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Commonwealth of Australia

HOUSE OF REPRESENTATIVES

Presented and read a first time

**Private Health Insurance (Prudential
Supervision) Bill 2015**

No. , 2015

(Treasury)

**A Bill for an Act to regulate private health
insurance, and for related purposes**

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A Bill for an Act to regulate private health insurance, and for related purposes

The Parliament of Australia enacts:

Part 1—Introduction

Division 1—Preliminary

1 Short title

This Act may be cited as the *Private Health Insurance (Prudential Supervision) Act 2015*.

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2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

| Commencement information | | |
|---------------------------------|---|---------------------|
| Column 1 | Column 2 | Column 3 |
| Provisions | Commencement | Date/Details |
| 1. The whole of this Act | As follows: (a) if this Act receives the Royal Assent before 1 July 2015—1 July 2015; (b) if this Act receives the Royal Assent on or after 1 July 2015—a single day to be fixed by Proclamation. However, if this Act receives the Royal Assent on or after 1 July 2015, and the provisions do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period. | |

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Simplified outline of this Act

| |
|--|
| Only a private health insurer may carry on health insurance business. A private health insurer is a company that is registered under Division 3 of Part 2. |
|--|

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

- (a) how health benefits funds are operated; and
- (b) changing the health benefits fund to which a policy of insurance is referable; and
- (c) terminating health benefits funds; and
- (d) external management of health benefits funds.

Private health insurers must comply with prudential standards made by APRA, and 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.

Note: The *Private Health Insurance Act 2007* 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.

4 Interpretation

(1) In this Act:

ADI means an authorised deposit-taking institution within the meaning of the *Banking Act 1959*.

application provision: see subsection 65(2).

applied Corporations Act provision: see subsection 65(3).

appointed actuary of a private health insurer means the person appointed as the actuary of the insurer in accordance with Division 2 of Part 5.

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approved form: see section 172.

APRA means the Australian Prudential Regulation Authority.

APRA rules: see subsection 174(1).

APRA staff member has the same meaning as in the *Australian Prudential Regulation Authority Act 1998*.

assets of a health benefits fund: see section 26.

chief executive officer of a private health insurer means the person who is primarily and directly responsible to the directors of the insurer for the general and overall management of the insurer.

civil penalty order: see subsection 156(2).

complying health insurance policy has the same meaning as in the *Private Health Insurance Act 2007*.

complying health insurance product has the same meaning as in the *Private Health Insurance Act 2007*.

constitutional corporation means a corporation to which paragraph 51(xx) of the Constitution applies.

cover, in relation to an insurance policy, has the same meaning as in the *Private Health Insurance Act 2007*.

declaration of contravention means a declaration under subsection 155(1).

dependent child has the same meaning as in the *Private Health Insurance Act 2007*.

director has the same meaning as in the *Corporations Act 2001*.

disqualified person: see sections 119 and 121.

enforceable obligation means any of the following:

- (a) a provision of this Act;
- (b) a direction given under this Act;
- (c) a provision of the risk equalisation levy legislation;

- (d) if the registration of a private health insurer is subject to terms and conditions (see subsection 15(1))—those terms and conditions;
- (e) in the case of a restricted access insurer—a provision included in the insurer’s constitution or rules in order to comply with subsection 15(3).

Note: References to this Act include prudential standards and APRA rules (see the definition of *this Act* in this subsection).

external administration means administration or control (however described) by an external administrator.

external administrator means:

- (a) any of the following, within the meaning of the *Corporations Act 2001*:
 - (i) a liquidator or provisional liquidator;
 - (ii) a receiver, manager, managing controller, receiver and manager or other controller;
 - (iii) an administrator or a scheme manager; or
- (b) a person who performs a similar role to a person referred to in subparagraph (a)(i), (ii) or (iii), whether under a law of the Commonwealth, or of a State or Territory, or otherwise;

but does not include an external manager or terminating manager.

external management means management, by an external manager, under Divisions 6 and 8 of Part 3.

external manager, in relation to a health benefits fund, means a person appointed under section 51 as the external manager of the fund.

Federal Court means the Federal Court of Australia.

for profit insurer means a private health insurer that is registered under Division 3 of Part 2 as a for profit insurer.

health benefits fund has the same meaning as in the *Private Health Insurance Act 2007*.

Health Department means the Department administered by the Health Minister.

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health insurance business has the same meaning as in the *Private Health Insurance Act 2007*.

Health Minister means the Minister administering the *Private Health Insurance Act 2007*.

health-related business has the same meaning as in the *Private Health Insurance Act 2007*.

Health Secretary means the Secretary of the Health Department.

improper discrimination has the same meaning as in the *Private Health Insurance Act 2007*.

inspector means a person appointed under section 130 to be an inspector.

insurance has the same meaning as in paragraph 51(xiv) of the Constitution.

investigation warrant: see subsection 136(1).

lawyer means a duly qualified legal practitioner and, in relation to a person, means such a practitioner acting for the person.

makes a permitted capital payment: see subsection 27(3).

manager, in relation to a health benefits fund, means an external manager or terminating manager of the fund.

net asset position of a health benefits fund means the difference between:

- (a) the assets of the fund; and
- (b) the policy liabilities and other liabilities of the fund that the private health insurer conducting the fund has incurred for the purposes of the fund.

officer of a private health insurer means:

- (a) a director of the insurer; or
- (b) a chief executive officer of the insurer; or

- (c) any other person who has or exercises senior management responsibilities (within the meaning of prudential standards) for the insurer.

penalty includes forfeiture or punishment.

personal information has the same meaning as in the *Privacy Act 1988*.

policy group of a health benefits fund: see subsection 32(7).

policy holder of a health benefits fund has the same meaning as in the *Private Health Insurance Act 2007*.

policy liability of a private health insurer means:

- (a) a liability that has arisen under an insurance policy; or
- (b) a liability that, subject to the terms and conditions of an insurance policy, will arise on the happening of an event, or at a time, specified in the policy.

premises includes the following:

- (a) a structure, building, vehicle, vessel or aircraft;
- (b) a place (whether or not enclosed or built on);
- (c) a part of a thing referred to in paragraph (a) or (b).

Private Health Insurance Ombudsman has the same meaning as in the *Private Health Insurance Act 2007*.

private health insurer means a body that is registered under Division 3 of Part 2.

proceeding means:

- (a) a proceeding in a court; or
- (b) a proceeding or hearing before, or an examination by or before, a tribunal;

whether the proceeding, hearing or examination is of a civil, administrative, criminal, disciplinary or other nature.

prudential matters: see subsection 92(2).

prudential standards: see subsection 92(1).

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referable has the same meaning as in the *Private Health Insurance Act 2007*.

responsible insurer means:

- (a) for a health benefits fund that is under external management—the private health insurer that was conducting the fund prior to the appointment of the external manager of the fund; or
- (b) for a health benefits fund that is under terminating management—the private health insurer that was conducting the fund prior to the appointment of the terminating manager of the fund.

restricted access group: see subsection 15(4).

restricted access insurer means a private health insurer that is registered under Division 3 of Part 2 as a restricted access insurer.

risk equalisation jurisdiction has the same meaning as in the *Private Health Insurance Act 2007*.

risk equalisation levy legislation means any of the following:

- (a) the *Private Health Insurance (Risk Equalisation Levy) Act 2003*;
- (b) the provisions of the *Private Health Insurance Act 2007*, as they apply in relation to:
 - (i) levy imposed under the *Private Health Insurance (Risk Equalisation Levy) Act 2003*; or
 - (ii) the Risk Equalisation Special Account.

Risk Equalisation Special Account has the same meaning as in the *Private Health Insurance Act 2007*.

rules of a private health insurer has the same meaning as in the *Private Health Insurance Act 2007*.

search powers means powers to search for, inspect, take extracts from, and make copies of, documents.

State insurance has the same meaning as in paragraph 51(xiv) of the Constitution.

statutory functions and duties of an actuary of a private health insurer: see subsection 107(2).

terminating management means management, by a terminating manager, under Divisions 5 and 8 of Part 3.

terminating manager, in relation to the health benefits funds of a private health insurer, means a person appointed under Division 5 or 7 of Part 3 as the terminating manager of the funds.

termination day, in relation to the health benefits funds of a private health insurer: see subsection 40(2).

this Act includes prudential standards and APRA rules.

voluntary deed of arrangement means:

- (a) a deed of arrangement agreed on at a meeting of a kind referred to in section 58; or
 - (b) such a deed as varied in accordance with APRA rules made for the purpose of this paragraph.
- (2) To avoid doubt, a reference in this Act to another Act includes a reference to any regulations, rules, standards or other instruments made, and to any conditions imposed, under that other Act.

Note: For example:

- (a) a reference to the *Private Health Insurance Act 2007* includes a reference to rules made under that Act; and
- (b) a reference to the *Financial Sector (Collection of Data) Act 2001* includes a reference to reporting standards made under that Act.

5 General administration of Act

APRA has the general administration of this Act.

Division 2—Constitutional matters

6 Act binds the Crown

Subject to section 7, this Act binds the Crown in each of its capacities.

7 Act not to apply to State insurance within that State

This Act does not apply with respect to State insurance that does not extend beyond the limits of the State concerned.

8 Compensation for acquisition of property

- (1) If the operation of this Act would 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.
- (2) If the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in the Federal Court for the recovery from the Commonwealth of such reasonable amount of compensation as the Court determines.

Part 2—Registration of private health insurers

Division 1—Introduction

9 Simplified outline of this Part

Only a private health insurer may carry on health insurance business. A private health insurer is a company that is registered under Division 3 of this Part.

Note: Part 4-2 of the *Private Health Insurance Act 2007* defines the concept of health insurance business.

There are 2 kinds of special status that some private health insurers may have. They are:

- (a) a for profit insurer; and
- (b) a restricted access insurer.

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

10 Carrying on health insurance business without registration

- (1) A person commits an offence if:
- (a) the person carries on health insurance business; and
 - (b) the person is not a private health insurer.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

Note: If a body corporate is convicted of an offence against this subsection, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the penalty stated above.

- (2) A person who contravenes subsection (1) commits a separate offence in respect of each day (including the day of conviction for any such offence or any later day) during which the contravention continues.

Note: This subsection is not intended to imply that section 4K of the *Crimes Act 1914* does not apply to offences against this Act.

11 Injunctions

- (1) The Federal Court may grant an injunction in such terms as it determines to be appropriate if, on the application of APRA, the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute a contravention of section 10.
- (2) The Federal Court may grant an interim injunction pending determination of an application under subsection (1).
- (3) The Federal Court must not require an applicant for an injunction to give an undertaking as to damages as a condition of granting an interim injunction.
- (4) The Federal Court may discharge or vary an injunction granted under subsection (1) or (2).

- (5) The power of the Federal Court to grant an injunction restraining a person from engaging in conduct may be exercised:
 - (a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; and
 - (b) whether or not the person has previously engaged in conduct of that kind.

- (6) The power of the Federal Court to grant an injunction requiring a person to do an act or thing may be exercised:
 - (a) whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing; and
 - (b) whether or not the person has previously refused or failed to do that act or thing.

Division 3—Registration

12 Applying for registration

- (1) A body that is:
 - (a) a company within the meaning of the *Corporations Act 2001*; and
 - (b) a constitutional corporation;may apply to APRA for registration as a private health insurer.
- (2) The application:
 - (a) must be in the approved form; and
 - (b) must be accompanied by a copy of the applicant's proposed rules; and
 - (c) if the applicant is seeking to be registered as a for profit insurer—must state that fact; and
 - (d) if the applicant is seeking to be registered as a restricted access insurer—must state that fact.

13 Requiring further information

Within 90 days after the application is made, APRA may, by written notice to the applicant, require the applicant to give APRA such further information relating to the application as is specified in the notice.

14 Criteria for registration

APRA rules may set out criteria for the registration of bodies as private health insurers.

15 Deciding the application

- (1) APRA may, in writing, grant the application, subject to such terms and conditions as APRA considers appropriate.

Note: Refusals of applications, and granting of applications subject to terms and conditions, are reviewable under section 168.

- (2) If APRA grants the application:
- (a) the applicant is taken to be, or have been, registered as a private health insurer under this Division from the date of effect specified in the instrument granting the application (which may be a date that occurred before the application was made); and
 - (b) if the grant is subject to terms and conditions—the registration is taken to be subject to those terms and conditions from the day on which the applicant is notified of the granting of the application; and
 - (c) if the applicant sought to be registered as a for profit insurer—the registration is taken to be registration of the applicant as a for profit insurer; and
 - (d) if the applicant sought to be registered as a restricted access insurer and the applicant’s constitution or rules satisfy subsection (3)—the registration is taken to be registration of the applicant as a restricted access insurer.

Note: 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) For the registration to be taken to be as a restricted access insurer, the applicant’s constitution or rules must:
- (a) describe the restricted access group to whom the applicant’s complying health insurance products are, or will be, available; and
 - (b) prohibit the applicant from issuing a complying health insurance policy to a person who does not belong to the group; and
 - (c) prohibit the applicant from ceasing to insure a person for the reason that the person has ceased to belong to the group.
- (4) A **restricted access group** is a group of people who all belong to a particular group, based on whether they:
- (a) are or were employed in a particular profession, trade, industry or calling; or
 - (b) are or were employed by a particular employer or by an employer who belongs to a particular class of employers; or

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- (c) are or were members of a particular profession, professional association or union; or
- (d) are or were members of the Defence Force or part of the Defence Force; or
- (e) are or were part of any group described in APRA rules made for the purpose of this paragraph.

The partners and dependent children of people who belong to such a group are also taken to belong to that group.

- (5) APRA rules made for the purpose of paragraph (4)(e) may describe a group as consisting of one or more classes of people (whether or not the class or classes are described by reference to matters of a kind referred to in paragraphs (4)(a) to (d)).

16 Notifying the decision

- (1) If APRA grants the application, APRA must:
 - (a) give the applicant written notice of the grant, and of the terms and conditions (if any) to which the grant is subject; and
 - (b) within one month after granting the application, publish in the Gazette a notification of the grant setting out:
 - (i) the applicant's name; and
 - (ii) the date of effect of the applicant's registration; and
 - (iii) the terms and conditions (if any) to which the grant is subject.
- (2) If APRA refuses the application, APRA must give the applicant written notice of the refusal.

17 APRA can be taken to refuse application

APRA is taken, for the purposes of section 168, to have refused the application if APRA does not give the applicant written notice of its decision on the application:

- (a) within 90 days after the application was made; or

- (b) if APRA has given the applicant a notice under section 13 requiring the applicant to give further information relating to the application—within 90 days after the applicant gives that information to APRA;
- whichever is later.

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

An up-to-date record of the following must be publicly available on APRA's website:

- (a) the names of all private health insurers;
- (b) in relation to each private health insurer:
 - (i) its address, telephone number and website address; and
 - (ii) the States and Territories in which it operates; and
 - (iii) if the insurer is registered as a restricted access insurer—the restricted access group to whom the insurer's complying health insurance products are, or will be, available.

19 Changing registration status

For profit insurer

- (1) A private health insurer that:
 - (a) because of subsection (2) or otherwise, is registered as a for profit insurer; and
 - (b) notifies APRA in the approved form, that it does not wish to be registered as a for profit insurer;is taken, from the day after the day on which APRA receives the notice, not to be registered as a for profit insurer.
- (2) If:
 - (a) because of subsection (1) or otherwise, a private health insurer is not registered as a for profit insurer; and
 - (b) APRA approves under section 20 an application by the insurer for the insurer to convert to being registered as a for profit insurer;

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the insurer is taken, from the day specified in APRA's approval, to be registered as a for profit insurer.

- (3) If a private health insurer is taken under this section to be, or not to be, registered as a for profit insurer, APRA must, as soon as practicable, given written notice of that fact to:
- (a) the Health Secretary; and
 - (b) the Private Health Insurance Ombudsman; and
 - (c) the Commissioner of Taxation.

