commenced into a private health insurer under Division 194 or 214 of the PHI Act at the transition time, but were not yet completed, will continue under Division 194 or 214 of the PHI Act (as the case may be) as if the relevant investigation provisions remained in force. *[Schedule 2, Part 2, item 12, subitems 1 and 2]*

11.288 The investigation will continue as if references to the Council in the grandfathered investigation provisions were references to APRA and things done, by or in relation to the Council, before the transition time, will be taken to have been done, by or in relation to APRA. *[Schedule 2, Part 2, item 12, subitems 1 and 2]*

11.289 An appointment of an inspector under section 214-1(1) of the will also continue as if APRA had appointed the inspector. *[Schedule 2, Part 2, item 12, subitem 3]*

11.290 If required, the Minister may make rules under item 43 in relation to how an investigation will continue to apply. *[Schedule 2, Part 2, item 12, subitem 4]*

11.291 Under Division 3, Part 6 of the Prudential Supervision Bill, APRA will be able to investigate breaches of Council-supervised obligations that occurred pre-transition. This will ensure that APRA can investigate breaches that occurred prior to the transition time, as well as breaches that occurred from that time. *[Schedule 2, Part 2, item 12, subitem 5]*

Enforceable undertakings

11.292 Enforceable undertakings that were accepted by the Council under subsection 197-1(2) of the PHI Act pre-transition will continue as if accepted by APRA under subsection 152(1) of the Prudential Supervision Bill. *[Schedule 2, Part 2, item 13]*

Federal Court remedies

11.293 Proceedings commenced by the Council under Division 203 of the PHI Act will continue after transition with APRA substituted for the Council as a party. Division 203 of the PHI Act includes power for the Council to apply to the Federal Court seeking a declaration of contravention of a Council-supervised obligation under the PHI Act, and also seek certain other orders such as an order for pecuniary penalty or another order redressing the contravention. *[Schedule 2, Part 2, item 14]*

11.294 As a result, Division 203 will continue in relation to proceedings commenced, but not concluded, at the transition time. In continuing these proceedings, references in Division 203 to the Council shall be read as references to APRA and things done, by or in relation to the Council, prior to the transition time, will be taken to have been done, by or in relation to APRA. *[Schedule 2, Part 2, item 14]*

11.295 APRA is not able to commence proceedings under Division 203 after the transition time. If APRA wants to commence proceedings after the transition time in relation to a contravention of a Council-supervised obligation that is continuing at the transition time, or to a contravention of such an obligation that occurred prior to transition time, proceedings will need to commence under Part 8 of the Prudential Supervision Bill. To this end, Part 8 of the Prudential Supervision Bill will have effect as if references in that Part to enforceable obligations also included references to Council-supervised obligations. *[Schedule 2, Part 2, item 14]*

Proceedings for injunctions relating to non-complying policies

11.296 If immediately prior to the transition, proceedings for an injunction are pending in the Federal Court under section 84-10 of the PHI Act (for example, in relation to conduct concerning complying policies or false representation of policies as complying policies), and the proceedings were commenced by the Council, then the proceedings will

continue, from the transition time, with the Health minister substituted for the Council as a party. *[Schedule 2, Part 2, item 15]*

Division 5 – Financial matters

Crediting of Council money to special accounts

11.297 Upon transition, all money held by the Council (***Council money***) must be credited to a special account. There are three special accounts under the new legislative regime:

- a Risk Equalisation Special Account, established under Division 318 of the PHI Act, as amended;
- a Collapsed Insurer Special Account, established under the new Division 2A of Part 5 of the APRA Act, as amended; and
- the (existing) APRA Special Account, under Division 1 of Part 5 of the APRA Act, which relates mainly to APRA's costs of administration. *[Schedule 2, Part 2, item 16, subitem 1]*

11.298 For the Risk Equalisation Special Account, the following amounts should be credited:

- amounts that were credited to the Risk Equalisation Trust Fund immediately prior to transition;
- any amounts of Council money that, immediately before the transitional time, were required by section 318-5 of the PHI Act, to be paid to the Risk Equalisation Trust Fund but that had not been paid prior to transition; and
- any other amount of Council money that consists of a repayment to the Council of a payment made, before the transition time, for the purpose of helping to meet liabilities as described in section 6 of the Collapsed Insurer Levy Act. *[Schedule 2, Part 2, item 16, subitem 2]*

11.299 In the event that an insurer, that collapsed prior to the transition, receives proceeds from the insurer levy, repayments from the insurer will be credited to the Risk Equalisation Special Account. This will enable the recovered amount to be returned to industry via an adjustment to the risk equalisation payment relating to each insurer.

11.300 For the Collapsed Insurer Special Account, the following amounts of Council money are to be credited:

- any amount that consists of Collapsed Insurer Levy, or a related late payment penalty, received by the Council before the transition time;
- any amount that consists on proceeds from investments made using Collapsed Insurer Levy, or related late payment penalty. *[Schedule 2, Part 2, item 16, subitem 3]*

11.301 All other amounts of Council money will be credited to the APRA Special Account after the transition time. *[Schedule 2, Part 2, item 16, subitem 4]*

11.302 The purposes for which funds in APRA's Special Account can be utilised are outlined in section 54 of the APRA Act.

Collection and recovery of Council administration levy and collapsed insurer levy imposed before the transition time

11.303 If the imposition day for an amount of Council administration levy or collapsed insurer levy is prior to transition time, and the levy has not been paid, then Division 307 and section 328-5 (as it relates to decisions made under Division 307) of the PHI Act will continue to apply as if certain references to the Council were references to APRA (acting for and on behalf of the Commonwealth). Division 307 of the PHI Act contains the PHI Act levy collection provisions and section 328-5 provides for review by the AAT of various decisions, including a decision on Division 307 relating to the waiver of levy or late payment penalty on levy. *[Schedule 2, Part 2, item 17]*

11.304 Any amount paid or recovered (including related late payment penalties) relating to the Council administration levy must be credited to the APRA Special Account. *[Schedule 2, Part 2, item 16, subitem 3]*

11.305 Similarly, any amount paid or recovered (including related late payment penalties) relating to the collapsed insurer levy must be credited to the Collapsed Insurer Special Account. *[Schedule 2, Part 2, item 16, subitem 4]*

11.306 The Private Health Insurance Supervisory Levy Imposition Bill will, for the 2015-16 financial year, preserve the imposition dates and rates determined by the Private Health Insurance (Council Administration Levy) Rules as in force immediately before the transition time.

Entitlements to be paid an amount out of the Risk Equalisation Trust Fund

11.307 If immediately before the transition time, a private health insurer has an entitlement to be paid an amount from the Risk Equalisation Trust Fund that has not been met, then APRA must pay that amount after the transition time. The amount must be debited from the Risk Equalisation Special Account. *[Schedule 2, Part 2, item 18]*

Division 6 – Other matters

Secrecy obligations

11.308 Sections 323-1 and 323-40 of the PHI Act prohibit certain persons, including staff of the Council, from disclosing information generally relating to private health insurers, unless the disclosure is an ‘authorised disclosure’ within the meaning of the PHI Act.