Restricted access insurer

- (4) A private health insurer that:
- (a) because of subsection (5) or otherwise, is registered as a restricted access insurer; and
 - (b) notifies APRA, in the approved form, that it does not wish to be registered as a restricted access insurer;
- is taken, from the day after the day on which APRA receives the notice, not to be registered as a restricted access insurer.
- (5) Subject to subsection 15(3), a private health insurer that:
- (a) because of subsection (4) of this section or otherwise, is not registered as a restricted access insurer; and
 - (b) notifies APRA, in the approved form, that it wishes to be registered as a restricted access insurer;
- is taken, from the day after the day on which APRA receives the notice, to be registered as a restricted access insurer.
- (6) If a private health insurer is taken under this section to be, or not to be, registered as a restricted access insurer, APRA must, as soon as practicable, give written notice of that fact to:
- (a) the Health Secretary; and
 - (b) the Private Health Insurance Ombudsman.

20 Conversion to for profit status

Application for conversion to for profit status

- (1) A private health insurer may apply to APRA for approval to convert to being registered as a for profit insurer.
- (2) The application:
 - (a) must be in the approved form and must contain, or be accompanied by, a conversion scheme as required by the approved form; and
 - (b) must be given to APRA at least 90 days before the day specified in the application as the day on which the insurer proposes that it become registered as a for profit insurer.

How APRA decides an application

- (3) APRA must, in writing, approve the application if APRA is satisfied, within 30 days after the application was made, that:
 - (a) the application complies with subsection (2); and
 - (b) the conversion scheme would not in substance involve the demutualisation of the insurer.
- (4) If subsection (3) does not apply:
 - (a) APRA must, at least 45 days before the day specified in the application, cause a notice of the application to be published in a national newspaper, or in a newspaper circulating in each jurisdiction where the insurer has its registered office or carries on business; and
 - (b) within 90 days after the application is made, APRA may, by written notice to the insurer, require the insurer to give APRA such further information relating to the application as is specified in the notice.
- (5) If subsection (3) does not apply, APRA must, in writing, approve the application if:
 - (a) APRA is satisfied that the application complies with subsection (2); and
 - (b) the insurer has given APRA such further information (if any) as APRA has required under paragraph (4)(b); and

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- (c) APRA is satisfied that the conversion scheme would not result in a financial benefit to any person who is not a policy holder of, or another person insured through, a health benefits fund conducted by the insurer; and
 - (d) APRA is satisfied that the conversion scheme would not result in financial benefits from the scheme being distributed inequitably between such policy holders and insured persons.
- (6) APRA rules may set out criteria for deciding, for the purposes of subsection (3), whether a conversion scheme would not in substance involve the demutualisation of the insurer.
- (7) An approval under this section is not a legislative instrument.

Notification of APRA's decision

- (8) APRA must notify the insurer in writing of APRA's decision on the application.

Note: Refusals of applications are reviewable under section 168.

21 Cancellation of registration

- (1) APRA must, in writing, cancel the registration of a private health insurer if:
- (a) the insurer has not conducted health insurance business during the preceding 12 months; or
 - (b) the insurer's health benefits funds have been terminated under Division 5 of Part 3; or
 - (c) the insurer ceases to be a company within the meaning of the *Corporations Act 2001*.
- (2) APRA must:
- (a) give the insurer written notice of the cancellation; and
 - (b) within one month after the cancellation, publish in the Gazette a notification of the cancellation.

Part 3—Health benefits funds

Division 1—Introduction

22 Simplified outline of this Part

A private health insurer must have at least one health benefits fund.

Note: Part 4-4 of the *Private Health Insurance Act 2007* defines the concept of a health benefits fund as well as other key concepts related to health benefits funds.

There are regimes governing:

- (a) how health benefits funds are operated; and
- (b) changing the health benefits fund to which a policy of insurance is referable; and
- (c) terminating health benefits funds; and
- (d) external management of health benefits funds.

APRA may require private health insurers to remedy contraventions of this Part.

Division 2—The requirement to have health benefits funds

23 Private health insurers must have health benefits funds

- (1) A private health insurer must at all times have at least one health benefits fund in respect of:
 - (a) its health insurance business; or
 - (b) its health insurance business and some or all of its health-related businesses.
- (2) A private health insurer may have more than one health benefits fund, but must not have more than one in respect of a particular risk equalisation jurisdiction.
- (3) Despite subsection (2), a private health insurer may have more than one health benefits fund in respect of a particular risk equalisation jurisdiction if:
 - (a) each of those funds is a fund (a *pre-1 April 2007 fund*):
 - (i) that existed on 1 April 2007; and
 - (ii) that, immediately before that day, was conducted by a registered organization (within the meaning of the *National Health Act 1953* as in force before that day); or
 - (b) each of those funds, other than one of them, is a pre-1 April 2007 fund and that one other fund was established in connection with a restructure of funds approved under:
 - (i) Division 4 of this Part; or
 - (ii) Division 146 of the *Private Health Insurance Act 2007* as in force before the commencement of this section.
- (4) Despite subsection (2), a private health insurer may have more than one health benefits fund in respect of a particular risk equalisation jurisdiction in circumstances specified in Private Health Insurance (Health Benefits Fund Policy) Rules made for the purpose of subsection 131-20(2) of the *Private Health Insurance Act 2007*.

24 Notifying APRA when health benefits funds are established

- (1) If a private health insurer establishes a health benefits fund, the insurer must give APRA written notice of:
 - (a) the establishment of the fund; and
 - (b) the day on which the fund was established; and
 - (c) such other matters as are specified in APRA rules made for the purpose of this paragraph.
- (2) The notice must be in the approved form.
- (3) This section does not apply if the fund is established in accordance with a restructure or arrangement approved under Division 4.

25 Inclusion of health-related businesses in health benefits funds

- (1) If a private health insurer has a health benefits fund in respect of its health insurance business and some or all of its health-related businesses, the dominant purpose of the fund must relate to its health insurance business.
- (2) If APRA is satisfied that a private health insurer is contravening subsection (1):
 - (a) APRA may, by written notice to the insurer, give the insurer such directions relating to divesting the fund of health-related businesses as APRA considers necessary to ensure the insurer's compliance with subsection (1); and
 - (b) the insurer must comply with those directions.
- (3) APRA may, by written notice to a private health insurer, vary or revoke a direction given to the insurer under subsection (2).
- (4) A direction under subsection (2) ceases to have effect if APRA revokes the direction.
- (5) Sections 98, 101, 102 and 103 apply in relation to a direction under subsection (2) as if:
 - (a) a reference in those sections to a direction under section 96 were a reference to a direction under subsection (2) of this section; and

Part 3 Health benefits funds

Division 2 The requirement to have health benefits funds

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- (b) the reference in subsection 101(3) to a direction of a kind referred to in paragraph 97(1)(l) were omitted.

Note: The matters dealt with in the sections applied by this subsection are as follows:

- (a) section 98—power to comply with a direction;
- (b) section 101—a direction is not grounds for denial of obligations;
- (c) section 102—supply of information about directions;
- (d) section 103—secrecy requirements.

Division 3—The operation of health benefits funds

26 Assets of health benefits funds

Assets of a health benefits fund to be kept separate from other assets

- (1) A private health insurer must keep assets of a health benefits fund distinct and separate from assets of other health benefits funds and from all other money, assets or investments of the insurer.
- (2) A private health insurer must maintain a separate account with an ADI for each health benefits fund that it conducts.

What are the assets of a health benefits fund?

- (3) The **assets** of a health benefits fund at a particular time are the following:
 - (a) the balance of money represented by amounts credited to the fund in accordance with section 27;
 - (b) assets of the insurer obtained as a result of the expenditure or application of money credited to the fund;
 - (c) investments held by the insurer as a result of the expenditure or application of money credited to the fund;
 - (d) other money, assets or investments of the insurer transferred to the fund, whether under this Act or otherwise.
- (4) Assets or investments obtained by the application of assets of a health benefits fund are themselves **assets** of the fund.
- (5) The **assets** of a health benefits fund:
 - (a) include assets that, in accordance with a restructure or arrangement approved under Division 4, are to be assets of the fund; but
 - (b) do not include assets that, in accordance with such a restructure or arrangement, are no longer to be assets of the fund.

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- (6) Despite paragraphs (3)(b) and (c) and subsection (4), assets or investments obtained by the expenditure of money of, or the application of other assets of, a health benefits fund are not *assets* of the fund if:
- (a) the private health insurer conducting the fund is a for profit insurer; and
 - (b) the expenditure or application was not done for the purposes of the fund.

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

- (7) To avoid doubt, nothing in this Act is intended to have the effect of making a private health insurer or its directors a trustee or trustees of the assets of the health benefits funds of the insurer.

27 Payments to health benefits funds

- (1) A private health insurer must credit the following amounts to a health benefits fund:
- (a) premiums payable under policies of insurance that are referable to the fund;
 - (b) amounts paid to the insurer in relation to a liability under Division 9 in relation to the fund;
 - (c) income from the investment of assets of the fund;
 - (d) money paid to or by the insurer under a judgment of a court relating to any matter concerning the business of the fund or any failure to comply with this Part in relation to the fund;
 - (e) any other money received by the insurer in connection with its conduct of the business of the fund;
 - (f) any other amounts specified in APRA rules made for the purpose of this paragraph.
- (2) This Act does not prevent a private health insurer from making a permitted capital payment to a health benefits fund.
- (3) A private health insurer *makes a permitted capital payment* to a health benefits fund if it credits to the fund an amount that:

- (a) is not required to be credited to the fund under subsection (1);
and
- (b) either:
 - (i) does not represent any part of the assets of another health benefits fund; or
 - (ii) is credited to the fund with APRA's written approval.

Note: Refusals to approve the crediting of an amount to a fund are reviewable under section 168.

- (4) An approval under subparagraph (3)(b)(ii) is not a legislative instrument.

28 Expenditure and application of health benefits funds

Assets of health benefits funds not to be applied or dealt with except in accordance with this Division

- (1) A private health insurer must not apply, or deal with, assets of a health benefits fund, whether directly or indirectly, except in accordance with this Division.

Application of assets: general rules

- (2) The assets of a health benefits fund must not be applied:
 - (a) for any purpose other than:
 - (i) meeting policy liabilities and other liabilities, or expenses, incurred for the purposes of the business of the fund including policy liabilities and other liabilities that are treated, in accordance with a restructure or arrangement approved under Division 4, as policy liabilities and other liabilities incurred for the purposes of the fund; or
 - (ii) making investments in accordance with section 30; or
 - (iii) making a distribution under Division 5; or
 - (iv) a purpose specified in APRA rules made for the purpose of this subparagraph; or
 - (b) for a purpose specified in APRA rules made for the purpose of this paragraph.

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Mortgaging or charging assets

- (3) A private health insurer must not mortgage or charge any of the assets of a health benefits fund except:
- (a) to secure an overdraft from an ADI; or
 - (b) for such other purposes, and subject to such conditions, as are specified in APRA rules made for the purpose of this paragraph.

Borrowing money

- (4) A private health insurer must not borrow money for the purposes of the business of a health benefits fund except in accordance with APRA rules made for the purpose of this subsection.

Application of assets: for profit insurers

- (5) Despite subsection (2), if a private health insurer is a for profit insurer, the assets of a health benefits fund conducted by the insurer may be applied for any purpose, except an application of the assets that is inconsistent with:
- (a) prudential standards relating to capital adequacy or solvency that apply in relation to the fund; or
 - (b) a direction given to the insurer under section 96 that relates to the fund.

Section does not apply to certain transfers of assets

- (6) This section does not apply to the transfer of assets:
- (a) from one health benefits fund to another in accordance with a restructure or arrangement approved under Division 4; or
 - (b) in accordance with a direction under subsection 25(2).

29 Effect of non-compliance with section 28

General principle

- (1) A transaction entered into in contravention of section 28 is of no effect unless:
- (a) the Federal Court makes an order under subsection (2); or

- (b) it is included in a class of transactions specified in APRA rules, made for the purpose of this paragraph, to be transactions to which this section applies, and the Court has not made an order under subsection (6).

Order declaring the transaction to be effective

- (2) The Federal Court, on application by a party to the transaction, may make an order declaring that the transaction is effective, and is to be taken always to have been effective, for all purposes.
- (3) The Federal Court must not make an order under subsection (2) unless it is satisfied that the applicant entered into the transaction in good faith and without knowledge of the contravention.
- (4) In deciding whether to make an order under subsection (2), the Federal Court may have regard to any hardship that would be caused to the applicant if the order were not made.
- (5) Subsection (4) is not intended to limit the matters to which the Federal Court may have regard on an application under subsection (2).

Order declaring the transaction to be of no effect

- (6) The Federal Court, on application by APRA, may make an order declaring that a particular transaction that:
- (a) was entered into in contravention of section 28; and
 - (b) is included in a class of transactions of a kind referred to in paragraph (1)(b) of this section;
- is, and is to be taken always to have been, of no effect for any purpose.
- (7) The Federal Court must not make an order under subsection (6) if it is satisfied that the effect of the order (if made) would be to cause hardship to a person who entered into the transaction in good faith and without knowledge of the contravention.

30 Investment of health benefits funds

- (1) A private health insurer may invest assets of a health benefits fund in any way that is likely to further the business of the fund.
- (2) However:
 - (a) nothing in this Act authorises a private health insurer to make an investment the insurer would otherwise be prohibited from making; and
 - (b) nothing in this Act authorises a private health insurer to make an investment the insurer would not otherwise have power to make; and
 - (c) a private health insurer must not invest assets of a health benefits fund, or keep such assets invested, if the investment, or the retention of the investment, as the case requires, is prohibited by APRA rules made for the purpose of this paragraph, or by prudential standards.
- (3) A transaction is not ineffective merely because it involves a contravention of paragraph (2)(c).

Division 4—Restructure, merger and acquisition of health benefits funds

31 Restriction on restructure, merger or acquisition of health benefits funds

A private health insurer must not change the health benefits fund to which a policy of insurance is referable unless the change is made in accordance with this Division.

32 Restructure of health benefits funds

When an insurer may restructure its health benefits funds

- (1) A private health insurer may restructure its health benefits funds so that insurance policies that are referable to a health benefits fund (a **transferring fund**) of the insurer become referable to one or more other health benefits funds (**receiving funds**) of the insurer (whether existing or proposed) if:
 - (a) the insurance policies concerned are all of the policies that, immediately before the restructure, were referable to the transferring fund and belonged to one or more policy groups of that fund; and
 - (b) the insurer applies to APRA, in the approved form, for approval of the restructure; and
 - (c) APRA approves the restructure in writing; and
 - (d) the insurer complies with any requirements imposed on the insurer in relation to the restructure by APRA rules made for the purpose of this paragraph.

How APRA decides whether to approve the restructure

- (2) Subject to subsection (4), APRA must approve the restructure if it is satisfied that:
 - (a) the assets and liabilities that would be transferred to the receiving fund or funds represent a reasonable estimate of what would, immediately before the restructure, be the net asset position of the transferring fund; and

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- (b) if there is more than one receiving fund—those assets and liabilities would be fairly distributed between the receiving funds; and
 - (c) the restructure will not result in any contravention of prudential standards.
- (3) For the purposes of paragraph (2)(a), in working out the net asset position of the transferring fund, disregard the net asset position of the fund to the extent that it relates to insurance policies that do not belong to a policy group referred to in paragraph (1)(a).
- (4) APRA must not approve the restructure if:
- (a) it considers that the restructure will result in unfairness to the policy holders of a health benefits fund of the insurer as that fund exists immediately before the restructure, when those policy holders are viewed as a group; or
 - (b) it considers that the restructure will result in unfairness to the persons who would be policy holders of a health benefits fund of the insurer as that fund would exist immediately after the restructure, when those persons are viewed as a group; or
 - (c) the insurer is being wound up when the application is made.

Note: Refusals to approve restructures are reviewable under section 168.

APRA rules may provide for various matters

- (5) APRA rules may provide for the following:
- (a) criteria for the approval of applications under subsection (1);
 - (b) how to work out reasonable estimates of the kind referred to in paragraph (2)(a);
 - (c) criteria for deciding under paragraph (2)(b) whether assets and liabilities would be fairly distributed;
 - (d) requirements to notify interested persons of the outcomes of such applications;
 - (e) matters connected with how restructures take place, including the following:
 - (i) insurance policies becoming referable to a receiving fund or funds;

- (ii) policy liabilities and other liabilities incurred for the purposes of a transferring fund becoming treated as policy liabilities and other liabilities incurred for the purposes of a receiving fund or funds;
- (iii) assets of a transferring fund becoming assets of a receiving fund or funds;
- (iv) the timing of restructures;
- (v) if a receiving fund is a proposed new health benefits fund—the establishment of that fund;
- (f) requirements for private health insurers to give APRA information following restructures.

Approval is not a legislative instrument

- (6) An approval under this section is not a legislative instrument.

Definition

- (7) A **policy group** of a health benefits fund, is all of the insurance policies:
 - (a) that are referable to the fund; and
 - (b) the addresses of the policy holders of which, as known to the private health insurer conducting the fund, are located in the same risk equalisation jurisdiction.

APRA rules may provide for how to work out the policy group for a policy that has 2 or more holders whose addresses are not all located in the same risk equalisation jurisdiction.

33 Merger and acquisition of health benefits funds

When an arrangement may be entered into

- (1) A private health insurer (the **transferee insurer**) may enter into an arrangement with one or more other private health insurers (**transferor insurers**) under which:
 - (a) insurance policies that are referable to a health benefits fund or funds (**transferring funds**) of the transferor insurer or transferor insurers become referable to a health benefits fund or funds (**receiving funds**) of the transferee insurer; and

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- (b) in relation to each of the transferring funds, the insurance policies concerned are:
 - (i) all of the insurance policies that are referable to the transferring fund; or
 - (ii) all of the insurance policies that are referable to the transferring fund and that belong to one or more policy groups of the fund.
- (2) However, the arrangement must not take effect unless:
 - (a) the insurers referred to in subsection (1) apply jointly to APRA, in the approved form, for approval of the arrangement; and
 - (b) APRA approves the arrangement in writing; and
 - (c) the insurers comply with any requirements imposed on the insurers in relation to the arrangement by APRA rules made for the purpose of this paragraph.

How APRA decides whether to approve the arrangement

- (3) APRA must approve the arrangement if it is satisfied that:
 - (a) the assets and liabilities that would be transferred, under the arrangement, to the receiving fund or funds represent a reasonable estimate of what would, immediately before the restructure, be:
 - (i) if there is only one transferring fund—the net asset position of the fund; or
 - (ii) if there is more than one transferring fund—the sum of the net asset positions of each of the funds; and
 - (b) if, under the arrangement, there would be more than one receiving fund—those assets and liabilities would be fairly distributed between the receiving funds; and
 - (c) if subparagraph (1)(b)(i) applies to any transferring fund—the net asset position of the fund immediately after the arrangement takes effect will not be greater than zero; and
 - (d) the arrangement will not result in any contravention of prudential standards if it takes effect.

Note: Refusals to approve transfers are reviewable under section 168.

- (4) For the purposes of paragraph (3)(a), in working out the net asset position of a transferring fund to which subparagraph (1)(b)(ii) applies, disregard the net asset position of the fund to the extent that it relates to insurance policies that do not belong to a policy group referred to in that subparagraph.

APRA rules may provide for various matters

- (5) APRA rules may provide for the following:
- (a) criteria for the approval of applications under subsection (2);
 - (b) how to work out reasonable estimates of the kind referred to in paragraph (3)(a);
 - (c) criteria for deciding under paragraph (3)(b) whether assets and liabilities would be fairly distributed;
 - (d) requirements to notify interested persons of the outcomes of such applications;
 - (e) matters connected with how arrangements take effect, including the following:
 - (i) insurance policies becoming referable to a health benefits fund or funds of the transferee insurer;
 - (ii) policy liabilities and other liabilities incurred for the purposes of a health benefits fund or funds of a transferor insurer becoming treated as policy liabilities and other liabilities incurred for the purposes of a health benefits fund or funds of the transferee insurer;
 - (iii) assets of a health benefits fund or funds of a transferor insurer becoming assets of a health benefits fund or funds of the transferee insurer;
 - (iv) the timing of arrangements;
 - (f) requirements for private health insurers to give APRA information following arrangements taking effect.

Notice to be given if arrangement takes effect

- (6) The transferee insurer must, within 28 days after the arrangement takes effect, notify APRA of the arrangement. The notice must comply with any requirements specified in APRA rules made for the purpose of this subsection.

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Effect of arrangement

- (7) For the purposes of this Act and the *Private Health Insurance Act 2007*, an insurance policy that becomes referable to a health benefits fund of the transferee insurer as a result of the arrangement is treated, after the arrangement takes effect, as if it were an insurance policy issued by the transferee insurer.

Approval is not a legislative instrument

- (8) An approval under this section is not a legislative instrument.

34 Consent of policy holders not required

The consent of the policy holders of a health benefits fund is not required for any:

- (a) restructuring health benefits funds as provided for in section 32; or
- (b) entering into arrangements of a kind referred to in section 33, or implementing such arrangements;

unless the constitution of the private health insurer conducting the fund provides otherwise.

Division 5—Termination of health benefits funds

Subdivision A—Approving the termination of health benefits funds

35 Applying for termination

A private health insurer may apply to APRA, in the approved form, for approval of the termination of each of its health benefits funds.

Note: Termination of health benefits funds may also occur if the Federal Court orders the appointment of a terminating manager under Division 7.

36 Requiring further information

Within 28 days after the application is made, APRA may, by written notice to the applicant, require the applicant to give APRA such further information relating to the application as is specified in the notice.

37 Deciding the application

- (1) APRA must, in writing, approve the termination if it is satisfied that:
 - (a) the insurer is not in the process of being wound up; and
 - (b) each of its health benefits funds complies with prudential standards relating to capital adequacy or solvency that apply in relation to the funds; and
 - (c) in relation to each of the funds, termination of the fund will not result in unfairness to the policy holders of the fund, when those policy holders are viewed as a group;and is satisfied as to such other matters as are specified in APRA rules made for the purpose of this subsection.
- (2) If APRA approves the termination, APRA:
 - (a) may, in writing, appoint a person other than the applicant as the terminating manager of the funds; and
 - (b) must give the insurer written notice:

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- (i) of the approval of the termination; and
 - (ii) if paragraph (a) applies—of the appointment of the terminating manager.
- (3) If APRA refuses to approve the termination, APRA must give the insurer written notice of the refusal.
- Note: Refusals to approve terminations are reviewable under section 168.
- (4) An approval under this section is not a legislative instrument.

38 APRA can be taken to have refused to approve termination

APRA is taken, for the purposes of section 168, to have refused to approve the termination if APRA does not notify the applicant of its decision on the application:

- (a) within 90 days after the application was made; or
 - (b) if APRA has given the applicant a notice under section 36 requiring the applicant to give further information relating to the application—within 90 days after the applicant gives that information to APRA;
- whichever is later.

Subdivision B—Conducting the termination of health benefits funds

39 The basis of the law relating to termination

- (1) A health benefits fund cannot be wound up or otherwise terminated except in accordance with this Part.
- (2) Subject to this Part, any provisions of a law of the Commonwealth, or of a State or Territory, that, but for this section, would relate to the winding up or termination of such a fund cease, by force of this section, to apply in relation to the fund.

40 Conduct of funds during termination process

- (1) A private health insurer must not, after being notified under subsection 37(2) that termination of its health benefits funds has been approved:
 - (a) enter into an insurance policy that is referable to any of its funds with a person who is not already a holder of such a policy; or
 - (b) if the insurer is a for profit insurer—apply the assets of any of the funds except in accordance with subsection 28(2) (unless this paragraph has ceased to apply to the insurer because of section 45); or
 - (c) if the insurer is not a for profit insurer—become a for profit insurer.

- (2) The insurer must, within 60 days after being notified under subsection 37(2) that termination of its health benefits funds has been approved:
 - (a) give a written notice, stating the day (the **termination day**) from which it will not renew insurance policies that are referable to any of its funds, to:
 - (i) each policy holder of any of its funds; and
 - (ii) APRA; and
 - (b) notify the termination day in a national newspaper, or in a newspaper circulating in each jurisdiction where the insurer has its registered office or carries on business.

The termination day must not be earlier than 90 days after the insurer finishes giving notices under this subsection.

- (3) The insurer must not, on or after the termination day, renew any insurance policies that are referable to any of those funds.

- (4) The insurer must accept any valid claim for benefits under an insurance policy that is or was referable to any of those funds if the claim is made before the end of the period of 12 months following the expiry of the last policy that was referable to any of those funds.

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41 Insurers etc. to give reports to APRA

If APRA has approved the termination of the health benefits funds of a private health insurer:

- (a) the terminating manager; or
- (b) the insurer (if there is no terminating manager);

must, within 28 days after the end of the termination day, make a written report to APRA setting out details of the assets and liabilities of each of the funds as at that day.

42 Terminating managers displace management of funds

If a terminating manager of the health benefits funds of a private health insurer has been appointed, then, for so long as the appointment is in force and until the termination is completed:

- (a) the management of the fund vests in the terminating manager; and
- (b) any officer of the responsible insurer for the fund who was vested with the management of the fund immediately before the appointment is, by force of this section, divested of that management.

Subdivision C—Ending the termination of health benefits funds

43 Power to end termination

- (1) At any time during the termination of the health benefits funds of a private health insurer, the Federal Court may, on application, make an order ending the termination on a day specified in the order.
- (2) An application may be made by:
 - (a) APRA; or
 - (b) a terminating manager of the funds.
- (3) On such an application, the Federal Court may, before making an order, direct the terminating manager, or the private health insurer (if there is no terminating manager), to give a report with respect to a relevant fact or matter.

- (4) If the Federal Court has made an order ending the termination, the Court may give such directions as it considers appropriate for the resumption of the management and control of the health benefits funds of the private health insurer by its officers.

Subdivision D—Completing the termination of health benefits funds

44 Completion of the termination process

The termination of the health benefits funds of a private health insurer is completed if:

- (a) the period of 12 months referred to in subsection 40(4) has come to an end; and
- (b) so far as possible having regard to the extent of the assets of the funds:
 - (i) the liabilities of the funds to the policy holders of the funds have been discharged; and
 - (ii) any collapsed insurer assistance payments (within the meaning of section 54H of the *Australian Prudential Regulation Authority Act 1998*) made by APRA, for the purposes of any of the funds, have been repaid to APRA; and
 - (iii) any other liabilities of the funds have been discharged.

45 Distribution of remaining assets after completion of the termination process

If the termination of the funds is completed and, on the completion, there are assets of those funds, then:

- (a) if the insurer is a for profit insurer—paragraph 40(1)(b) ceases to apply to the insurer; or
- (b) if the insurer is not a for profit insurer—the insurer is liable to pay to APRA an amount equal to the value of those assets.

Note: Amounts received by APRA under paragraph (b) are required to be credited to the Risk Equalisation Special Account (see section 318-5 of the *Private Health Insurance Act 2007*).

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46 Liability of officers of insurers for loss to terminated funds

- (1) If:
- (a) a private health insurer contravenes this Act in relation to a health benefits fund that it conducts; and
 - (b) the contravention results in a loss to the fund; and
 - (c) the termination of the fund is completed;
- the persons who were officers of the insurer when the contravention occurred are jointly and severally liable to pay to APRA an amount equal to the amount of the loss.

Note: For relief from liability, see section 166.

- (2) A person is not liable under subsection (1) if the person proves that he or she used due diligence to prevent the occurrence of such a contravention.
- (3) On application by APRA, the Federal Court may order any person liable under subsection (1) to pay to APRA the whole or any part of the loss.

Note: Amounts received by APRA under this section are required to be credited to the Risk Equalisation Special Account (see section 318-5 of the *Private Health Insurance Act 2007*).

47 Reporting by terminating manager

- (1) A terminating manager:
- (a) must make a written report to APRA relating to the termination of the health benefits funds of a private health insurer as soon as practicable after the completion of the termination of the funds; and
 - (b) may, at any earlier time, make a written report to APRA relating to the termination of the funds.
- (2) A report under paragraph (1)(a) may include a recommendation that an application be made under section 48 for the winding up of the insurer.

48 Applying for winding up

- (1) If a report by a terminating manager under section 47 includes a recommendation that an application be made under this section for the winding up of a private health insurer, APRA, or the terminating manager, may apply to the Federal Court for an order that the insurer be wound up.
- (2) However, the terminating manager must not apply unless directed by APRA to apply.
- (3) On an application under subsection (1), the Federal Court may make an order that the insurer be wound up if the Court is satisfied that it is in the financial interests of the policy holders of the health benefits funds conducted by the insurer that such an order be made.
- (4) The winding up of the insurer is to be conducted in accordance with the *Corporations Act 2001*.

Division 6—External management of health benefits funds

Subdivision A—Preliminary

49 Purpose of Division

The purpose of this Division is to permit the business, affairs and property of a health benefits fund under external management to be managed in a way:

- (a) that maximises the chance that the policy holders of the fund continue to be covered for health insurance either by that fund or by another fund to which the business of that fund is transferred; or
- (b) if it is not possible for that coverage to be maintained—that, to the extent possible, safeguards the financial interests of those policy holders if the fund is terminated.

50 The basis of the law relating to external management

- (1) The external management of a health benefits fund is regulated:
 - (a) by the provisions of this Division; and
 - (b) by the provisions of Divisions 6, 7, 8, 10, 11, 13 and 16 of Part 5.3A of Chapter 5 of the *Corporations Act 2001* and of Division 7A of Part 5.6 of that Chapter, all applying, so far as they are capable of so doing, subject to such modifications as are set out in:
 - (i) this Act; or
 - (ii) APRA rules made for the purpose of this subparagraph.
- (2) A health benefits fund cannot be placed under external administration, or dealt with as a fund under external administration, except in accordance with this Part.
- (3) Subject to this Part, any provisions of a law of the Commonwealth, or of a State or Territory, that, but for this section, would relate to the external administration of such a fund cease, by force of this section, to apply in relation to the fund.

- (4) In the application of the provisions of the *Corporations Act 2001* referred to in subsection (1) in relation to the external management of a health benefits fund, those provisions apply as if:
 - (a) a reference to the company were a reference to the fund; and
 - (b) a reference to the administrator were a reference to the external manager of the fund appointed under this Act; and
 - (c) a reference to the Court were a reference to the Federal Court.
- (5) APRA rules referred to in subparagraph (1)(b)(ii) may provide for different modifications according to the nature of the health benefits fund that is to be, or that is being, administered.

Subdivision B—Appointment of external managers

51 APRA may appoint external managers

- (1) APRA may, in writing, appoint a person as the external manager of a health benefits fund if the requirements of subsections 52(1) and (2) are satisfied.
- (2) However, the person:
 - (a) must be registered, or taken to be registered, as an official liquidator under the *Corporations Act 2001*; and
 - (b) must not be a person who is:
 - (i) a policy holder of the fund; or
 - (ii) an appointed actuary of the fund; or
 - (iii) an auditor of the fund; or
 - (iv) a chargee of property of the fund; or
 - (v) an officer of a body corporate that is a chargee of property of the fund; or
 - (vi) a person who is otherwise related to the fund.
- (3) The appointment takes effect from the day specified in the instrument of appointment.

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52 Preconditions for appointment of external managers

- (1) APRA must not appoint an external manager to a health benefits fund unless APRA considers that the appointment of an external manager to the fund is, in the circumstances, in the interests of the policy holders of the fund.
- (2) In addition to subsection (1) being satisfied, APRA must not appoint an external manager to a health benefits fund unless:
 - (a) APRA is satisfied that the private health insurer conducting the fund has contravened:
 - (i) a prudential standard relating to capital adequacy or solvency that applies in relation to the fund; or
 - (ii) a direction given to the insurer under section 96 that relates to the fund; or
 - (b) a request for external management of the fund is made to APRA by a resolution of the directors of the insurer; or
 - (c) a ground specified in APRA rules, made for the purpose of this paragraph, applies in respect of the fund.

53 External managers to displace management of funds

If a person is appointed as external manager of a health benefits fund, then, for so long as the fund is under external management:

- (a) the management of the fund vests in the external manager; and
- (b) any officer of the responsible insurer for the fund who was vested with the management of the fund immediately before the appointment of the external manager is, by force of this section, divested of that management.