11.309 A disclosure of information, where that information was obtained under the PHI Act before the transition time, will be considered an authorised disclosure under sections 323-1 and 323-40 of the PHI Act (and therefore permissible) if the disclosure is:

- made in the course of performing or exercising an APRA private health insurance duty, function or power (within the meaning of section 323-1 of the PHI Act); or
- one that the person would have been able to make under section 56 of the APRA Act, had the information been obtained in the course of performing such a duty, function or power. *[Schedule 2, Part 2, item 19]*

11.310 This has the effect of preserving secrecy in relation to information transferred to APRA, and/or known by employees of the Council who have been transferred to APRA, while ensuring that, if the information can be disclosed under a provision in APRA’s secrecy provision, it may be disclosed without having to also be an ‘authorised disclosure’ under the PHI Act.

Report on operations of private health insurers before transition time

11.311 If by the transitional time, the Council has not given a report in relation to a financial year ending at or before the transition time under section 364-15 of the PHI Act as in force immediately before the transition time, that section of the PHI Act is taken to continue in force as if the reference to the Council were instead a reference to APRA. *[Schedule 2, Part 2, item 20]*

Part 3 – General transitional provisions

Division 1 – Transitional functions

11.312 To allow both the Council and APRA to prepare for the transfer, the functions of both the Council and APRA have been extended to allow such steps as may be necessary or convenient to prepare for or give effect to the abolition of the Council, through the operation of this Schedule and the enactment of the Consequential Amendments and Transitional Provisions Bill and the Prudential Supervision Bill. *[Schedule 2, Part 3, item 21]*

11.313 This will allow the Council and APRA to work together to ensure the transition is carried out effectively.

11.314 The ***transition period*** is defined as the period commencing from the day the Bill receives the Royal Assent and ends immediately before the transition time. Transition time is defined in item 1 of Part 1 to Schedule 2 to mean the commencement of section 3 of the Prudential Supervision Bill (which is when the substantive provisions of that Act are to come into effect). *[Schedule 2, Part 3, subitem 21(3)]*

Division 2 – Transfer of assets and liabilities

Vesting of assets and liabilities

11.315 Immediately before the Council is abolished, the assets and liabilities of the Council will be transferred to APRA.

11.316 At the transition time, the assets will cease to be assets of the Council and become assets of APRA. For example, this would include the remaining cash reserves and equipment of the Council among other assets, immediately before the transition. *[Schedule 2, Part 3, item 22]*

11.317 Similarly, at the transition time, all liabilities will cease to be liabilities of the Council and will become liabilities of APRA. For example, APRA will be responsible for the Council's liabilities including employees' annual leave and any accounts payable, immediately before, or after, the transition time. *[Schedule 2, Part 3, item 23]*

11.318 The APRA Minister may also make a determination, in writing, that specified assets or liabilities will become assets of the Commonwealth. *[Schedule 2, Part 3, subitems 22(3)-(5) and 23(3)-(5)]*

11.319 It is expected that all assets and liabilities held by the Council immediately before the transition time will transfer to APRA and such a determination would only be made should unforeseen circumstances arise.

Transfers of land may be registered

11.320 If required, the transitional provisions also provide for the transfer of land (including an interest in land under a lease) from the Council to APRA or the Commonwealth. *[Schedule 2, Part 3, item 24]*

11.321 The provision provides that to facilitate the land transfer, a certificate that is signed by the APRA Minister, identifies the land and states that the land is now vested in APRA or the Commonwealth, should be lodged with a land registration official. The certificate is not a legislative instrument within the meaning of the Legislative Instruments Act and there is a statement to this effect for information purposes. *[Schedule 2, Part 3, item 24]*

11.322 When the land registration official registers the matter in a manner that is the same as, or similar to, the way in which dealings in land of that kind are registered, the deal will give effect to the certificate. *[Schedule 2, Part 3, item 24]*

Certificates relating to vesting of assets other than land

11.323 If required, the transitional provisions also provide for the registration of transfer of assets other than land from the Council to APRA or the Commonwealth. This would be relevant if, for example, an intellectual property interest, or a security interest associated with an asset, required registration. *[Schedule 2, Part 3, item 25]*

11.324 The provision provides that to facilitate the asset transfer (other than land), a certificate that is signed by the APRA Minister, identifies the asset and states that the asset is now vested in APRA or the Commonwealth, should be lodged with an assets official. The certificate is not a legislative instrument within the meaning of the Legislative Instruments Act and there is a statement to this effect for information purposes. *[Schedule 2, Part 3, item 25]*

11.325 The assets official may deal with, and give effect to, the certificate as if it were a proper and appropriate instrument for transactions in relation to assets of that kind and make entries in the register. *[Schedule 2, Part 3, item 25]*

Division 3 – Transfer of other matters

Things done by, or in relation to, the Council

11.326 Any action done by, or in relation to, the Council before the transition time, will, following the transition time have effect as if it had been done by, or in relation to, APRA. *[Schedule 2, Part 3, item 26]*

11.327 The APRA Minister may also make a determination, in writing, which specifies that a specified thing can be attributed to the Commonwealth. Alternatively, the APRA Minister may also make a determination, in writing, which states that this item does not apply to a specified thing. A determination made under subitem 3 is not a legislative instrument within the meaning of the Legislative Instruments Act and there is a statement to this effect for information purposes. *[Schedule 2, Part 3, item 26]*

11.328 It is expected that all actions of the Council will be imputed to APRA and such a determination would only be used in unforeseen circumstances where there are sound reasons for imputing the action of thing to the Commonwealth rather than APRA.

References in certain instruments to the Council

11.329 Instruments that are in force immediately before the transition time and contain a reference to the Council will be taken to refer to APRA. *[Schedule 2, Part 3, item 27]*

11.330 This will include instruments that relate to:

- an asset or liability of the Council that will become an asset or liability of APRA under item 22 or 23;
- a thing done by, or in relation to, the Council that is taken to be done by, or in relation to, APRA under item 26. *[Schedule 2, Part 3, subitem 27(2)]*

11.331 An *instrument* is defined to include:

- a contract, undertaking, deed or arrangement; and
- a notice, authority, order or instruction; and
- an instrument made under an Act or under a legislative instrument. *[Schedule 2, Part 3, subitem 27(8)]*

11.332 This will only translate references to the Council in instruments that continue in force after the transition time. It will not cover prudential standards or solvency or capital standards made by the Council. Such prudential standards will cease to have effect upon the repeal of the PHI Act and APRA will make wholly new prudential standards under the Prudential Supervision Bill.