Subdivision C—Duties and powers of external managers

54 Duties of external managers

- (1) The main duties of the external manager of a health benefits fund are:
 - (a) to examine the business, affairs and property of the fund; and
 - (b) to ascertain the assets and liabilities of the fund; and

- (c) if the business of the fund has been mixed with other business of the private health insurer concerned—to apportion the assets and liabilities as between the fund and that other business; and
 - (d) to form an opinion as to which course of action maximises the chance that the policy holders of the fund continue to be covered for health insurance either by that fund or by another fund to which the business of that fund is transferred; and
 - (e) to make a final written report to APRA, in accordance with Subdivision E, recommending that course of action.
- (2) In the day-to-day administration of a health benefits fund, it is the duty of the external manager to administer the fund as efficiently and economically as possible.

55 Additional powers of external managers

- (1) In the application of the provisions of Division 8 of Part 5.3A of Chapter 5 of the *Corporations Act 2001*, for the purpose of:
- (a) conferring further powers on the external manager of a health benefits fund; and
 - (b) where appropriate, qualifying the exercise of those powers;
- the provisions of that Division are taken not to include section 442A or subsection 442D(1).
- (2) For the purposes of section 442F of the *Corporations Act 2001* as so applying, sections 128 and 129 of that Act are also taken to apply, subject to such modifications as are specified in APRA rules made for the purpose of this subsection.

56 Protection of property during external management

- (1) In the application of the provisions of Division 6 of Part 5.3A of Chapter 5 of the *Corporations Act 2001* in relation to the protection, during the external management of a health benefits fund, of the property of the fund, the provisions of that Division are taken not to include section 440A.
- (2) In determining, for the purposes of section 440D of the *Corporations Act 2001* as so applying, whether the external

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manager should consent to, or the court should give leave for, a person's beginning or continuing legal proceedings, the external manager or the court must have regard to whether:

- (a) the proceedings do, or do not, relate to any property of the fund under external management; and
- (b) the proceedings would, or would not, be materially detrimental to the interests of the policy holders of the fund.

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

- (1) In the application of the provisions of Division 7 of Part 5.3A of Chapter 5 of the *Corporations Act 2001* in relation to the property of a health benefits fund under external management:
 - (a) the provisions of that Division are taken not to include section 441A; and
 - (b) subsection 441D(1) is taken not to include the words following paragraph 441D(1)(b).
- (2) Nothing in that Division as so applying prevents:
 - (a) the external manager of a health benefits fund giving written consent; or
 - (b) the court giving leave;for the enforcement of a charge, subject to any condition specified by the external manager or by the court, as the case requires, if the external manager or the court is satisfied:
 - (c) that the charge does not relate to the property of the fund under external management; and
 - (d) that the enforcement of the charge will not be materially detrimental to the interests of the policy holders of the fund.

Subdivision D—Procedure relating to voluntary deeds of arrangement

58 Matters that may be included in APRA rules

- (1) APRA rules may provide for all or any of the following:

- (a) the convening by external managers of health benefits funds of meetings of creditors of those funds, and the policy holders of the funds, to consider the possibility of the responsible insurers for those funds executing voluntary deeds of arrangement;
 - (b) the procedure for convening such meetings (including the giving of notices);
 - (c) the conduct of such meetings;
 - (d) the matters that may be decided at such meetings;
 - (e) the circumstances in which the external managers must include in their reports to APRA under section 59, recommendations arising out of decisions taken at such meetings;
 - (f) the kinds of such recommendations that may be included in those reports;
 - (g) the actions that APRA may take if such recommendations are included in those reports.
- (2) This section does not limit the matters that may be included in APRA rules for the purposes of any other provision of this Part.

Subdivision E—External managers’ reports to APRA

59 External managers to give reports to APRA

- (1) As soon as practicable after being appointed as external manager of a health benefits fund, and in any case within the period under subsection (2), the external manager must:
 - (a) conclude the examination of the business, affairs and property of the fund; and
 - (b) make a final written report to APRA.
- (2) The period is:
 - (a) the 3 months after being appointed as external manager; or
 - (b) such longer period as APRA determines in writing.
- (3) The external manager must, in the report to APRA:
 - (a) recommend a course of action that, in the external manager’s opinion, maximises, in the circumstances, the chance that the

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policy holders of the fund continue to be covered for health insurance either by that fund or by another fund to which the business of that fund is transferred; and

- (b) set out the reasons for that recommendation.
- (4) Without limiting subsection (3), the external manager may recommend:
- (a) subject to the Federal Court's making an order or orders in relation to the matter, that the responsible insurer for the fund implement a scheme of arrangement concerning the business of the fund; or
 - (b) subject to the Court's making an order or orders in relation to the matter, that a terminating manager of the health benefits funds of the responsible insurer be appointed; or
 - (c) that the external management cease and that the business of the fund be resumed by the responsible insurer for the fund.
- (5) However, if APRA rules made for the purpose of this subsection so provide, the external manager must recommend that APRA approve the execution of a voluntary deed of arrangement.
- (6) Without limiting the matters that may be dealt with in a scheme of arrangement referred to in paragraph (4)(a), such a scheme may provide for:
- (a) the continuance, on terms or conditions set out in the scheme, of the business of the fund; or
 - (b) the transfer of the fund, on terms set out in the scheme, to a private health insurer other than the responsible insurer for the fund; or
 - (c) the execution of a deed in the same terms as a proposed voluntary deed of arrangement rejected at a meeting of a kind referred to in section 58.

60 Dealing with reports given to APRA

Deciding what to do in relation to a recommendation

- (1) For the purpose of deciding what to do in relation to a recommendation under subsection 59(3), APRA may:
 - (a) request the external manager to provide further information on any matter; and
 - (b) engage any person to assist it in evaluating assessments made, or projections relied on, by the external manager in relation to matters dealt with in the report.

APRA must have regard to the external manager's report, and to any additional information provided by the external manager or by any person engaged to assist APRA, in reaching its decision.

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

- (2) If APRA is satisfied that a course of action recommended by the external manager under subsection 59(3) will, in the circumstances, be in the interests of the policy holders of the fund, APRA must, by written notice, inform the external manager to that effect.

Note: If APRA is satisfied with a recommendation that the external management cease, then the external management ends when notice is given under this subsection (see paragraph 62(2)(c)).

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

- (3) If the course of action in relation to which APRA is satisfied as mentioned in subsection (2) is a course of action specified in paragraph 59(4)(a), APRA must, in writing, direct the external manager to apply under subsection 61(1) to give effect to the course of action.
- (4) If the course of action in relation to which APRA is satisfied as mentioned in subsection (2) is termination of the funds of the private health insurer in question, APRA must, in writing, direct the external manager to apply under subsection 66(1) for the appointment of a terminating manager of the funds.

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- (5) APRA rules may provide for what is to be done if the course of action in relation to which APRA is satisfied as mentioned in subsection (2) is a course of action that is not of a kind specified in subsection 59(4) or (5).

If APRA is not satisfied with a recommended course of action

- (6) If APRA is not satisfied as mentioned in subsection (2), APRA may take a different course of action that APRA is satisfied will, in the circumstances, be in the interests of policy holders of the fund.
- (7) The courses of action that APRA may take under subsection (6) include:
- (a) APRA applying to the Federal Court for an order or orders in relation to the responsible insurer for the fund implementing a scheme of arrangement concerning the business of the fund; and
 - (b) APRA applying to the Court for an order or orders for the appointment of a terminating manager of the health benefits funds of the responsible insurer.

61 Federal Court orders in respect of schemes of arrangement

- (1) If, under subsection 60(3), APRA directs the external manager to apply under this subsection to give effect to a course of action specified in paragraph 59(4)(a), the external manager must apply to the Federal Court for an order or orders to give effect to the course of action.

Note: For what is to happen if the course of action is to be termination of a fund, see subsection 66(1).

- (2) On an application to the Federal Court under subsection (1) of this section, or under paragraph 60(7)(a):
- (a) APRA and any other person interested are entitled to be heard; and
 - (b) the Federal Court may make such order or orders in respect of the course of action the subject of the application as it considers to be, in all the circumstances, in the interests of the policy holders of the health benefits fund concerned.

Subdivision F—Miscellaneous

62 When an external management begins and ends

- (1) The external management of a health benefits fund begins when an external manager is appointed under section 51 to administer the fund.
- (2) The external management of a health benefits fund ends when:
 - (a) APRA terminates the appointment of the external manager and does not appoint a replacement external manager; or
 - (b) a voluntary deed of arrangement relating to the fund is executed; or
 - (c) 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
 - (d) the Federal Court makes an order or orders under section 61 for a course of action approved by APRA and incorporated in a scheme of arrangement; or
 - (e) a terminating manager of the fund is appointed.

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

A payment made, transaction entered into, or other act or thing done, in good faith, by, or with the consent of, the external manager of a health benefits fund:

- (a) is valid and effectual for the purposes of this Act and the *Private Health Insurance Act 2007*, and for the purposes of the *Corporations Act 2001* as it applies in relation to the fund; and
- (b) is not liable to be set aside in a termination of the fund.

64 Disclaimer of onerous property

- (1) In the application of the provisions of Division 7A of Part 5.6 of Chapter 5 of the *Corporations Act 2001* for the purpose of determining the power of an external manager of a health benefits

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fund to disclaim property of the fund, those provisions have effect as if:

- (a) the external manager were the liquidator of the company that the fund is taken to constitute; and
 - (b) the references in subsections 568B(3) and 568E(5) of that Act to the company's creditors were references to the policy holders of the fund.
- (2) A disclaimer by an external manager of a health benefits fund has the same effect, and the external manager is under the same obligations, for the purposes of this Act, as if the disclaimer had been made under Division 7A of Part 5.6 of Chapter 5 of the *Corporations Act 2001*.

65 Application of provisions of Corporations Act

Regulations etc. under the Corporations Act

- (1) A reference in an application provision to an applied Corporations Act provision includes (unless the contrary intention appears) a reference to any regulations or other instruments in force for the purposes of that provision, or any of those provisions, of the *Corporations Act 2001*.

Note: So, for example, a provision of this Act that applies a particular provision of the *Corporations Act 2001* also applies any regulations that have effect for the purposes of that provision (unless a contrary intention appears).

- (2) An **application provision** is a provision of this Division that:
- (a) provides for the application of a provision, or a group of provisions (including a Chapter, Part, Division or Subdivision), of the *Corporations Act 2001*; or
 - (b) refers to a provision, or group of provisions, of the *Corporations Act 2001* as so applied.
- (3) An **applied Corporations Act provision** is a provision, or a provision in a group of provisions, of the *Corporations Act 2001* that is applied as mentioned in paragraph (2)(a).

Modifications under APRA rules

- (4) If an application provision contains a power for APRA rules to modify an applied Corporations Act provision the power extends to modifying any regulations or other instruments, in force for the purposes of that provision of the *Corporations Act 2001*, that are applied as a result of subsection (1).
- (5) The fact that provision is made in this Act for a specific modification of one or more applied Corporations Act provisions does not imply that further modifications of that provision, or any of those provisions, consistent with that specific modification, should not be made by APRA rules.

Corporations Act definitions and interpretation principles

- (6) The definitions and interpretation principles that have effect in or under the *Corporations Act 2001* have the same effect in relation to:
 - (a) an applied Corporations Act provision; or
 - (b) a provision of regulations or another instrument that is applied as a result of subsection (1);as that provision applies for the purposes of a provision of this Division, unless a contrary intention appears in an application provision or in a modification made by APRA rules.

Things that may be done under regulations under the Corporations Act

- (7) If an applied Corporations Act provision allows something to be done in or by regulations, then:
 - (a) APRA rules may do that thing for the purposes of the applied Corporations Act provision; and
 - (b) if they do, any regulations or instruments that are applied as a result of subsection (1) are ineffective, for the purposes of this Division, to the extent that they are inconsistent with the provisions of APRA rules that do that thing.

Division 7—Ordering the termination of health benefits funds

66 Applications by external managers to the Federal Court

- (1) If, under subsection 60(4), APRA directs the external manager to apply under this subsection for the appointment of a terminating manager of the health benefits funds of a private health insurer, the external manager must apply to the Federal Court for an order or orders to give effect to such an appointment.
- (2) APRA and any other person likely to be affected by the termination of the funds are entitled to be heard on the application.

67 Orders made on applications for appointments of terminating managers

- (1) On an application under subsection 66(1), or under paragraph 60(7)(b), the Federal Court may make an order for the appointment of a terminating manager of the health benefits funds of a private health insurer, and any related orders.
- (2) However, the Federal Court must not make an order for the appointment of a terminating manager unless it is satisfied that doing so will, in the circumstances, be in the interests of the policy holders of the funds.

68 Notice of appointments

If the Federal Court orders the appointment of a terminating manager of the health benefits funds of a private health insurer, APRA must give the insurer written notice of the person appointed as the terminating manager.

69 Application of other provisions if Federal Court orders appointment of a terminating manager

If the Federal Court orders the appointment of a terminating manager of the health benefits funds of a private health insurer,

then, subject to any other orders made by the Court, 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).

Division 8—External managers and terminating managers

Subdivision A—Powers of managers

70 Powers of managers

- (1) While a health benefits fund is under external management or terminating management, the manager has power, in the interests of the policy holders of the fund:
 - (a) to control the business, affairs and property of the fund; and
 - (b) to carry on the business of the fund, and to manage the affairs and property of the fund; and
 - (c) to terminate or dispose of all or any part of the business, and to dispose of all or any part of the property, of the fund; and
 - (d) to execute a document, bring or defend proceedings, or do any other thing, in the name of the responsible insurer for the fund, for the purposes of the business of the fund; and
 - (e) to appoint a lawyer to assist him or her in his or her duties; and
 - (f) to appoint an agent to do any business that the manager is unable to do, or that it is unreasonable to expect the manager to do, in person; and
 - (g) to perform or exercise any other function or power that the insurer or any of its officers or employees could perform or exercise in relation to the conduct of the fund if the fund were not under external management or terminating management.
- (2) The rights of the following:
 - (a) the insurer;
 - (b) any of the insurer's officers or employees;
 - (c) an external administrator of any of the assets of the fund;to perform or exercise any of the functions or powers mentioned in subsection (1) in relation to the fund are suspended while the fund is under external management or terminating management. However, such a person may exercise powers or functions with the manager's written approval.

- (3) Nothing in this Division or in section 42 or 53 is taken to imply that an officer or employee of the insurer, or an external administrator, ceases to be an officer or employee, or an external administrator.

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

A person commits an offence if:

- (a) a health benefits fund is under external management or terminating management; and
- (b) the person is not the manager of the fund; and
- (c) the person performs or exercises in relation to the fund, or purports to perform or exercise in relation to the fund, a function or power as:
 - (i) an officer of the responsible insurer for the fund; or
 - (ii) an external administrator of any of the assets of the fund; and
- (d) the person does so without the manager's written approval; and
- (e) the function or power is one that the manager has power to exercise or perform.

Penalty: Imprisonment for 12 months or 60 penalty units, or both.

Note: If a body corporate is convicted of an offence against this section, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the penalty stated above.

72 Managers act as agents of private health insurers

- (1) When exercising a power as manager of a health benefits fund, the manager is taken to be acting as the agent of the responsible insurer for the fund.
- (2) To avoid doubt, subsection (1) does not confer on the responsible insurer for the fund power to direct the manager in the exercise of his or her powers.

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

73 Directors etc. to help managers

- (1) As soon as practicable after the external management or terminating management of a health benefits fund begins, each director of the responsible insurer for the fund must:
 - (a) deliver to the manager all records in the director's possession that relate to the business of the fund; and
 - (b) if the director knows of the locality of other records relating to the business of the fund—tell the manager of that locality.
- (2) The directors and other officers of the responsible insurer for the fund must give the manager a statement about the business, property, affairs and financial circumstances of the fund. The statement must be given to the manager within 7 days after the external management or terminating management begins, or such longer period as the manager determines in writing.
- (3) The statement must comply with any requirements of the manager as to its form and contents.
- (4) A director or other officer of the responsible insurer for the fund must:
 - (a) attend on the manager at such times; and
 - (b) give the manager such information about the business, property, affairs and financial circumstances of the fund; as the manager reasonably requires.
- (5) A person commits an offence if:
 - (a) the person is required, by or under subsection (1), (2), (3) or (4), to do something; and
 - (b) the person does not comply with the requirement.

Penalty: 30 penalty units.

Note: If a body corporate is convicted of an offence against this subsection, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the penalty stated above.

- (6) Subsection (1) does not apply if the person is entitled to retain possession of the records, as against the manager and the responsible insurer for the fund.

Note: A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the *Criminal Code*).

74 Managers' rights to certain records

- (1) A person is not entitled, as against the manager of a health benefits fund:
- (a) to retain possession of records of the responsible insurer for the fund; or
 - (b) to claim or enforce a lien on such records;
- but such a lien is not otherwise prejudiced.
- (2) Paragraph (1)(a) does not apply in relation to records of which a secured creditor of the responsible insurer for the fund is entitled to possession otherwise than because of a lien. However, the manager is entitled to inspect, and make copies of, such records at any reasonable time.
- (3) The manager of a health benefits fund may, by written notice to a person, require the person to deliver to the manager, as specified in the notice, records so specified that are in the person's possession.
- (4) A notice under subsection (3) must specify a period of at least 3 days as the period within which the notice must be complied with.
- (5) A person commits an offence if:
- (a) the person is given a notice under subsection (3); and
 - (b) the person fails to comply with the notice.

Penalty: 30 penalty units.

Note: If a body corporate is convicted of an offence against this subsection, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the penalty stated above.

- (6) Subsection (5) does not apply if the person is entitled to retain possession of the records, as against the manager and the responsible insurer for the fund.

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Note: A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the *Criminal Code*).

75 Only manager can deal with property of fund under management

- (1) A transaction or dealing affecting the property of a health benefits fund that is entered into, while the fund is under external management or terminating management, by the responsible insurer for the fund (or by a person purportedly on behalf of the fund or the responsible insurer), is void unless:
 - (a) the transaction or dealing has been entered into by the manager of the fund; or
 - (b) the manager consented to the transaction or dealing before it was entered into; or
 - (c) the transaction or dealing was entered into by order of the Federal Court or of the Supreme Court of a State or Territory.
- (2) Subsection (1) does not apply to a payment that an ADI makes, out of an account kept with the ADI by the responsible insurer for the fund, that is made:
 - (a) in good faith and in the ordinary course of the ADI's banking business; and
 - (b) after the external management or terminating management began but on or before the day on which:
 - (i) the manager gives to the ADI written notice of the appointment that began the external management or terminating management; or
 - (ii) the manager notifies the appointment in a national newspaper, or in a newspaper circulating in each jurisdiction where the responsible insurer has its registered office or carries on business;whichever happens first.
- (3) Subsection (1) has effect subject to any order that the Federal Court makes after the purported transaction or dealing.
- (4) A person commits an offence if:
 - (a) the person is:

- (i) an officer of the responsible insurer for a health benefits fund under external management or terminating management; or
 - (ii) an external administrator of any of the assets of the fund; and
- (b) the person:
- (i) purported to enter into a transaction or dealing on behalf of the responsible insurer; or
 - (ii) was in any way, by act or omission, directly or indirectly concerned in, or party to, a transaction or dealing; and
- (c) the transaction or dealing is, because of the operation of subsection (1), void, or would be void apart from subsection (3).

Penalty: Imprisonment for 12 months or 60 penalty units, or both.

Note: If a body corporate is convicted of an offence against this subsection, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the penalty stated above.

76 Order for compensation where officer involved in void transaction

- (1) If:
- (a) a court finds a person guilty of an offence against subsection 75(4); and
 - (b) the court is satisfied that the health benefits fund under external management or terminating management to which the offence relates has suffered loss or damage because of the act or omission constituting the offence;
- the court may (whether or not it imposes a penalty) order the person to pay compensation of such amount as the order specifies to the responsible insurer for the fund.
- (2) An order under subsection (1) may be enforced as if it were a judgment of the court.

Note: For relief from liability, see section 166.

Subdivision C—Provisions incidental to appointment of managers

77 Remuneration and allowances of managers

Remuneration and allowances of terminating managers appointed under Division 7

- (1) APRA may, in writing, determine the remuneration and allowances that a terminating manager appointed under Division 7 is to receive. However, APRA cannot make such a determination if an order of the Federal Court under section 67 determines the manager's remuneration and allowances.

Source of funds for payment of remuneration and allowances of external managers and terminating managers

- (2) Subject to any order made by the Federal Court under section 67, and to any determination made by APRA under subsection (3) of this section, the remuneration and allowances of an external manager or terminating manager are to be paid out of the assets of the health benefits fund under external management or terminating management.
- (3) APRA may, in writing, determine that a particular person is to pay the remuneration and allowances of an external manager or terminating manager. However APRA cannot make such a determination for a terminating manager appointed under Division 7 if an order of the Federal Court under section 67 determines who is to pay the remuneration and allowances.

78 Directions to managers

Directions to managers (other than terminating managers appointed under Division 7)

- (1) APRA may, by written notice to a manager (other than a terminating manager appointed under Division 7) give the manager directions concerning:
 - (a) the exercise of the powers that are vested in the manager; or

- (b) the provision to APRA, from time to time, of interim reports relating to the business of the health benefits fund under external management or terminating management.
- (2) Directions under subsection (1) will ordinarily be of a general nature but may, where appropriate, take into account specific circumstances relevant to the particular health benefits fund under external management or terminating management.

Directions to terminating managers appointed under Division 7

- (3) The Federal Court may, by order, give to a terminating manager appointed under Division 7 directions concerning:
 - (a) the exercise of the powers that are vested in the manager; or
 - (b) the provision to APRA, from time to time, of interim reports relating to the business of the health benefits fund under external management or terminating management.
- (4) Orders under subsection (3) may be made on application by:
 - (a) APRA; or
 - (b) a terminating manager appointed under Division 7.

Obligation to comply with directions

- (5) A manager must comply with any directions given to him or her under subsection (1) or (3).

79 Termination of appointments of managers

- (1) APRA may, at any time, by written notice given to a manager, terminate the appointment of the manager with effect from the day specified in the notice. When the termination takes effect:
 - (a) the manager is divested of the functions and powers referred to in subsection 70(1); and
 - (b) all of the other functions and powers of the manager in relation to the fund cease.
- (2) If APRA terminates the appointment of an external manager, it may, in writing, appoint another external manager to carry on the external management.

Section 80

- (3) If APRA terminates the appointment of a terminating manager, it must, in writing, appoint another terminating manager to carry on the terminating management, unless:
- (a) the Federal Court has ordered under section 43 an end to the termination of the health benefits funds in question; or
 - (b) the termination of those funds has been completed, and the terminating manager has reported to APRA in accordance with paragraph 47(1)(a).
- (4) If APRA terminates the appointment of a manager of a health benefits fund but does not appoint another manager as mentioned in subsection (2) or (3), then:
- (a) subsection 70(2) ceases to have effect; and
 - (b) officers, employees and external administrators may resume performing or exercising powers and functions in relation to the fund, subject to any directions made by the Federal Court under subsection 43(4).

Note: In the case of terminating the appointment of a terminating manager, this subsection is not intended to imply that APRA has a discretion not to appoint another terminating manager, if subsection (3) requires another terminating manager to be appointed.

80 Acts of managers valid etc.

- (1) The acts of the manager of a health benefits fund are valid despite any defects that may afterwards be discovered in his or her appointment.
- (2) Despite any defect or irregularity affecting the validity of the appointment of the manager of a health benefits fund:
- (a) a conveyance, assignment, transfer, mortgage or charge of assets of the fund; or
 - (b) a payment of money of the fund; or
 - (c) any other disposition of assets of the fund;
- is valid in favour of any person taking such assets in good faith and for value and without actual knowledge of the defect or irregularity.

- (3) Despite any defect or irregularity affecting the validity of the appointment of the manager of a health benefits fund, a person making or permitting:
- (a) a payment of money of the fund; or
 - (b) any other disposition of assets of the fund;
- is to be protected and indemnified in so doing if the person does not have actual knowledge of the defect or irregularity.

81 Indemnity

The manager of a health benefits fund is not subject to any action, claim or demand by, or liable to, any person in respect of anything done or omitted to be done in good faith in, or in connection with, the exercise of the powers conferred on the manager by this Act.

82 Qualified privilege

The manager of a health benefits fund has qualified privilege in respect of a statement that he or she makes, whether orally or in writing, in the course of his or her duties as manager.

Subdivision D—Miscellaneous

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

If:

- (a) for any purpose (for example, the purposes of a law, agreement or instrument) an act must or may be done within a particular period or before a particular time; and
- (b) this Division, or Division 5 or 6, prevents the act from being done within that period or before that time;

the period is extended, or the time is deferred, because of this section, according to how long this Division, or Division 5 or 6, prevented the act from being done.

Section 84

84 Continued application of other provisions of Act

- (1) The appointment of a person as the external manager of a health benefits fund does not affect the continued operation of provisions of this Act (other than Division 6), or of the *Private Health Insurance Act 2007*:
 - (a) in relation to the fund; or
 - (b) in relation to the rights and obligations of persons in relation to the responsible insurer for the fund.
- (2) The appointment of a person as the terminating manager of a health benefits fund does not affect the continued operation of provisions of this Act (other than Division 5 or 7), or of the *Private Health Insurance Act 2007*:
 - (a) in relation to the fund; or
 - (b) in relation to the rights and obligations of persons in relation to the responsible insurer for the fund.

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

- (1) APRA rules may set out modifications of this Act, or the *Private Health Insurance Act 2007*, relating to how Chapter 3 of the *Private Health Insurance Act 2007* applies in relation to health benefits funds for which:
 - (a) external managers have been appointed under Division 6 of this Part; or
 - (b) terminating managers have been appointed under Division 5 or 7 of this Part.
 - (2) APRA rules may provide for different such modifications according to the nature of the health benefits funds concerned.
 - (3) The modifications cannot:
 - (a) modify a provision of this Act that creates an offence; or
 - (b) include new provisions that create offences.
 - (4) Before making APRA rules for the purposes of this section, APRA must consult the Health Secretary. However, a failure to consult the Health Secretary does not affect the validity of such rules.
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Note: This consultation requirement also applies to any repeal or amendment of such rules (see subsection 33(3) of the *Acts Interpretation Act 1901*).

- (5) This Act and the *Private Health Insurance Act 2007* have effect subject to the modifications.

86 Order of Federal Court to be binding on all persons

An order of the Federal Court made under this Division, or Division 5, 6 or 7, relating to any matter, is binding on all persons and has effect despite anything in the constitution or rules of a private health insurer to which the order may relate.

87 APRA rules dealing with various matters

APRA rules may:

- (a) make provision for, or in relation to, any of the following matters in relation to meetings required or permitted to be held by Division 6, or by provisions of APRA rules:
 - (i) the convening, conduct of, and procedure at, a meeting;
 - (ii) voting at a meeting (including proxy voting);
 - (iii) the number of persons that constitutes a quorum at a meeting;
 - (iv) the sending of notices to persons entitled to attend a meeting;
 - (v) the lodging of copies of notices of, or resolutions passed at, a meeting; and
- (b) make provision relating to the form and contents of any document or instrument required or permitted to be given to APRA, or to an external manager or terminating manager of a health benefits fund, by a provision of Division 5 or 6.

Division 9—Duties and liabilities of directors etc.

88 Notices to remedy contraventions

- (1) If a private health insurer has contravened this Part, APRA may, by written notice to the insurer, require the insurer, within a specified period, to take such action as is specified in the notice to remedy the contravention.
- (2) The period specified in the notice must end at least one month after the giving of the notice. APRA may extend the period by written notice to the insurer.
- (3) The action to be specified in the notice is such action as APRA considers appropriate and reasonable to overcome the effects of the contravention.

89 Liability of directors in relation to non-compliance with notices

- (1) If:
 - (a) APRA has given a notice to a private health insurer under section 88 in respect of a contravention of this Part; and
 - (b) the contravention has resulted in a loss to a health benefits fund; and
 - (c) the insurer has failed to comply with the notice within the period specified in it, or within that period as extended under subsection 88(2);the persons who were the directors of the insurer when the contravention occurred are jointly and severally liable to pay the insurer an amount equal to the amount of the loss.
- (2) A person is not liable under subsection (1) if the person proves that he or she used due diligence to ensure that the insurer complied with the notice.
- (3) An action to recover an amount for which a person is liable under subsection (1) may be brought:
 - (a) by the insurer; or

- (b) with the written approval of APRA, by a policy holder of the health benefits fund involved.

Note: For relief from liability, see section 166.

- (4) An approval under subsection (3) may be given subject to conditions relating to the persons, or the number of persons, who may join in the action as plaintiffs.
- (5) An approval under subsection (3) is not a legislative instrument.

90 APRA may sue in the name of private health insurers

If APRA considers that it is in the interests of the policy holders of a health benefits fund to do so, APRA may bring an action against a person in the name, and for the benefit, of a private health insurer for the recovery of an amount that the insurer is entitled to recover under this Division.

Part 4 Prudential standards and directions

Division 1 Introduction

Section 91

Part 4—Prudential standards and directions

Division 1—Introduction

91 Simplified outline of this Part

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.

Division 2—Prudential standards

92 Prudential standards

APRA may make prudential standards

- (1) Subject to subsection (8), APRA may, in writing, make standards (***prudential standards***), relating to prudential matters, that must be complied with by, or in relation to, private health insurers.
- (2) ***Prudential matters***, in relation to a private health insurer, are matters relating to:
 - (a) the conduct of the affairs of the insurer in such a way as:
 - (i) to keep the insurer in a sound financial position; or
 - (ii) not to cause or promote instability in the Australian private health insurance system; or
 - (b) the conduct of the affairs of the insurer with integrity, prudence and professional skill.

The private health insurers to which a prudential standard applies

- (3) A prudential standard may be expressed to apply in relation to:
 - (a) all private health insurers; or
 - (b) a specified class of private health insurers only; or
 - (c) one or more specified private health insurers only.

Prudential standards may provide for APRA to exercise powers and discretions

- (4) A prudential standard may provide for APRA to exercise powers and discretions under the standard, including but not limited to discretions to approve, impose, adjust or exclude specific prudential requirements in relation to a particular private health insurer.

Variation and revocation of prudential standards

- (5) APRA may, in writing, vary or revoke a prudential standard.

Section 92

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

- (6) A prudential standard referred to in paragraph (3)(a) or (b), or an instrument varying or revoking such a prudential standard, is a legislative instrument. However, a prudential standard referred to in paragraph (3)(c), or an instrument varying or revoking such a prudential standard, is not a legislative instrument.

Note 1: Paragraph (3)(c) covers prudential standards that are expressed to apply in relation to one or more specified private health insurers only. Section 93 applies to these prudential standards.

Note 2: A decision to make, vary or revoke a prudential standard referred to in paragraph (3)(c) is reviewable under section 168.

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

- (7) A prudential standard may provide for a matter by applying, adopting or incorporating, with or without modification, any matter contained in an instrument or other writing as in force or existing from time to time, despite:
- (a) section 46AA of the *Acts Interpretation Act 1901*; and
 - (b) section 14 of the *Legislative Instruments Act 2003*.

Prudential standards may not do certain things

- (8) To avoid doubt, prudential standards may not do the following:
- (a) create an offence or civil penalty;
 - (b) provide powers of:
 - (i) arrest or detention; or
 - (ii) entry, search or seizure;
 - (c) impose a tax;
 - (d) set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act;
 - (e) directly amend the text of this Act.

Delegation of power to make etc. prudential standards

- (9) APRA may, under section 15 of the *Australian Prudential Regulation Authority Act 1998*, delegate the power to make, vary or revoke prudential standards, but only if the delegation is to:
- (a) an APRA member (within the meaning of that Act); or
 - (b) an APRA staff member who is an executive general manager or equivalent.

93 Additional matters in relation to standards that are not legislative instruments

- (1) A prudential standard referred to in paragraph 92(3)(c), or an instrument varying or revoking such a standard, has effect:
- (a) from the day on which the standard or instrument is made; or
 - (b) if the standard or instrument specifies a later day—from that later day.
- (2) If APRA makes, varies or revokes a prudential standard referred to in paragraph 92(3)(c), it must, as soon as practicable:
- (a) in the case of making a standard—give a copy of the standard to each private health insurer to which the standard applies; or
 - (b) in the case of varying a standard—give a copy of the variation to:
 - (i) each private health insurer to which the standard (as in force before the variation) applied; and
 - (ii) any other private health insurer to which the standard will (because of the variation) apply; or
 - (c) in the case of revoking a standard—give notice of the revocation to each private health insurer to which the standard (as in force before the revocation) applied.