11.333 An instrument does not include:

- an Act;

- an instrument made under the Consequential Amendments and Transitional Provisions Bill; or
- an instrument specified in rules made under item 43.
[Schedule 2, Part 3, subitem 27(8)]

11.334 Where under one of the above provisions the Minister determines that an asset or liability should be transferred to the Commonwealth or that a thing should be imputed to the Commonwealth (for example, where a contract has been transferred to the Commonwealth), the transitional provisions also provide for an associated instrument (in the example, the contract) that refers to the Council to be taken to refer to the Commonwealth. *[Schedule 2, Part 3, subitem 27(4)]*

11.335 The APRA Minister may determine in writing that the reference to the Council, at and after the transition time, should be a reference to APRA or the Commonwealth. This power would be used to make it clear that a reference in an instrument to the Council should be taken to be a reference to the Commonwealth or APRA and would only be relevant if the Minister had determined that an asset should be transferred to the Commonwealth rather than APRA or that a thing or action should be imputed to the Commonwealth rather than APRA. *[Schedule 2, Part 3, subitem 27(4)]*

11.336 The determination may be made before or after the transition time. A determination is not a legislative instrument.

Legal proceedings of the Council

11.337 Any legal proceedings to which the Council was a party and are pending in any court of tribunal immediately before the transition time will continue with APRA as a party to those proceedings, in place of the Council, from the transition time. *[Schedule 2, Part 3, item 28]*

11.338 Alternatively, the APRA Minister may determine, in writing, that the Commonwealth is substituted for the Council as a party to those proceedings. *[Schedule 2, Part 3, item 28]*

11.339 The APRA Minister can make a determination before or after the transition time and it is not a legislative instrument within the meaning of the Legislative Instruments Act and there is a statement to this effect for information purposes. *[Schedule 2, Part 3, item 28]*

Transfer of Council's records and documents

11.340 Any records or documents that were in the possession of the Council immediately before the transition time will transfer to APRA after the transition time. *[Schedule 2, Part 3, item 29]*

11.341 Alternatively, the APRA Minister may determine, in writing, that a record or document should be transferred to the Commonwealth after the transition time. *[Schedule 2, Part 3, item 29]*

11.342 The determination may be made before or after the transition time. A determination is not a legislative instrument. *[Schedule 2, Part 3, item 29]*

11.343 For the purposes of the *Public Governance, Performance and Accountability Act 2013*, sections 37 and 41 will apply to any records or documents transferred to an entity within the meaning of that Act (for example, APRA, and if relevant another Commonwealth agency to which records might be transferred) as if the records or document related to that entity. Section 37 provides for the accountable entity of a Commonwealth authority to keep records that properly record and explain the entity's performance in achieving its purposes and section 41 provides in similar terms in relation to accounts that explain the entity's transactions. *[Schedule 2, Part 3, subitem 29(7)]*

Transfer of the Ombudsman investigations

11.344 If, before the transition time, a complaint was made to the Commonwealth Ombudsman under the *Ombudsman Act 1976* in relation to something done by the Council, or the Ombudsman has been conducting an investigation in relation to such a matter and it has not been finally disposed of, the Ombudsman Act is to apply in relation to the matter as if APRA had done the thing that is subject to the complaint or investigation. This will ensure that the Ombudsman's processes can continue despite the transfer of functions and staff to APRA. *[Schedule 2, Part 3, item 30]*

Division 4 – Staff and officers of the Council

Transferring employees – transfer to APRA

11.345 In transferring the Council's functions to APRA, it is expected that all Council employees at the transition time will transfer to APRA to ensure regulatory continuity and transfer of knowledge of the industry.

11.346 At the transition time, staff employed by the Council under subsection 273-15(1) of the PHI Act immediately before the transition time (a ***transferring employee***):

- cease to be employed by the Council; and
- are taken to have been appointed as an employee under section 45 of the APRA Act. *[Schedule 2, Part 3, item 30]*

11.347 Section 45 of the APRA Act allows APRA to appoint permanent, temporary or casual staff as it considers necessary for the performance of its functions.

11.348 A transferring employee is not entitled to receive any payment or other benefit as a result of the fact that he or she ceased being an employee of the Council. *[Schedule 2, Part 3, subitem 31(3)]*

Transferring employees – terms and conditions of employment with APRA

11.349 It is expected that the terms and conditions of employment of transferring staff will be set under an enterprise agreement, under the *Fair Work Act 2009*, or in the case of certain senior staff by a separate agreement, and in all cases supplemented by terms and conditions determined under subsection 45(2) of the APRA Act. The Chair of APRA has the ability to determine terms and conditions of appointment (including remuneration) for APRA employees. *[Schedule 2, Part 3, item 32]*

11.350 A transferring employee's terms and conditions of appointment must be no less favourable, considered on an overall basis, than the terms and conditions of employment to which the employee was entitled, immediately before the transition time, as an employee of the Council. *[Schedule 2, Part 3, subitem 32(1)]*

11.351 However, where an enterprise agreement (within the meaning of the *Fair Work Act 2009*), made on or after the transition time, applies to employees of APRA as appointed under subsection 45(1) of the APRA Act, subitem 1 ceases to have effect. *[Schedule 2, Part 3, subitem 32(2)]*

11.352 This will ensure that an employee that is compulsorily transferred is no worse off, looking at their conditions on an overall basis, as a result of the implementation of this Government decision.

11.353 A determination made under subsection 45(2) of the APRA Act for the transferring employee is able to be made before or after the transition time and may take effect from the transition time or a later time. *[Schedule 2, Part 3, subitem 32(3)]*

11.354 However, to avoid doubt:

- the Chair of APRA may determine different terms and conditions of appointment under subsection 45(2) of the APRA Act for different transferring employees; or
- a transferring employee may be covered by either of the following instruments (whether made before or after the transition time):

- a fair work instrument (within the meaning of the *Fair Work Act 2009*);
- a determination made under subsection 45(2) of the APRA Act. *[Schedule 2, Part 3, subitem 32(4)]*

Transferring employees – accrued leave and prior service

11.355 All leave accrued by a transferring employee immediately before the transition time, in relation to a transferring employee's employment by the Council, will be considered as leave in relation to periods of service as an employee of APRA appointed under section 45 of the APRA Act. *[Schedule 2, Part 3, item 33]*

11.356 Furthermore, the service of a transferring employee as an employee of the Council will be taken to have been continuous with his or her service as an employee of APRA appointed under section 45 of the APRA Act. *[Schedule 2, Part 3, item 33]*

Transferring employees – processes begun before transition time

11.357 Rules made under item 34 may provide for 'staffing procedures' of the Council and APRA to apply, or to continue to apply, in relation to:

- processes begun before, but not completed by, the transition time; or
- things done by, for or in relation to the Council or a transferring employee before that time. *[Schedule 2, Part 3, item 34]*

11.358 **Staffing procedures** includes procedures and policies related to:

- recruitment, promotion or performance management; or
- inefficiency, misconduct, forfeiture of position, fitness for duty or loss of essential qualifications; or
- disciplinary action, grievance processes or reviews of or appeals against staffing decisions; or
- transfers, resignations or termination of employment; or
- leave. *[Schedule 2, Part 3, subitem 34(2)]*

Safety, Rehabilitation and Compensation Act 1998 – rehabilitation provisions

11.359 Item 35 provides that the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act) applies to an employee of the Council, who suffered an injury before the transition time, as if the employee had been an employee of APRA. [*Schedule 2, Part 3, item 35*]

11.360 An employee of the Council under subsection 273-15(1) of the PHI Act at any time, regardless of whether or not the person is a transferring employee, or an employee of the Council within the meaning of the SRC Act are covered. [*Schedule 2, Part 3, item 35*]

11.361 The item ensures that APRA is the relevant employer of employees of the Council (including employees who ceased employment with the Council before the commencement time) in respect of an injury within the meaning of the SRC Act sustained before the commencement time.