94 Compliance with prudential standards

A private health insurer must comply with prudential standards that apply in relation to the insurer.

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

- (1) A private health insurer commits an offence if:
- (a) the insurer becomes aware of:
 - (i) a contravention by it of a prudential standard, other than a contravention that is merely of a minor or technical nature; or
 - (ii) any other matter or occurrence that materially affects its financial position; and
 - (b) the insurer fails to notify APRA, as soon as practicable, in writing of the contravention or of the other matter or occurrence.

Penalty: 30 penalty units.

Note: If a body corporate is convicted of an offence against this subsection, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the penalty stated above.

- (2) A notification given to APRA of a matter referred to in paragraph (1)(a) must not include personal information relating to a person insured under a complying health insurance product that is referable to a health benefits fund conducted by the insurer, unless the information relates to prudential matters relating to the insurer.

Division 3—Directions

96 APRA’s power to give directions

- (1) APRA may give a private health insurer a direction of a kind specified in section 97 if APRA reasonably believes that:
- (a) the insurer has contravened:
 - (i) an enforceable obligation; or
 - (ii) a provision of the *Financial Sector (Collection of Data) Act 2001*; or
 - (b) the insurer:
 - (i) is likely to contravene an enforceable obligation, or a provision referred to in subparagraph (a)(ii); and
 - (ii) the contravention is likely to give rise to a prudential risk; or
 - (c) the direction is necessary in the interests of policy holders, or prospective policy holders, of the insurer; or
 - (d) the insurer is, or is about to become, unable to meet its liabilities; or
 - (e) there is, or there might be, a material risk to the security of the insurer’s assets; or
 - (f) there has been, or there might be, a material deterioration in the insurer’s financial condition; or
 - (g) the insurer is conducting its affairs in an improper or financially unsound way; or
 - (h) the failure to issue a direction would materially prejudice the interests of policy holders or prospective policy holders of the insurer; or
 - (i) the insurer is conducting its affairs in a way that may cause or promote instability in the Australian private health insurance system.

Note: A decision to give a direction on a ground specified in paragraph (1)(a), (b) or (c) is reviewable under section 168.

- (2) A direction must:
- (a) be given by written notice to the private health insurer; and

Section 97

- (b) specify the ground referred to in subsection (1) because of which the direction is given.

Note: Two or more directions may be given in the same notice.

- (3) A direction under subsection (1) may deal with the time by which, or period during which, it is to be complied with.

97 The kinds of direction that may be given

- (1) The kinds of direction that a private health insurer may be given under section 96 are directions to do any one or more of the following:
 - (a) to comply with all, or specified:
 - (i) enforceable obligations; or
 - (ii) provisions of the *Financial Sector (Collection of Data) Act 2001*; or
 - (b) to remove an officer of the insurer from office;
 - (c) 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;
 - (d) to appoint a person as an officer of the insurer for such term as APRA directs;
 - (e) 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;
 - (f) not to give financial accommodation to any person;
 - (g) not to issue or renew any policy, undertake any liability under any policy or collect any premium;
 - (h) not to borrow any amount;
 - (i) not to accept any payment on account of share capital, except payments in respect of calls that fell due before the direction was given;
 - (j) not to repay any amount paid on shares;
 - (k) not to pay a dividend on any shares;
 - (l) not to discharge any policy or other liability;
 - (m) not to transfer any asset;

- (n) not to pay or transfer any amount to any person, or create an obligation (contingent or otherwise) to do so;
 - (o) not to undertake any financial obligation (contingent or otherwise) on behalf of any other person;
 - (p) to hold, or otherwise deal in a specified way, with a specified amount of capital;
 - (q) to provide, or further provide, in its accounts for the purposes of this Act, 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;
 - (r) to order an actuarial investigation of the affairs of the insurer, at the expense of the insurer, by an actuary chosen by APRA;
 - (s) 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;
 - (t) to modify the rules of the insurer;
 - (u) 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;
 - (v) 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 this Act and in the interests of the policy holders of the fund.
- (2) A direction referred to in paragraph (1)(m) or (n) does not apply to the payment or transfer of money pursuant to an order of a court or a process of execution.
- (3) Without limiting subsection (1), a direction referred to in a paragraph of that subsection may:
- (a) deal with some only of the matters referred to in the paragraph; or
 - (b) deal with a particular class or particular classes of those matters; or
 - (c) make different provision with respect to different matters or different classes of matters.
-

98 Power to comply with a direction

A private health insurer has power to comply with a direction under section 96 despite anything in its constitution or rules or any contract or arrangement to which it is a party.

99 Varying or revoking a direction

- (1) APRA may, by written notice to a private health insurer, vary a direction given to the insurer under section 96 if, at the time of the variation, APRA considers that the variation is necessary or appropriate.

Note: A decision to vary, or to refuse to vary, a direction that was given on a ground specified in paragraph 96(1)(a), (b) or (c) is reviewable under section 168.

- (2) APRA may, by written notice to a private health insurer, revoke a direction given to the insurer under section 96 if, at the time of the revocation, APRA considers that the direction is no longer necessary or appropriate.

Note: A decision to refuse to revoke a direction that was given on a ground specified in paragraph 96(1)(a), (b) or (c) is reviewable under section 168.

100 When a direction ceases to have effect

A direction under section 96 ceases to have effect if APRA revokes the direction under section 99.

101 Direction not grounds for denial of obligations

- (1) This section applies if a private health insurer is party to a contract, whether the proper law of the contract is Australian law (including the law of a State or Territory) or law of a foreign country (including the law of part of a foreign country).
- (2) The fact that the private health insurer is subject to a direction by APRA under section 96 does not allow the contract, or a party to the contract, other than the insurer, to do any of the following:
 - (a) deny any obligations under that contract;

- (b) accelerate any debt under that contract;
- (c) close out any transaction relating to that contract.

This subsection has effect subject to subsections (3) and (4).

- (3) If the private health insurer is prevented from fulfilling its obligations under the contract because of a direction under section 96, other than a direction of a kind referred to in paragraph 97(1)(1), the other party or parties to the contract are, subject to any orders made under subsection (4) of this section, relieved from obligations owed to the insurer under the contract.
- (4) A party to a contract to which subsection (3) applies may apply to the Federal Court for an order relating to the effect on the contract of a direction under section 96. The order may deal with matters including (but not limited to) the following:
 - (a) requiring a party to the contract to fulfil an obligation under the contract despite subsection (3);
 - (b) obliging a party to the contract to take some other action (for example, paying money or transferring property) in view of obligations that were fulfilled under the contract before the direction was made.

The order must not require a person to take action that would contravene the direction, or any other direction under section 96.

102 Supply of information about directions

Power to publish notice of directions in Gazette

- (1) APRA may publish in the Gazette notice of any direction given under section 96. The notice must include the name of the private health insurer given the direction and a summary of the direction.

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

- (2) If APRA publishes notice of a direction given under section 96 and then later varies or revokes the direction, APRA must publish in the Gazette notice of that variation or revocation as soon as practicable after the revocation.

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Requirement to provide information about directions to Minister

- (3) If the Minister, in writing, requests APRA to provide information about:
- (a) any directions under section 96 in respect of a particular private health insurer; or
 - (b) any directions made during a specified period under section 96 in respect of any private health insurer;
- APRA must comply with the request.

Power to inform Minister of directions

- (4) APRA may provide any information that it considers appropriate to the Minister about any directions under section 96, or variations or revocations of such directions, in respect of any private health insurer, at any time.

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

- (5) If APRA provides the Minister with information about a direction and then later varies or revokes the direction, APRA must notify the Minister of the variation or revocation of the direction as soon as practicable after the revocation.

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

- (6) A failure to comply with a requirement of this section in relation to a direction, or the variation or revocation of a direction, does not affect the validity of the direction, or the variation or revocation.

103 Secrecy requirements

Information relating to directions under section 96, and revocations of such directions, is subject to the secrecy requirements in Part 6 of the *Australian Prudential Regulation Authority Act 1998*, unless the information has been published in the Gazette under section 102 of this Act.

104 Non-compliance with a direction

- (1) A private health insurer commits an offence if:
- (a) the insurer is given a direction under section 96; and
 - (b) the insurer fails to comply with the direction.

Penalty: 30 penalty units.

Note: If a body corporate is convicted of an offence against this subsection, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the penalty stated above.

- (2) If a private health insurer commits an offence against subsection (1), the insurer commits an offence against that subsection in respect of:
- (a) the first day on which the offence is committed; and
 - (b) each subsequent day (if any) on which the circumstances that gave rise to the insurer committing the offence continue (including the day of conviction for any such offence or any later day).

Note: This subsection is not intended to imply that section 4K of the *Crimes Act 1914* does not apply to offences against this Act.

- (3) An officer of a private health insurer commits an offence if:
- (a) the insurer is given a direction under section 96; and
 - (b) the officer's duties include ensuring that the insurer complies with the direction, or with a class of directions that includes the direction; and
 - (c) the officer fails to take reasonable steps to ensure that the insurer complies with the direction.

Penalty: 30 penalty units.

Note: If a body corporate is convicted of an offence against this subsection, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the penalty stated above.

- (4) If an officer of a private health insurer fails to take reasonable steps to ensure that the insurer complies with a direction given to it under section 96 in circumstances that give rise to the officer committing an offence against subsection (3), the officer commits an offence against that subsection in respect of:

Part 4 Prudential standards and directions

Division 3 Directions

Section 104

- (a) the first day on which the offence is committed; and
- (b) each subsequent day (if any) on which the circumstances that gave rise to the officer committing the offence continue (including the day of conviction for any such offence or any later day).

Note: This subsection is not intended to imply that section 4K of the *Crimes Act 1914* does not apply to offences against this Act.

Part 5—Other obligations of private health insurers

Division 1—Introduction

105 Simplified outline of this Part

The obligations of a private health insurer include obligations 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 obligations to draw certain matters to the attention of the insurer's directors, and to provide information to APRA.

Division 2—Appointed actuaries

106 Appointment

- (1) Subject to subsection (2), a private health insurer must have an actuary appointed by the insurer.
- (2) Within 6 weeks after a person ceases to be the appointed actuary of a private health insurer, the insurer must appoint another person to be the actuary of the insurer.
- (3) A private health insurer must not appoint a person as the actuary of the insurer unless the insurer is satisfied that the person meets the eligibility criteria set out in prudential standards for appointment as the actuary of a private health insurer.
- (4) A private health insurer must not appoint a person as the actuary of the insurer if:
 - (a) the person is disqualified from being or acting as an actuary of the private health insurer because of an order under section 120; or
 - (b) the person is a disqualified person (other than only because of an order under section 120).
- (5) An appointment of a person as actuary of a private health insurer cannot take effect while there is in force an appointment of another person as the actuary of the insurer.

107 Terminating an appointment as actuary

- (1) A private health insurer must terminate the appointment of a person as actuary of the insurer if:
 - (a) the person does not meet the eligibility criteria set out in prudential standards for appointment as the actuary of a private health insurer; or
 - (b) the insurer reasonably believes that the person has failed to perform adequately and properly the person's statutory functions and duties as actuary of the private health insurer; or

- (c) the person is disqualified from being or acting as an actuary of the private health insurer because of an order under section 120; or
 - (d) the person is a disqualified person (other than only because of an order under section 120).
- (2) The ***statutory functions and duties*** of an actuary of a private health insurer are the functions and duties that an actuary has under:
- (a) this Act; and
 - (b) the *Private Health Insurance Act 2007*; and
 - (c) the *Financial Sector (Collection of Data) Act 2001*.

Note 1: The reference in paragraph (a) to this Act includes prudential standards and APRA rules (see the definition of ***this Act*** in subsection 4(1)).

Note 2: The references in paragraphs (b) and (c) to Acts include regulations, rules, standards etc. made under those Acts (see subsection 4(2)).

- (3) If:
- (a) a private health insurer is required under subsection (1) to terminate the appointment of a person as actuary of the insurer; and
 - (b) the power to appoint the actuary of the insurer is not vested in the directors of the insurer or is not vested in the directors of the insurer alone;
- the directors may appoint a person who satisfies the requirements of subsection 106(3) to be the actuary of the insurer until an appointment is made in accordance with the constitution or rules of the private health insurer.

108 Notification of appointment etc.

- (1) A private health insurer that appoints a person under this Division must give APRA written notice of:
- (a) the name of the person; and
 - (b) details of the actuarial qualifications and experience of the person; and
 - (c) the date of the appointment; and
 - (d) any other matter specified in prudential standards.

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- (2) Notice under subsection (1) must be given within 14 days after the day of the appointment.
- (3) If a person ceases to be the appointed actuary of a private health insurer, the insurer must give APRA written notice that the person has so ceased and of the day on which he or she so ceased.
- (4) Notice under subsection (3) must be given within 14 days after the day on which the person ceased to be the appointed actuary.

109 Role of appointed actuary

- (1) The appointed actuary of a private health insurer must perform the actuary's statutory functions and duties.
- (2) The private health insurer must make any arrangements necessary to enable the appointed actuary to perform those functions and duties. These arrangements may include (without limitation) the following:
 - (a) providing access to documents and information in the insurer's control;
 - (b) requiring officers or employees of the insurer to answer questions;
 - (c) allowing the actuary to attend meetings of directors of the insurer, annual general meetings or any other meetings of members of the insurer;
 - (d) allowing the actuary to speak at meetings of directors of the insurer on matters under consideration that relate to the actuary's statutory functions and duties.

110 Actuary's obligations to inform of matters etc.

Obligation to draw matters to attention of private health insurer or its directors

- (1) The appointed actuary of a private health insurer must draw to the attention of the insurer, or the directors of the insurer, any matter that comes to the attention of the actuary and that the actuary considers requires action to be taken by the insurer or its directors:

- (a) to avoid a contravention of this Act, the *Private Health Insurance Act 2007* or the *Financial Sector (Collection of Data) Act 2001*; or
- (b) to avoid prejudice to the interests of policy holders of a health benefits fund conducted by the insurer.

Obligation to inform APRA of matters

- (2) If the appointed actuary of a private health insurer considers:
 - (a) that the insurer, or an officer of the insurer, may have contravened this Act or any other law; and
 - (b) that the contravention is of such a nature that it may affect significantly the interests of policy holders of a health benefits fund conducted by the insurer;the appointed actuary must immediately inform APRA in writing of:
 - (c) his or her opinion; and
 - (d) the information on which it is based.
- (3) Subsection (2) does not apply to the appointed actuary of a private health insurer in relation to a contravention if:
 - (a) an officer of the private health insurer informs the actuary that the private health insurer has informed APRA in writing of the contravention; and
 - (b) the actuary has no reason to disbelieve the officer.
- (4) A person commits an offence if:
 - (a) the person is an officer of a private health insurer; and
 - (b) the person knows that:
 - (i) there are reasonable grounds for believing that the insurer, or an officer of the insurer, may have contravened this Act or any other law; and
 - (ii) the contravention is of such a nature that it may affect significantly the interests of policy holders of a health benefits fund conducted by the insurer; and
 - (c) the person informs the appointed actuary of the private health insurer that the private health insurer has informed APRA in writing of the contravention; and

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(d) the private health insurer has not so informed APRA.

Penalty: Imprisonment for 12 months or 60 penalty units, or both.

Note: If a body corporate is convicted of an offence against this subsection, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the penalty stated above.

(5) If:

(a) the appointed actuary of a private health insurer has drawn to the attention of the insurer, or of an officer of the insurer, a matter that the actuary considers requires action to be taken by the insurer or its directors:

(i) to avoid a contravention of this Act, the *Private Health Insurance Act 2007* or the *Financial Sector (Collection of Data) Act 2001*; or

(ii) to avoid prejudice to policy holders of a health benefits fund conducted by the insurer; and

(b) the appointed actuary is satisfied that there has been reasonable time for the taking of the action but the action has not been taken;

the appointed actuary must inform APRA in writing of the matter referred to in paragraph (a).

(6) If:

(a) a person becomes subject to an obligation under subsection (2) or (5) to inform APRA of anything; and

(b) before the person informs APRA, the person ceases to be the appointed actuary of the private health insurer concerned;

the person remains subject to the obligation as if he or she were still the appointed actuary of the insurer.

111 Appointed actuary may give information or documents to APRA

(1) A person who is or was the appointed actuary of a private health insurer may give information, or produce documents, relating to the private health insurer to APRA if the person considers that doing so will assist APRA in performing its functions under this

Act, the *Private Health Insurance Act 2007* or the *Financial Sector (Collection of Data) Act 2001*.

- (2) A person who, in good faith and without negligence, gives information, or produces a document, to APRA in accordance with this section is not subject to any action, claim or demand by, or any liability to, any other person in respect of the information or document.

112 Duty of appointed actuary to give information or documents when required

- (1) APRA may, by written notice to a person who is, or was, the appointed actuary of a private health insurer, require the person, within the period specified in the notice, to:
- (a) give APRA information relating to the private health insurer;
 - or
 - (b) produce to APRA documents relating to the private health insurer;
- if APRA considers that the giving of the information, or the production of the documents, will assist APRA in performing APRA's functions under this Act, the *Private Health Insurance Act 2007* or the *Financial Sector (Collection of Data) Act 2001*.
- (2) The period specified in a notice under subsection (1) must be reasonable, and must end at least 7 days after the day on which the notice is given.
- (3) A person commits an offence if:
- (a) the person is given a notice under subsection (1); and
 - (b) the person fails to comply with the notice.

Penalty: 30 penalty units.

Note: If a body corporate is convicted of an offence against this subsection, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the penalty stated above.

- (4) However, a person is only required to comply with a notice under subsection (1) to the extent that the person is capable of doing so.

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Note: A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the *Criminal Code*).

Self-incrimination

- (5) A person is not excused from giving information or producing a document pursuant to a notice under subsection (1) on the ground that the information or production of the document might tend to incriminate the person or expose the person to a penalty.
- (6) However, in the case of an individual:
- (a) the information given or document produced; and
 - (b) giving the information or producing the document;
- are not admissible in evidence against the individual in any criminal or civil proceedings, except proceedings under, or arising out of, section 137.1 or 137.2 of the *Criminal Code* in relation to giving the information or producing the document.

Note 1: This subsection does not apply in relation to proceedings for a penalty by way of a disqualification under section 120 (see subsection 122(4)).

Note 2: Sections 137.1 and 137.2 of the *Criminal Code* create offences for providing false or misleading information or documents.

113 Qualified privilege of appointed actuary

- (1) A person who is, or has been, the appointed actuary of a private health insurer has qualified privilege in respect of any statement, whether written or oral, made by him or her for the purpose of the performance of the actuary's statutory functions and duties.
- (2) In particular (and without limiting subsection (1)), a person who is or has been the appointed actuary of a private health insurer has qualified privilege in respect of:
- (a) any statement, written or oral, made by him or her under, or for the purposes of, a provision of this Act, the *Private Health Insurance Act 2007* or the *Financial Sector (Collection of Data) Act 2001*; and
 - (b) the answer to any question he or she is required by the insurer to answer.

- (3) The privilege conferred by this section is in addition to any privilege conferred on a person by any other law.

114 Referring matters to professional associations for actuaries

- (1) If APRA considers that an appointed actuary of a private health insurer:
- (a) has failed, whether within or outside Australia, to perform adequately and properly:
 - (i) the actuary's statutory functions and duties; or
 - (ii) the actuary's functions or duties under any other law of the Commonwealth, or of a State or Territory; or
 - (b) is otherwise not a fit and proper person to be the actuary of a private health insurer;
- APRA may, in writing, refer the details of the matter to those members of the professional association of the actuary whom APRA considers will be involved in considering or taking any disciplinary or other action concerning the matter against the actuary.
- (2) If APRA refers details of a matter under this section, APRA must also give written notice of the referral (including the nature of the matter) to the actuary.

115 APRA may direct removal of actuary

When a direction may be given

- (1) APRA may, by written notice to a private health insurer, direct the insurer to terminate the appointment of a person as the appointed actuary of the insurer if APRA is satisfied that there is a ground under subsection (2) for giving the direction.

Note: Decisions to give directions under this section are reviewable under section 168.

- (2) The grounds for giving a direction to terminate a person's appointment are:

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- (a) the person is disqualified from being or acting as an actuary of the private health insurer because of an order under section 120; or
- (b) the person is a disqualified person (other than only because of an order under section 120); or
- (c) the person is not a fit and proper person to hold the appointment; or
- (d) the person has failed to perform adequately and properly the person's statutory functions and duties as an actuary of the insurer.

Notice to be given before direction

- (3) Before directing a private health insurer to terminate a person's appointment, APRA must:
 - (a) give written notice to:
 - (i) the insurer; and
 - (ii) the person; and
 - (b) give the insurer and the person a reasonable opportunity to make submissions on the matter.
- (4) The notice must include a statement that any submissions in response to the notice may be discussed by APRA with other persons as mentioned in paragraph (5)(b).
- (5) If a submission is made in response to the notice, APRA:
 - (a) must have regard to the submission; and
 - (b) may discuss any matter contained in the submission with any persons APRA considers appropriate for the purpose of assessing the truth of the matter.

When a direction takes effect

- (6) A direction to terminate a person's appointment takes effect on the day specified in the notice giving the direction, which must be at least 7 days after the day on which notice is given.

Insurer and person to be given copy of direction

- (7) If APRA directs a private health insurer to terminate a person's appointment, APRA must give the insurer and the person a copy of the direction.

Offence

- (8) A private health insurer commits an offence if:
- (a) the insurer is given a direction under this section; and
 - (b) the insurer fails to comply with the direction.

Penalty for contravention of this subsection: 30 penalty units.

Note: If a body corporate is convicted of an offence against this subsection, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the penalty stated above.

Division 3—Disqualified persons

116 Private health insurers not to allow disqualified persons to act as officers or appointed actuaries

- (1) A private health insurer commits an offence if:
- (a) the insurer allows a person to be or to act as an officer, or appointed actuary, of the insurer; and
 - (b) the person is a disqualified person; and
 - (c) if the person is a disqualified person only because of an order under section 120—the person is disqualified from being or acting as that officer or actuary.

Penalty: Imprisonment for 12 months or 60 penalty units, or both.

Note: If a body corporate is convicted of an offence against this subsection, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the penalty stated above.

- (2) Subsection (1) does not apply if the private health insurer:
- (a) contacted APRA within a reasonable period before allowing the person to be to or act as an officer or appointed actuary, as the case may be; and
 - (b) was advised by APRA that the person was not a disqualified person.

Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3) of the *Criminal Code*).

117 Disqualified persons must not act for private health insurers

A person commits an offence if:

- (a) the person acts as an officer, or appointed actuary, of a private health insurer; and
- (b) the person is a disqualified person; and
- (c) if the person is a disqualified person only because of an order under section 120—the person is disqualified from being or acting as that officer or actuary.

Penalty: Imprisonment for 12 months or 60 penalty units, or both.

Note: If a body corporate is convicted of an offence against this section, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the penalty stated above.

118 Effect of non-compliance

A failure to comply with section 116 or 117 does not affect the validity of an appointment or transaction.

119 Who is a *disqualified person*?

- (1) A person is a *disqualified person* if, at any time:
- (a) the person has been convicted of an offence against or arising out of:
 - (i) this Act; or
 - (ii) the *Private Health Insurance Act 2007*; or
 - (iii) the *Financial Sector (Collection of Data) Act 2001*; or
 - (iv) the *Corporations Act 2001*, the Corporations Law that was previously in force, or any law of a foreign country that corresponds to that Act or to that Corporations Law; or
 - (b) the person has been convicted of an offence against or arising out of a law in force in Australia, or the law of a foreign country, if the offence concerns dishonest conduct or conduct relating to:
 - (i) a private health insurer; or
 - (ii) a financial sector company (within the meaning of the *Financial Sector (Shareholdings) Act 1998*); or
 - (iii) a superannuation entity (within the meaning of the *Superannuation Industry (Supervision) Act 1993*); or
 - (c) the person has been or becomes bankrupt; or
 - (d) the person has applied to take the benefit of a law for the relief of bankrupt or insolvent debtors; or
 - (e) the person has compounded with his or her creditors; or
 - (f) the Federal Court has disqualified the person under section 120.

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- (2) A reference in subsection (1) to a person who has been convicted of an offence includes a reference to a person in respect of whom an order has been made relating to the offence under:
 - (a) section 19B of the *Crimes Act 1914*; or
 - (b) a corresponding provision of a law of a State or Territory, or of a foreign country.
- (3) Nothing in this section affects the operation of Part VIIC of the *Crimes Act 1914* (which includes provisions that, in certain circumstances, relieve persons from the requirement to disclose spent convictions and require persons aware of such convictions to disregard them).

120 Court power of disqualification

- (1) On application by APRA, the Federal Court may, by order, disqualify a person from being or acting as someone referred to in subsection (2), for a period that the Court considers appropriate, if the Court is satisfied that:
 - (a) the person is not a fit and proper person to be or act as such a person; and
 - (b) the disqualification is justified.
- (2) For the purposes of subsection (1), the Federal Court may disqualify a person from being or acting as an officer or appointed actuary of:
 - (a) a particular private health insurer; or
 - (b) a class of private health insurers; or
 - (c) any private health insurer.
- (3) In deciding whether paragraph (1)(a) is satisfied, the Federal Court may take into account:
 - (a) any criteria for fitness and propriety set out in prudential standards; and
 - (b) any other matters specified in prudential standards; and
 - (c) any other matters the Court considers relevant.
- (4) In deciding whether paragraph (1)(b) is satisfied, the Federal Court may have regard to:

- (a) if the application is for the person to be disqualified from being or acting as an officer—the person’s conduct in relation to the management, business or property of any corporation; and
 - (b) if the application is for the person to be disqualified from being or acting as an appointed actuary—the person’s conduct, in relation to the person’s functions or duties as an actuary, under any of the following:
 - (i) this Act;
 - (ii) the *Private Health Insurance Act 2007*;
 - (iii) the *Financial Sector (Collection of Data) Act 2001*;
 - (iv) the *Insurance Act 1973*;
 - (v) the *Life Insurance Act 1995*;
 - (vi) the *Superannuation Industry (Supervision) Act 1993*;and
 - (c) in any case—any other matters the Court considers relevant.
- (5) As soon as practicable after the Federal Court disqualifies a person under this section, APRA must cause particulars of the disqualification:
- (a) if the person is, or is acting as, an officer or appointed actuary of a private health insurer—to be given to the private health insurer concerned; and
 - (b) to be published in the Gazette.

121 Court power to revoke or vary a disqualification etc.

- (1) A disqualified person, or APRA, may apply to the Federal Court for:
 - (a) if the person is a disqualified person only because of an order under section 120—a variation or a revocation of the order made under that section; or
 - (b) otherwise—an order that the person is not a disqualified person.
- (2) If the Federal Court revokes an order under paragraph (1)(a) or makes an order under paragraph (1)(b), then, despite section 119, the person is not a ***disqualified person***.

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- (3) At least 21 days before commencing the proceedings, written notice of the application must be given:
 - (a) if the disqualified person makes the application—by the person to APRA; or
 - (b) if APRA makes the application—by APRA to the disqualified person.
- (4) An order under paragraph (1)(b) may be expressed to be subject to exceptions and conditions determined by the Federal Court.

122 Privilege against exposure to penalty—disqualification under section 120

Proceedings

- (1) In the case of any proceeding under, or arising out of, this Act, a person is not entitled to refuse or fail to comply with a requirement:
 - (a) to answer a question or give information; or
 - (b) to produce a document; or
 - (c) to do any other act;on the ground that the answer or information, production of the document, or doing that other act, as the case may be, might tend to make the person liable to a penalty by way of a disqualification under section 120.
- (2) Subsection (1) applies whether or not the person is a defendant in, or a party to, the proceeding or any other proceeding.

Statutory requirements

- (3) A person is not entitled to refuse or fail to comply with a requirement under this Act:
 - (a) to answer a question or give information; or
 - (b) to produce a document; or
 - (c) to do any other act;on the ground that the answer or information, production of the document, or doing that other act, as the case may be, might tend to

make the person liable to a penalty by way of a disqualification under section 120.

Admissibility

- (4) Subsections 112(6) and 149(2) do not apply to a proceeding for the imposition of a penalty by way of a disqualification under section 120.

Note: Subsections 112(6) and 149(2) relate to self-incrimination.

Other provisions

- (5) Subsections (1) and (3) of this section have effect despite anything in:
- (a) any other provision of this Act; or
 - (b) the *Private Health Insurance Act 2007*; or
 - (c) the *Administrative Appeals Tribunal Act 1975*.

Division 4—Miscellaneous

123 Restrictions on payment of pecuniary penalties etc.

A private health insurer must not:

- (a) use its money, or permit the use of its money, for:
 - (i) the payment of a pecuniary penalty imposed on an officer of the insurer because of an offence under this Act; or
 - (ii) the payment of an amount that an officer of the insurer, or a person who has been such an officer, is liable to pay under this Act; or
- (b) reimburse:
 - (i) an officer of the insurer in respect of a pecuniary penalty imposed on the officer because of an offence under this Act; or
 - (ii) an officer of the insurer, or a person who has been such an officer, in respect of a liability imposed on the officer under this Act.

124 Giving APRA copies of reports made to policy holders

APRA rules may require a private health insurer to give APRA copies of reports that the insurer makes to all or any of the policy holders of health benefits funds conducted by the insurer.

125 Notifying APRA of name and contact details of officers

APRA rules may require a private health insurer to notify APRA of, or of changes to, the names and contact details of officers of the insurer.

Part 6—Monitoring and investigation

Division 1—Introduction

126 Simplified outline of this Part

APRA may, for the purposes of this Act or the risk equalisation levy legislation, require insurers to provide information, reports or documents, and may require officers of insurers to provide documents.

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.

Division 2—Monitoring

127 Purposes for which powers may be exercised etc.

- (1) The powers in this Division may only be exercised:
 - (a) for the purposes of this Act; or
 - (b) for the purposes of the risk equalisation levy legislation.
- (2) The powers in this Division may be exercised in relation to a private health insurer, even if an investigation is being conducted of the whole or a part of the affairs of the insurer under Division 3.

128 Power to require private health insurer to provide information and reports

- (1) APRA may, by written notice to a private health insurer, require the insurer to give APRA particular information, or a report on particular matters, relating to the affairs of the insurer within the period specified in the notice.

Note: Refusal or failure to comply with a requirement under this subsection is an offence (see section 148).

- (2) The period specified in a notice under subsection (1) must be reasonable, and must end at least 7 days after the day on which the notice is given.

129 Power to require production of documents

- (1) APRA may, by written notice to:
 - (a) a private health insurer; or
 - (b) an officer of a private health insurer;require the insurer or officer to produce to APRA, at a time and place specified in the notice, any documents relating to the affairs of the insurer.

Note: Refusal or failure to comply with a requirement under this subsection is an offence (see section 148).

- (2) The time specified in a notice under subsection (1) must be reasonable, and must be at least 7 days after the day on which the notice is given. The place specified in the notice must also be reasonable.
- (3) If a document produced to APRA under subsection (1) is not in writing and in English, APRA may, by written notice to the insurer, require the insurer to produce to APRA a version of the document that is in writing and in English.

Note: Refusal or failure to comply with a requirement under this subsection is an offence (see section 148).

- (4) APRA, or an APRA staff member, may inspect, take extracts from and make copies of any document, or of any version of any document, produced to APRA under this section.

Division 3—Investigation

130 Investigation of private health insurers by inspectors

- (1) Subject to subsection (2), APRA may, in writing, appoint an APRA staff member to be an inspector to investigate the affairs of a private health insurer if APRA reasonably suspects that:
 - (a) the affairs of the insurer are being, or are about to be, carried on in a way that is not in the interests of the policy holders of a health benefits fund conducted by the insurer; or
 - (b) the insurer has contravened an enforceable obligation.
- (2) 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.
- (3) An instrument appointing an APRA staff member to be an inspector must specify:
 - (a) the matter referred to in paragraph (1)(a) or (b) that APRA suspects; and
 - (b) the ground on which APRA suspects the matter; and
 - (c) the matters into which the investigation is to be made, being the whole or some part of the affairs of the private health insurer.
- (4) APRA may, in writing, at any time:
 - (a) terminate an investigation; or
 - (b) terminate the appointment of a person as an inspector; or
 - (c) appoint another APRA staff member to be an inspector for the purposes of an investigation.