No transfer of Council officers or consultants

11.362 A Council officer includes:

- the Commissioner of Private Health Insurance Administration;
- any other member of the Council;
- the Chief Executive Officer of the Council. [*Schedule 2, Part 3, subitem 36(2)*]

11.363 Nothing in this Part provides that the appointment of a Council officer immediately before the transition time has effect at or after the transition time as if it were an appointment of the person in relation to APRA or the Commonwealth. [*Schedule 2, Part 3, item 36*]

11.364 Similarly, nothing in this Part provides that a person engaged as a consultant to the Council under subsection 273-15(3) of the PHI Act immediately before the transition time becomes engaged at or after the transition time as a consultant under subsection 47(1) of the APRA Act. [*Schedule 2, Part 3, item 36*]

Division 5 - Annual reporting obligation

Final annual report for the Council

11.365 APRA will assume the residual annual reporting obligation of the Council. In doing so, the Chair of APRA must prepare and give a

report (the **final report**) on the activities of the Council during the **final reporting period** to the APRA Minister for presentation to the Parliament. *[Schedule 2, Part 3, item 37]*

11.366 The **final reporting period** is defined as the period:

- beginning:
 - if, by the transition time, no annual report for the Council has been given to the Health Minister for the most recent reporting period for the Council that ended before the transition time – at the start of that reporting period; or
 - otherwise – at the start of the reporting period for the Council that includes the transition time; and
- ending immediately before the transition time. *[Schedule 2, Part 3, subitem 37(6)]*

11.367 In practice this means that if the transition day is 1 July 2015, APRA will fulfil the requirement to publish an annual report in respect of the 2014-15 financial year on behalf of the Council. If the transition time is later but before the Council has given its 2015-15 annual report to the Health Minister (for example, a transition day of 1 September 2015) then APRA will prepare a final report on behalf of the Council covering the period from 1 July 2014 to the transition day (in the example, 1 July 2014 to 31 August 2015). If the transition time is after the Council has provided its 2014-15 annual report to the Health Minister, APRA will prepare a final report for the period 1 July 2015 to the end of the day that is immediately before the transition time.

11.368 Sections 39, 40, 42, 43 and 46 of the *Public Governance, Performance and Accountability Act 2013*, and associated rules made for the purposes of those sections, apply in relation to the Council and the final reporting as if references in those sections and rules:

- to an **annual report** for a Commonwealth entity were references to the final report; and
- to a **reporting period** for a Commonwealth entity were references to the final reporting period; and
- to a Commonwealth entity were references to the Council; and
- to the accountable authority for a Commonwealth entity were references to the Chair of APRA; and

- to the responsible Minister for a Commonwealth entity were references to the APRA Minister. *[Schedule 2, Part 3, subitem 37(2)]*

11.369 A **reporting period** for the Council means the reporting period for the Council under the Public Governance, *Performance and Accountability Act 2013*. *[Schedule 2, Part 3, subitem 37(6)]*

11.370 The **annual report** is a report under section 46 of the Public Governance, *Performance and Accountability Act 2013*. *[Schedule 2, Part 3, subitem 37(6)]*

11.371 These provisions will ensure that both the financial reporting and report on operations are dealt with in the final annual report in the normal way.

11.372 The Chair of APRA must give the final report to the APRA Minister by the 15th day of the fourth month after the end of the final reporting period. As explained above, the end of the reporting period will be the end of the day that falls immediately before the transition time. The APRA Minister may grant an extension of time in special circumstances. *[Schedule 2, Part 3, subitem 37(3)]*

11.373 As soon as possible after receiving the report, the APRA Minister must table the final report in each House of the Parliament. *[Schedule 2, Part 3, subitem 37(4)]*

11.374 Also, APRA must publish the final report on its website as soon as possible after the report has been tabled in the House of Representatives. *[Schedule 2, Part 3, subitem 37(5)]*

Part 4 – Miscellaneous

Relationship between Part 3 and other provisions

11.375 The general transitional provisions in Part 3 of Schedule 2 have effect subject to the more specific transitional provisions in Part 2 and any rules made under item 43. Part 2 outlines the transitional provisions which preserve, among other things, legal actions (including injunction applications and proceedings for a pecuniary penalty) undertaken under the PHI Act immediately before the transition time. These will be taken over by APRA under equivalent provisions in the Prudential Supervision Bill, or modified provisions of the PHI Act, but this will be achieved by the specific provisions in Part 2 and not by the general provisions relating to court proceedings in Part 3. *[Schedule 2, Part 4, item 38]*

Exemption from stamp duty and other State or Territory taxes

11.376 Item 39 provides that no stamp duty or other tax is payable under a law of a State or a Territory in respect of an exempt matter, or anything connected with an exempt matter. *[Schedule 2, Part 4, item 39]*

11.377 For this purpose, an **exempt matter** is:

- the vesting of an asset or liability under this Schedule; or
- the operation of this Schedule in any other respect. *[Schedule 2, Part 4, subitem 39(2)]*

11.378 The APRA Minister may certify in writing:

- that a specified matter is an exempt matter; or
- that a specified thing was connected with a specified exempt matter. *[Schedule 2, Part 4, subitem 39(3)]*

11.379 A certificate under subitem 3 is not a legislative instrument within the meaning of the Legislative Instruments Act and there is a statement to this effect for information purposes. A certificate will be prima facie evidence of the matters stated in the certificate in all courts, for all purposes (other than for the purposes of criminal proceedings). The certificate is merely for evidentiary purposes and the making of a certificate is not a precondition for the application of the exemption from stamp duty and other tax as the exemption applies because of subitem 39(1).

Certificates taken to be authentic

11.380 A document that appears to be a certificate made or issued under a particular provision of this Schedule is taken to be such a certificate and is taken to be properly given unless the contrary is established. *[Schedule 2, Part 4, item 40]*

Delegation by APRA Minister

11.381 If required, the APRA Minister may delegate all or any of his or her powers and functions to:

- the Secretary of the Department responsible for administering the APRA Act; or
- an SES employee, or acting SES employee, in that Department. *[Schedule 2, Part 4, subitem 41(1)]*

11.382 ‘SES employee’ and ‘acting SES employee’ are defined in the *Acts Interpretation Act 1901*.

11.383 Any delegate of the APRA Minister must comply with any directions. *[Schedule 2, Part 4, subitem 41(2)]*

11.384 The delegation power of the APRA Minister does not apply to a power to make, vary or revoke a legislative instrument (such as transitional rules under 43). *[Schedule 2, Part 4, subitem 41(3)]*

Compensation for acquisition of property

11.385 If the operation of the Consequential Amendments and Transitional Provisions Bill were to result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) from a person otherwise than on just terms (within the meaning of that paragraph), the Commonwealth is liable to pay a reasonable amount of compensation to the person. *[Schedule 2, Part 4, item 42]*

11.386 The person may institute proceedings in a court if the Commonwealth and the person cannot agree on the amount of the compensation. The court would determine a reasonable amount of compensation and would recover the amount for the Commonwealth. *[Schedule 2, Part 4, item 42]*

Transitional rules

11.387 The APRA Minister may, by legislative instrument, make rules regarding transitional matters relating to:

- the amendments or repeals made by the Consequential Amendments and Transitional Provisions Bill; or
- the enactment of the Consequential Amendments and Transitional Provisions Bill or the Prudential Supervision Bill. *[Schedule 2, Part 4, item 43]*

11.388 The rules are intended to be used where the transition provisions do not cover a situation that may arise during the transition but cannot be predicted with any certainty or catered for in detail prior to it occurring (for example, to enable the making of rules, for the purposes of item 34, catering for the continuation of a process commenced by the Council, in relation to transferring staff). A number of the general transitional provisions expressly refer to particular situations being catered for in transitional rules, if necessary.

11.389 The rules may not:

- create an offence or civil penalty provision;
- provide:
 - powers of arrest or detention; or
 - powers relating to entry, search or seizure;
- impose a tax;
- set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in the Consequential Amendments and Transitional Provisions Bill;
- directly amend the text of the Consequential Amendments and Transitional Provisions Bill. [*Schedule 2, Part 4, subitem 43(3)*]

11.390 The Consequential Amendments and Transitional Provisions Bill (other than subitem (3)) does not limit the rules that may be made.

Chapter 12

Private Health Insurance Supervisory Levy

Outline of chapter

12.1 Chapter 12 relates to the new Private Health Insurance Supervisory Levy Imposition Bill 2015 (Supervisory Levy Imposition Bill).

12.2 Unless otherwise stated, all references in this Chapter relate to the Supervisory Levy Imposition Bill.

Summary of new law

12.3 The Private Health Insurance Supervisory Levy Imposition Bill effectively replaces the *Private Health Insurance (Council Administration Levy) Act 2003*, which is being repealed by item 183 of the Consequential Amendments and Transitional Provisions Bill.

12.4 The Supervisory Levy Imposition Bill establishes the legislative framework for the calculation, and collection, of a supervisory levy to recover APRA's costs incurred in regulating the private health insurance industry. It will be administered by APRA.

12.5 In 2015-16, the levy will be collected on a quarterly basis in line with the existing Private Health Insurance (Council Administration Levy) Rules 2007.

12.6 From the 2016-17 financial year, the new levy will be collected annually from private health insurers and will be calculated for each insurer with reference to the number of single equivalent units that they provide health insurance products to.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
The Private Health Insurance Supervisory levy will be collected annually by APRA (other than in relation to 2015-16 where it will be collected on a quarterly basis).	The Private Health Insurance (Council Administration) Levy is collected up to four times a year (with up to two supplementary levy days) by the Council.

Detailed explanation of new law

12.7 The Supervisory Levy Imposition Bill is a Bill to impose a levy on bodies registered as private health insurers under the Prudential Supervision Bill.

12.8 The supervisory levy will be collected to recover APRA's costs of regulating private health insurers and be deposited in APRA's Special Account. APRA collects similar levies for the other industries that it prudentially regulates, including life and general insurers. Consistent with the collection of APRA's other supervisory levies, the levies will be set by a determination from the Minister.

12.9 In line with the Government's Cost Recovery Guidelines, the amount to be collected is based on what APRA expects to expend in the regulation of the private health insurance industry in the coming year. This amount, and the method of allocating it within the private health insurance industry (that is, the rate per single equivalent units), will be outlined in an annual discussion paper released after the Commonwealth Budget. The Government welcomes submissions on this paper.

12.10 At the end of each financial year, APRA also publish a Cost Recovery Impact Statement to demonstrate how the costs of their activities have been allocated to each industry.

12.11 Where APRA collects more to supervise an industry than is required, APRA endeavours to return these funds to industry (through an adjustment to levies applying in subsequent years) as soon as possible.

12.12 Sections 1 and 2 (the short title and commencement provisions) are taken to commence when the Supervisory Levy Imposition Bill receives Royal Assent. Sections 3-8 (the substantive provisions) are taken to take effect at the same time as section 3 of the Prudential Supervision Bill commences [*Part 1, section 2*].

12.13 Section 3 notes that the Supervisory Levy Imposition Bill binds the Crown in each of its capacities [*Part 1, section 3*].

12.14 Section 4 extends the application of the Supervisory Levy Imposition Bill to Norfolk Island on and after the commencement of Part 1 of Schedule 2 to the *Norfolk Island Legislation Amendment Act 2015* [*Part 1, section 4*].

12.15 Section 5 inserts the following definitions [*Part 1, Section 5*]:

- **census day** for a financial year means the day that specified as the census day for the financial year in the levy determination;
- **complying health insurance policy** has the same meaning as in the PHI Act;
- **levy determination** means the legislative instrument referred to in subsection 7(4) determining the levy amount that is payable in respect of a complying health insurance policy;
- **levy imposition day**, in relation to a private health insurer for a financial year, means:
 - (a) if the private health insurer is a private health insurer on 1 July of the financial year—that day; or
 - (b) in any other case—the day, during the financial year, on which the private health insurer becomes a private health insurer.
- **private health insurer** has the same meaning as in the Prudential Supervision Bill.
- **supervisory levy** means a levy payable in accordance with subsection 8(4A) or (4C) of the FISLC Act.

12.16 Section 6 imposes a levy payable in accordance with subsection 8(4A) or (4C) of the FISLC Act, as amended by the Consequential Amendments and Transitional Provisions Bill. Subsection 8(4A) relates to the 2015-16 financial year and subsection 8(4C) relates to subsequent financial years. [*Part 1, section 6*].

12.17 Section 7 establishes the amount of supervisory levy payable for quarters in the financial year starting on 1 July 2015 (ending 30 June 2016). For these quarters, the amount of levy payable is the amount of the Council Administration Levy that would have been payable in the relevant quarter under the Private Health Insurance (Council Administration Levy) Rules 2007, as if that instrument and other relevant legislation had continued to be in effect. [*Part 1, section 7, Subsections (1) and (2)*]

12.18 This is in order to align the levy payable by private health insurance entities in 2015-16 with the levy that they would have paid to the Council if it had continued to operate.

12.19 Section 8 establishes how the amount of the supervisory levy payable by a private health insurer will be determined for the 2016-17 (and later) financial years. It applies to any levy amounts payable in accordance with subsection 8(4C) of the FISLC Act, as amended by the Consequential Amendments and Transitional Provisions Bill. *[Part 1, section 8, Subsection (1)]*

12.20 Subsection 8(2) states that the amount of supervisory levy payable will be the sum of the levy amounts (that is, the amounts for both complying single and joint health insurance policies) calculated using the levy determination for the relevant year. The number of complying single and joint health insurance policies will be calculated on either:

- the census day for the financial year; or
- if the levy imposition day for an insurer for the levy year is later than that census day, the levy imposition day. *[Part 1, section 8, Subsection (2)]*

12.21 Subsection 8(3) provides the mechanism to calculate the levy payable if the levy imposition day for the private health insurer is later than 1 July in the financial year. This will be relevant where an insurer is registered as a private health insurer after 1 July in a particular year.

12.22 This formula prorates the levy that would have been payable by the insurer if their levy had been calculated on 1 July on the basis of the number of days remaining in the year (including the levy imposition day).

12.23 That is, if the levy payable for an insurer would have been \$365 for a financial year if the imposition day was 1 July, but instead it is to be calculated on a separate 'levy imposition day' (for example, on July 30), the levy payable will equal to: $\$365/655 \times (1+334)$. That is, \$335. *[Part 1, section 8, Subsection (3)]*

12.24 Subsections 8(4) to 8(7) outline that from 1 July 2016 *[Part 1, item 8, Subsection (4)]* the Minister must make a levy determination to determine the levy amount payable or a method for calculating the levy amount payable. *[Part 1, section 8, Subsection (6)]* This determination must:

- specify a day in the financial year as the census day *[Part 1, section 8, Subsection (5)]*; and

- provide for the levy amount to be calculated with regard to the number of complying health insurance policies on issue on the census day, to be calculated by applying different levy amounts depending on the number of people insured (for example to single and joint health insurance policies), and may determine a levy amount of zero [*Part 1, section 8, Subsection (7)(a),(b), and (c)*]; and
- ensure that the levy amount per single health insurance policy cannot exceed \$2 and the levy amount for all other health insurance policies cannot exceed \$4 [*Part 1, section 8, Subsection (7)(d)*].

Chapter 13

Private Health Insurance Risk Equalisation Levy

Outline of chapter

13.1 Chapter 12 relates to amendments to the Risk Equalisation Levy Act.

13.2 Unless otherwise stated, all references in this Chapter relate to the Risk Equalisation Levy Amendment Bill.

Summary of new law

13.3 The Risk Equalisation Levy Amendment Bill amends the Risk Equalisation Levy Act to give APRA the functions of the Council under the Risk Equalisation Levy Act.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Reflects current legislation	The Risk Equalisation Levy is imposed to allow for cross-subsidisation of high-cost policy holders between insurers, to assist insurers offset the costs of complying with the community rating principle.
Reflects current legislation	Risk Equalisation Levy imposition days are set by the Health Minister in the Private Health Insurance (Risk Equalisation Levy) Rules. A maximum of four days per financial year may be set, plus a maximum of two supplementary imposition days.

<i>New law</i>	<i>Current law</i>
The rate of the Risk Equalisation Levy is determined in writing by APRA. APRA must comply with the Private Health Insurance (Risk Equalisation Levy) Rules when setting the rate of levy.	The rate of the Risk Equalisation Levy is determined in writing by the Council. The Council must comply with the Private Health Insurance (Risk Equalisation Levy) Rules when setting the rate of levy.
Reflects current legislation.	A maximum of two supplementary risk equalisation levy days and the rate of supplementary levy may be set through determinations made by the Health Minister. The Minister must comply with the Private Health Insurance (Risk Equalisation Levy) Rules when setting the rate of supplementary levy.
Before setting supplementary risk equalisation levy days and the rate of any supplementary levy, the Minister must obtain and take into account advice from APRA.	Before setting supplementary risk equalisation levy days and the rate of any supplementary levy, the Minister must obtain and take into account advice from the Council.
Reflects current legislation	Health Minister may make Private Health Insurance (Risk Equalisation Levy) Rules required or permitted or necessary or convenient for operation of Act.
Reflects current legislation	Governor-General may make regulations required or permitted or necessary or convenient for operation of Act. Before the Governor-General makes regulations, the Minister must take into account any relevant recommendation by APRA.

<i>New law</i>	<i>Current law</i>
No equivalent provisions in Act as amended.	Amounts purportedly determined by the Council before 1 July 2004 that registered health benefits organisations had to pay into the Reinsurance Trust Fund taken to have been validly levied on organisation. Any associated late payment penalty taken to have been validly imposed on organisation.

Detailed explanation of new law

13.4 The Risk Equalisation Levy Act provides for the imposition of the Risk Equalisation Levy on private health insurers.

13.5 The Risk Equalisation Levy supports funding for the Private Health Insurance Risk Equalisation Special Account (formerly known as the Risk Equalisation Trust Fund). The purpose of the Risk Equalisation Special Account is to ensure that no insurer is unduly impacted by costly claims because of the risk profile of its members. It does this by allowing for internal cross-subsidisation for aged, chronic and long-term acute care patients and other high-cost policy-holders within the private health insurance industry. This assists insurers to offset the effects of complying with the principle of community rating established under the PHI Act.

13.6 The Health Minister will retain overall policy responsibility for the Risk Equalisation Levy, with APRA having a similar role administering the Account as the Council had administering the Risk Equalisation Trust Fund. APRA will not assume any of the Council's existing powers under Division 313 of the PHI Act. APRA will have the power to investigate in relation to the Risk Equalisation Levy under Part 6 of the Prudential Supervision Bill.

Definitions

13.7 *APRA* has been defined in the Risk Equalisation Levy Amendment Bill as the Australian Prudential Regulation Authority [Schedule 1, Part 1, Item 1].

13.8 The definition of Council, registered health benefits organisation and Risk Equalisation Trust Fund have been repealed as they are no longer needed. [Schedule 1, Part 1, Items 2 and 3]

Rate of risk equalisation to be imposed on a risk equalisation levy day

13.9 As was previously the case, the Risk Equalisation Levy is imposed on an insurer on each day (to a maximum of four) as specified in Private Health Insurance (Risk Equalisation Policy) Rules made by the Health Minister (see section 6 of the Risk Equalisation Levy Act).

13.10 Subsections 7(1) and (2) of the Risk Equalisation Levy Act has been amended to give APRA the Council's former function of determining in writing the rate of risk equalisation levy to be imposed on a risk equalisation levy day. *[Schedule 1, Part 1, Item 5]*

13.11 In determining the rate of risk equalisation levy APRA must comply with the Private Health Insurance (Risk Equalisation Policy) Rules, as did the Council. *[Schedule 1, Part 1, item 5]*

Imposition of risk equalisation on a supplementary risk equalisation levy day

13.12 As well as the maximum of four risk equalisation levy days for a financial year, the Risk Equalisation Levy may also be imposed on insurers on up to two additional supplementary risk equalisation levy days determined by the Health Minister (see section 6 of the Risk Equalisation Levy Act). The rate of levy to be imposed on supplementary risk equalisation levy days is determined by the Health Minister (see section 7 of the Risk Equalisation Levy Act).

13.13 Section 8 of the Risk Equalisation Levy Act has been amended to require the Health Minister, before exercising his or her powers, to determine supplementary risk equalisation levy days and the rate of risk equalisation levy to be imposed on those days, to obtain and take into account, advice from APRA on:

- whether to determine a supplementary risk equalisation levy day and the day or days that are to be supplementary risk equalisation levy days; and
- the rate of risk equalisation levy to be imposed on the supplementary risk equalisation levy day or days. *[Schedule 1, Part 1, items 6 and 7]*

13.14 The Minister formerly obtained this advice from the Council.

Repeal of redundant validation provisions

13.15 Sections 9 and 10 of the Risk Equalisation Levy Act validated amounts that the Council purported to require registered health benefits organisations (as insurers were known under the *National Health Act 1953*) to pay to the Reinsurance Trust Fund before 1 July 2004. There were concerns that these amounts had not been validly levied on registered health benefits organisations due to a technical defect in the method of imposition.

13.16 Sections 9 and 10 have had effect to validate relevant amounts and the opportunity has been taken to repeal them. The repeal of the sections does not affect their previous operation or liabilities incurred under them (see section 7 of the *Acts Interpretation Act 1901*). [Schedule 1, Part 1, item 8]

Regulation making power

13.17 Under section 11 of the Risk Equalisation Levy Act the Governor-General may make regulations prescribing matters required or permitted to be prescribed by the Act, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

13.18 Subsection 11(2) has been amended so that prior to the Governor-General making regulations the Health Minister must take into consideration any relevant recommendations made to the Minister by APRA. The subsection previously referred to recommendations made to the Minister by the Council. [Schedule 1, Part 1, Item 9]

Application and transitional provisions

13.19 Any determinations made by the Council under section 7 of the Risk Equalisation Levy Act setting the rate of Risk Equalisation Levy, or by the Health Minister under sections 6 and 7 setting supplementary risk equalisation levy days and the rate of the supplementary levy, and which are in force immediately before the commencement of the Risk Equalisation Levy Amendment Bill, will continue to have effect as if made in accordance with the Risk Equalisation Levy Act as amended by the Risk Equalisation Levy Amendment Bill. [Schedule 1, Part 1, Item 10]

Chapter 14

Private Health Insurance Collapsed Insurer Levy

Outline of chapter

- 14.1 Chapter 14 relates to amendments to the Collapsed Insurer Levy Act.
- 14.2 Unless otherwise stated, all references in this Chapter relate to the Collapsed Insurer Amendment Bill.

Summary of new law

- 14.3 The Collapsed Insurer Amendment Bill makes amendments consequential on the transfer of responsibility for the Collapsed Insurer Levy from the Council and the Health Minister to APRA and a Treasury Minister. There are related amendments to the FISLC Act that will give APRA responsibility for the collection of the levy.
- 14.4 The Collapsed Insurer Amendment Bill amends the legislative framework for the imposition and calculation, of a levy, and the setting of levy days. The purpose of the levy will not change. It will continue to be used, if required, to recover the cost of meeting a collapsed insurer's liabilities to the people insured under its complying health insurance policies, that it is unable to meet itself.
- 14.5 For private health insurers, the Collapsed Insurer Levy, if activated, will operate as it would have prior to the cessation of the Council.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
The Collapsed Insurer Levy will be imposed in the case of a private health insurers' collapse by a Treasury Minister.	The Collapsed Insurer Levy is imposed in the case of a collapsed private health insurers' by the Health Minister.

<i>New law</i>	<i>Current law</i>
<p>Before making a determination imposing the levy a Treasury Minister must obtain and take into account, advice from APRA in relation to:</p> <ul style="list-style-type: none"> • whether to make a levy determination; • whether to exempt any insurers; • the day or days to be specified as the levy day(s); • the rate to be specified on the levy day; • the day or days to be specified as the census day(s); • the day to be specified as the payment day in relation to a collapsed insurer levy day; and • the total value of the collapsed insurer’s liabilities to people insured under its complying policies. <p>Any advice received by the Minister from APRA must be laid before each House of Parliament with the determination to which the advice relates.</p>	<p>Before making a determination the Minister for Health must obtain and take into account, advice from the Council in relation to:</p> <ul style="list-style-type: none"> • whether to make a levy determination; • whether to exempt any insurers; • the day or days to be specified as the levy day(s); • the rate to be specified on the levy day; • the day or days to be specified as the census day(s); • the total value of the collapsed insurer’s liabilities to people insured under its complying policies. <p>Any advice received by the Minister from the Council must be laid before each House of Parliament with the determination to which the advice relates.</p>

Detailed explanation of new law

14.6 In Section 5, the definition of ‘collapsed insurer’ has been replaced to reflect APRA’s role and the transfer of provisions on the external management and terminating management of health benefits funds from the PHI Act to the Prudential Supervision Bill. This is not intended to alter the substantial effect of the definition. It will ensure that a private health insurer is a ‘collapsed insurer’ if at least one of the following applies to at least one of the insurer’s health benefits funds:

- APRA has approved the termination of the health benefits fund under section 37 of the Prudential Supervision Bill [*Schedule 1, Part 1, Item 2(a)*];

- APRA has appointed an external manager of the health benefits fund under section 51 of the Prudential Supervision Bill *[Schedule 1, Part 1, Item 2(b)]*;
- the Federal Court of Australia has ordered the appointment of a terminating manager of the health benefits fund under section 67 of the Prudential Supervision Bill. *[Schedule 1, Part 1, Item 2(c)]*

14.7 In Section 5, the definition of ‘health benefits fund’ has also been inserted and it will have the same meaning as in the PHI Act, as the term is referred to in the definition of ‘collapsed insurer’. *[Schedule 1, Part 1, Item 4]*

14.8 Finally, in Section 5, ‘private health insurer’ now has the same meaning as in the Prudential Supervision Bill, rather than that contained in the PHI Act. *[Schedule 1, Part 1, Item 5]*

14.9 Subsection 7(3) is inserted to clarify that any determination specifying a collapsed insurer levy day must also specify the payment day for that levy. *[Schedule 1, Part 1, Item 6]*

14.10 Subsection 8(2), paragraphs (a) and (b) are being replaced to align with the new prudential standards outlined in the Prudential Supervision Bill. That is:

- a prudential standard (within the meaning of the Prudential Supervision Bill) relating to capital adequacy or solvency that applies in relation to the insurer; or
- a direction given to the insurer under section 96 of the Prudential Supervision Bill. *[Schedule 1, Part 1, Item 7]*

14.11 Section 10 is to be renamed ‘Minister to obtain advice from APRA’. Subsection 10(1) and 10(2) are to be amended to replace ‘Council’ with ‘APRA’. *[Schedule 1, Part 1, Items 8,9, and 11]*

14.12 Paragraph 10(1)(ca) will be inserted to clarify that the Minister must also obtain advice from APRA in relation to the ‘payment day’ to be specified in relation to the Collapsed Insurer Levy. *[Schedule 1, Part 1, Item 10]*

14.13 Section 11 is to be repealed *[Schedule 1, Part 1, Item 12]* and Subsection 12(2) is to be amended to replace ‘Council’ with ‘APRA’. *[Schedule 1, Part 1, Item 13]*

Transitional provisions

14.14 Section 14 is to be inserted to ensure that any determination in force immediately before the commencement of this item under sections 7, 8 or 9 of the Collapsed Insurer Levy Act will continue to have effect. *[Schedule 1, Part 1, Item 14]*

Part 2 - Other Amendments

14.15 The Collapsed Insurer Amendment Bill is extended to Norfolk Island on and after the commencement of Part 1 of Schedule 2 to the *Norfolk Island Legislation Amendment Act 2015*. *[Schedule 1, Part 12 Item 15]*

Chapter 15

Statement of Compatibility with Human Rights

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

PRIVATE HEALTH INSURANCE (PRUDENTIAL SUPERVISION) BILL 2015, PRIVATE HEALTH INSURANCE (PRUDENTIAL SUPERVISION) (CONSEQUENTIAL AMENDMENTS AND TRANSITIONAL PROVISIONS) BILL 2015, PRIVATE HEALTH INSURANCE SUPERVISORY LEVY IMPOSITION BILL 2015, PRIVATE HEALTH INSURANCE (RISK EQUALISATION LEVY) AMENDMENT BILL 2015 AND PRIVATE HEALTH INSURANCE (COLLAPSED INSURER LEVY) AMENDMENT BILL 2015

15.1 The package of Bills is 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

15.2 As part of the 2014-15 Budget: *Smaller Government - additional reductions in the number of Australian Government bodies* it was announced that the Council would cease to function as a separate body and the Council's prudential and regulatory functions would transfer to the APRA from 1 July 2015. The Prudential Supervision Bill implements this measure by creating a regime for the prudential regulation of private health insurers by APRA.

15.3 The Consequential Amendments and Transitional Provisions Bill makes consequential amendments to relevant legislation including the repeal of the provisions relating to the in the PHI Act. It also provides for necessary transitional arrangements to facilitate the transfer. The Supervisory Levy Imposition Bill, the Risk Equalisation Levy Amendment Bill and the Collapsed Insurer Levy Amendment Bill provide for the continued imposition of levies upon the private health insurance industry to fund regulatory activities.

15.4 Given the Bills are interdependent this is single statement of capability with human rights for the package of Bills.

Human rights implications

The Right to Health

15.5 The right to health - the right to the enjoyment of the highest attainable standard of physical and mental health - is contained in article 12(1) of the International Covenant on Economic, Social and Cultural Rights. The United Nations Committee on Economic, Social and Cultural Rights (the Committee) has stated that health is a ‘fundamental human right indispensable for the exercise of other human rights’, and that the right to health is not to be understood as a right to be healthy, but rather entails a right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.

15.6 The right may be understood as a right of access to a variety of public health and health care facilities, goods, services, programmes and conditions necessary for the realisation of the highest attainable standard of health.

15.7 The package of Bills promotes the right to health and continues a regulatory regime which operates to protect the interests of individuals who take out private health insurance in order to manage their health care costs.

Fair trial and fair hearing rights

15.8 Fair trial and fair hearing rights are contained in article 14 of the International Covenant on Civil and Political Rights (ICCPR) to which Australia is a signatory. Article 40 of the Convention on the Rights of the Child (CRC) and article 13 of the Convention on the Rights of Persons with Disabilities (CRPD) also apply.

15.9 The right to a fair and public criminal trial or a fair and public hearing in civil proceedings is one of the guarantees in relation to legal proceedings. Fair trial and fair hearing rights include:

- that all persons are equal before courts and tribunals, and
- the right to a fair and public hearing before a competent, independent and impartial court or tribunal established by law.

15.10 The other guarantees are the presumption of innocence, and minimum guarantees in criminal proceedings, such as the right to counsel and not to be compelled to self-incriminate.

15.11 The Prudential Supervision Bill engages the right to not to be compelled to self-incriminate, by providing that in certain circumstances a person cannot refuse to answer a question or comply with a request where the answer or information may incriminate them. However, the Prudential Supervision Bill ensures that individuals' rights are protected by preventing this information being used to prosecute an individual (this is known as 'use immunity').

15.12 Whilst the civil penalty orders in Part 8 of the Prudential Supervision Bill may appear large, civil penalties must be sufficiently large to act as a deterrent as they do not carry the stigma attached to a criminal offence.

15.13 The Prudential Supervision Bill protects the rights of individuals from arbitrariness or abuses of power by providing that only a court can make a declaration of contravention leading to a civil penalty order.

Right against arbitrary interference

15.14 Article 17 of the ICCPR prohibits arbitrary or unlawful interference with an individual's privacy, family, home or correspondence, and protects a person's honour and reputation from unlawful attacks. This right may be subject to permissible limitations where those limitations are provided by law and non-arbitrary. In order for limitations not to be arbitrary, they must be aimed at a legitimate objective and are reasonable, necessary and proportionate to that objective.

15.15 The Prudential Supervision Bill protects against arbitrary abuses of power as the entry, monitoring, search, seizure and information gathering powers provided in it are conditional upon consent being given by the occupier of the premises or prior judicial authorisation. Where entry is based on the consent of the occupier, consent must be informed and voluntary and the occupier of premises can restrict entry by authorised persons to a particular period. Additional safeguards are provided through provisions requiring authorised persons and any persons assisting them to leave the premises if the occupier withdraws their consent.

15.16 The Prudential Supervision Bill specifies that an issuing officer of a warrant to enter premises for the purpose of monitoring or investigation must be a judicial officer. The Prudential Supervision Bill also provides limits on the issuing of a monitoring or investigation warrant. In the case of an investigation warrant, for example, an issuing

officer may issue an investigation warrant only when satisfied, by oath or affirmation, that there are reasonable grounds for suspecting that there is, or may be within the 72 hours, evidential material on the premises. An issuing officer must not issue a warrant unless the issuing officer has been provided, either orally or by affidavit, with such further information as they require concerning the grounds on which the issue of the warrant is being sought. Such constraints on this power ensure adequate safeguards against arbitrary limitations on the right to privacy in the issuing of warrants.

15.17 An authorised person cannot enter premises unless their identity card or a copy of the warrant under which they are entering is shown to the occupier of the premises. This provides for the transparent utilisation of the Prudential Supervision Bill's powers and mitigates arbitrariness and risk of abuse.

15.18 The Prudential Supervision Bill also engages the right to reputation by allowing a court to disqualify certain persons from being actuaries and officers of private health insurers and then requiring APRA to publish the disqualification. However, it protects from arbitrary attacks on reputation by only allowing a court to disqualify someone, and only if certain conditions are met.

15.19 These powers are reasonable, necessary and proportionate to achieve a legitimate objective. Adequate safeguards and limitations on the use of regulatory powers in the package of Bills ensures that such lawful interferences are not arbitrary or at risk of abuse.

Conclusion

15.20 The package of Bills is compatible with human rights. To the extent that they may limit human rights, those limitations are reasonable, necessary and proportionate.

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**Private Health Insurance (Prudential Supervision)
(Consequential Amendments and Transitional Provisions) Bill
2015**

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