131 Identity cards for inspectors

- (1) APRA must issue an identity card to each inspector.
- (2) The identity card must:
 - (a) be in the form prescribed by APRA rules; and

- (b) contain a photograph that is no more than 1 year old of the inspector.
 - (3) A person commits an offence if:
 - (a) the person has been issued with an identity card; and
 - (b) the person ceases to be an inspector; and
 - (c) the person does not return the identity card to APRA within 14 days after ceasing to be an inspector.
- Penalty: 1 penalty unit.
- (4) Subsection (3) does not apply if the identity card was lost or destroyed.
- Note: A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the *Criminal Code*).
- (5) An inspector must carry his or her identity card at all times when exercising powers under this Act as an inspector.

132 Powers of inspectors

- (1) An inspector may, by written notice to a person whom the inspector believes to have some knowledge of the affairs of the private health insurer that the inspector is investigating, require that person, within the period specified in the notice:
 - (a) to produce to the inspector all or any documents relating to the affairs of the insurer that are in the custody, or under the control, of that person; or
 - (b) to give to the inspector all reasonable assistance within the person's power in connection with the investigation; or
 - (c) to appear before the inspector for examination concerning matters that are relevant to the investigation and are within the knowledge of the person.
- Note: Refusal or failure to comply with a requirement under this subsection is an offence (see section 148).
- (2) The period specified in a notice under subsection (1) must be reasonable, and must end at least 7 days after the day on which the notice is given.

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- (3) If documents are produced to an inspector under subsection (1), the inspector may:
 - (a) take possession of them for such period as the inspector considers necessary for the purposes of the investigation; and
 - (b) make copies of, and take extracts from, them.
- (4) An inspector is not entitled to refuse to permit a person to inspect documents that are in the possession of the inspector under subsection (3) if the person would be entitled to inspect those documents if the inspector had not taken possession of them.

133 Person may be represented by lawyer when being examined

A lawyer acting for a person being examined by an inspector:

- (a) may attend the examination; and
- (b) may, to the extent that the inspector allows:
 - (i) address the inspector; and
 - (ii) examine the person;in relation to matters in respect of which the inspector has questioned the person.

134 Access to premises

The functions of an inspector under this section

- (1) An inspector who:
 - (a) is appointed to investigate the whole or a part of the affairs of a private health insurer; and
 - (b) enters any premises under subsection (3) or (4);may exercise the functions of an inspector under this section in relation to the insurer.
- (2) The functions of an inspector under this section in relation to the insurer are to exercise search powers in relation to any documents that relate, or that the inspector reasonably believes relate, to the affairs of the insurer.

Entry with consent

- (3) An inspector may, with the consent of the occupier of premises, enter the premises for the purpose of exercising the functions of an inspector under this section in relation to the private health insurer whose affairs the inspector is investigating.

Note: See also section 135, which contains general provision relating to obtaining consent.

Entry under warrant

- (4) An inspector may, in accordance with an investigation warrant in relation to premises, enter the premises for the purpose of exercising the functions of an inspector under this section in relation to the private health insurer whose affairs the inspector is investigating.

Note: An investigation warrant also authorises such assistance as the inspector considers necessary, and such force as is necessary and reasonable in the circumstances (see paragraph 136(4)(c)).

135 General provisions relating to obtaining consent to enter premises

- (1) Before obtaining the consent of an occupier of premises for the purpose of subsection 134(3), an inspector must inform the occupier that the occupier may refuse consent.
- (2) A consent has no effect unless the consent is voluntary.
- (3) A consent may be expressed to be limited to entry during a particular period. If so, the consent has effect for that period unless the consent is withdrawn before the end of that period.
- (4) A consent that is not limited as mentioned in subsection (3) has effect until the consent is withdrawn.
- (5) If an inspector entered premises because of the consent of the occupier of the premises, the inspector, and any person assisting, must leave the premises if the consent ceases to have effect.
- (6) If:

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- (a) an inspector enters premises because of the consent of the occupier of the premises; and
 - (b) the inspector has not shown the occupier his or her identity card before entering the premises;
- the inspector must do so on, or as soon as is reasonably practicable after, entering the premises.

136 Investigation warrants

- (1) An inspector may apply to a magistrate for a warrant under this section (an *investigation warrant*) in relation to premises.
- (2) The magistrate may issue the warrant if the magistrate is satisfied, by information on oath or affirmation, that there are reasonable grounds for suspecting that there are, or there may be within the next 72 hours, documents in the premises relating to the affairs of the private health insurer that the inspector is investigating.
- (3) However, the magistrate must not issue the warrant unless the inspector or some other person has given to the magistrate, either orally or by affidavit, such further information (if any) as the magistrate requires concerning the grounds on which the issue of the warrant is being sought.
- (4) The warrant must:
 - (a) state that the warrant is issued under this Division; and
 - (b) name the inspector who applied for the warrant; and
 - (c) state that the warrant authorises the inspector, with such assistance as the inspector considers necessary, to enter the premises, using such force as is necessary and reasonable in the circumstances:
 - (i) during such hours of the day or night as the warrant specifies; or
 - (ii) if the warrant so specifies, at any time;for the purpose of exercising the functions of an inspector under section 134 in relation to the insurer concerned; and
 - (d) specify the day (not more than 1 week after the issue of the warrant) on which the warrant ceases to be in force.

137 Announcement before entry under investigation warrant

- (1) Before an inspector enters premises under an investigation warrant, the inspector must:
 - (a) announce that he or she is authorised to enter the premises; and
 - (b) show his or her identity card to the occupier of the premises, or to another person who apparently represents the occupier, if the occupier or other person is present at the premises; and
 - (c) give any person at the premises an opportunity to allow entry to the premises.
- (2) However, an inspector is not required to comply with subsection (1) if the inspector believes on reasonable grounds that immediate entry to the premises is required to ensure that the effective execution of the warrant is not frustrated.
- (3) If:
 - (a) an inspector does not comply with subsection (1) because of subsection (2); and
 - (b) the occupier of the premises, or another person who apparently represents the occupier, is present at the premises;the inspector must, as soon as practicable after entering the premises, show his or her identity card to the occupier or other person.

138 Inspector to be in possession of investigation warrant

An inspector executing an investigation warrant must be in possession of the warrant issued by the magistrate under section 136, or a copy of the warrant as so issued.

139 Details of warrant etc. to be given to occupier

- If:
- (a) an investigation warrant is being executed in relation to premises; and
 - (b) the occupier of the premises, or another person who apparently represents the occupier, is present at the premises;

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an inspector executing the warrant must, as soon as practicable:

- (c) make a copy of the warrant available to the occupier or other person; and
- (d) inform the occupier or other person in writing of the rights and responsibilities of the occupier or other person under sections 140 and 141.

140 Right to observe execution of warrant

- (1) The occupier of premises to which an investigation warrant relates, or another person who apparently represents the occupier, is entitled to observe the execution of the warrant if the occupier or other person is present at the premises while the warrant is being executed.
- (2) The right to observe the execution of the warrant ceases if the occupier or other person impedes that execution.
- (3) This section does not prevent the execution of the warrant in 2 or more areas of the premises at the same time.

141 Responsibility to provide facilities and assistance

- (1) The occupier of premises to which an investigation warrant relates, or another person who apparently represents the occupier, must provide:
 - (a) an inspector executing the warrant; and
 - (b) any person assisting the inspector;with all reasonable facilities and assistance for the effective exercise of their powers.
- Note: Obstructing, hindering, intimidating or resisting an inspector in the performance of his or her functions is an offence against section 149.1 of the *Criminal Code*.
- (2) A person commits an offence if:
 - (a) the person is subject to subsection (1); and
 - (b) the person fails to comply with that subsection.

Penalty for contravention of this subsection: 30 penalty units.

Note: If a body corporate is convicted of an offence against this subsection, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the penalty stated above.

142 Concealing etc. documents

- (1) A person commits an offence if:
 - (a) the person does an act; and
 - (b) the act results in the concealment, destruction, mutilation or alteration of a document; and
 - (c) the document relates to affairs of a private health insurer that are being investigated under this Division.

Penalty: Imprisonment for 12 months or 60 penalty units, or both.

Note: If a body corporate is convicted of an offence against this subsection, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the penalty stated above.

- (2) Subsection (1) does not apply if the person did not act with intent to defeat the purposes of this Division and did not act with intent to delay or obstruct the carrying out of the investigation.

Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3) of the *Criminal Code*).

143 Reports of inspectors

- (1) An inspector:
 - (a) must, on the completion of an investigation of the whole or a part of the affairs of a private health insurer, report in writing to APRA on the result of the investigation; and
 - (b) if so directed in writing by APRA, must make such written reports during the investigation as are specified in the direction; and
 - (c) may make one or more other written reports to APRA during the investigation.
- (2) Subject to subsection (3), an inspector may include in a report under this section any recommendations that the inspector considers appropriate.

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- (3) An inspector must not include in a report under this section:
 - (a) a recommendation relating to the institution of criminal proceedings; or
 - (b) a statement to the effect that the inspector considers that a specified person has committed a criminal offence.
- (4) However, if an inspector considers that criminal proceedings ought to be instituted or that a person has committed a criminal offence, the inspector must state that opinion in writing given to APRA.

144 Dissemination of reports

- (1) APRA must give a copy of a report made to APRA under paragraph 143(1)(a) to the private health insurer to which the report relates.
- (2) However, subsection (1) does not apply if APRA considers that, having regard to proceedings that have been or might be instituted, a copy of the report should not be given to the insurer.
- (3) If APRA has given a copy of the report to the insurer under subsection (1), APRA may, if it considers it is in the public interest to do so, cause the whole or a part of the report to be published.
- (4) A court before which proceedings under this Act, or the risk equalisation levy legislation, are brought against a private health insurer or other person in respect of matters dealt with in a report under section 143 may order that a copy of the report be given to that insurer or other person.

145 Liability for publishing reports etc.

An action or proceeding, civil or criminal, does not lie against a person (not being a person referred to in section 58 of the *Australian Prudential Regulation Authority Act 1998*) for publishing in good faith a copy of, or a fair extract from or of, a publication made under subsection 144(3).

Note: Section 58 of the *Australian Prudential Regulation Authority Act 1998* protects APRA and persons connected with APRA (including, APRA members and APRA staff members) from liability.

146 Powers of magistrates

- (1) A power conferred on a magistrate by this Division is conferred on the magistrate:
 - (a) in a personal capacity; and
 - (b) not as a court or a member of a court.
- (2) The magistrate need not accept the power conferred.
- (3) A magistrate exercising a power conferred by this Division has the same protection and immunity as if the magistrate were exercising the power:
 - (a) as the court of which the magistrate is a member; or
 - (b) as a member of the court of which the magistrate is a member.

147 Delegation by inspectors

- (1) An inspector may, by writing signed by the inspector, delegate any of the inspector's powers under this Division to an APRA staff member.
- (2) An inspector must not delegate powers to an APRA staff member unless the inspector is satisfied that the staff member has suitable qualifications and experience to exercise those powers properly.
- (3) A delegate who proposes to exercise his or her delegated powers must, at the request of any person who may be affected by the proposed exercise, produce for the inspection of that person the instrument of delegation or a copy of that instrument.

Division 4—Other matters

148 Refusing or failing to comply with requirements

- (1) A person commits an offence if:
 - (a) a requirement is made of the person under section 128, 129 or 132; and
 - (b) the person fails to comply with the requirement.

Penalty: 30 penalty units.

Note: If a body corporate is convicted of an offence against this subsection, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the penalty stated above.

- (2) However, a person is only required to comply with a requirement referred to in paragraph (1)(a) to the extent that the person is capable of doing so.

Note: A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the *Criminal Code*).

149 Self-incrimination

- (1) A person is not excused from answering a question, providing information or a report, or producing a document, under this Part on the ground that the answer, the information or report, or the production of the document, might tend to incriminate the person or make the person liable to a penalty.
- (2) However, in the case of an individual:
 - (a) the answer given, the information or report provided or the document produced; and
 - (b) answering the question, providing the information or report, or producing the document;

are not admissible in evidence against the individual in any criminal or civil proceedings, except proceedings under, or arising out of, section 137.1 or 137.2 of the *Criminal Code* in relation to answering the question, providing the information or report, or producing the document.

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Note 1: This subsection does not apply in relation to proceedings for a penalty by way of a disqualification under section 120 (see subsection 122(4)).

Note 2: Sections 137.1 and 137.2 of the *Criminal Code* create offences for providing false or misleading information or documents.

150 Protection from liability

A person who complies with a requirement made of the person under this Part by APRA or an inspector does not incur any liability to any other person merely because of that compliance.

Part 7—Enforceable undertakings

151 Simplified outline of this Part

APRA may accept an undertaking given by a person in connection with matters relating to this Act 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.

152 Enforceable undertakings

- (1) APRA may accept a written undertaking given by a person in connection with a matter in relation to which APRA has a power or function under:
 - (a) this Act; or
 - (b) the risk equalisation levy legislation.
- (2) The person may withdraw or vary the undertaking at any time, but only with APRA's written consent.
- (3) A consent under subsection (2) is not a legislative instrument.
- (4) If APRA considers that the person who gave the undertaking has contravened any of its terms, APRA may apply to the Federal Court for an order under subsection (5).
- (5) If the Federal Court is satisfied that the person has contravened a term of the undertaking, the Court may make all or any of the following orders:
 - (a) an order directing the person to comply with that term of the undertaking;
 - (b) an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the

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- person has obtained directly or indirectly and that is reasonably attributable to the contravention;
- (c) any order that the Court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the contravention;
 - (d) any other order that the Court considers appropriate.

Part 8—Remedies in the Federal Court

153 Simplified outline of this Part

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.

154 APRA may apply to the Federal Court

- (1) If APRA is satisfied that a private health insurer has contravened an enforceable obligation, APRA may apply to the Federal Court for:
 - (a) a declaration of contravention (see section 155); and
 - (b) any one or more of the following orders:
 - (i) a civil penalty order (see section 156);
 - (ii) a compensation order (see section 157);
 - (iii) any other order that APRA considers to be appropriate to redress the contravention.
- (2) The application must be made within 4 years of the alleged contravention.

155 Declarations of contravention

- (1) If, on application under section 154, the Federal Court is satisfied that a private health insurer has contravened an enforceable obligation, it must make a declaration of contravention.

Note: For relief from liability, see section 166.
- (2) The declaration must specify:
 - (a) the enforceable obligation that was contravened; and
 - (b) the private health insurer that contravened the obligation; and

- (c) the conduct that constituted the contravention; and
 - (d) if the Federal Court is satisfied that an officer of the private health insurer failed to take reasonable steps to prevent the insurer contravening the obligation—the officer.
- (3) The declaration is conclusive evidence of the matters mentioned in subsection (2).

156 Civil penalty order

- (1) If the Federal Court has made a declaration of contravention that specifies an officer of a private health insurer (see paragraph 155(2)(d)), the Court may order the officer to pay the Commonwealth a pecuniary penalty of up to 1,000 penalty units.
- (2) An order under subsection (1) is a *civil penalty order*.
- (3) The Federal Court must not make a civil penalty order if it is satisfied that a court has ordered the officer to pay damages in the nature of punitive damages in respect of:
- (a) the contravention of the enforceable obligation; or
 - (b) the officer's failure to take reasonable steps to prevent the insurer contravening the enforceable obligation.
- (4) The pecuniary penalty is a civil debt payable to the Commonwealth.
- (5) The Commonwealth may enforce the order as if it were an order made in civil proceedings against the officer to recover a debt due by the officer. The debt arising from the order is taken to be a judgment debt.

157 Compensation order

- (1) If the Federal Court has made a declaration of contravention, the Court may order the private health insurer specified in the declaration to compensate an individual for any injury or loss suffered by the individual as a result of the contravention.
- (2) The order must specify the amount of compensation.

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- (3) The order may be enforced as if it were a judgment of the Court.

158 Other order

- (1) If the Federal Court has made a declaration of contravention, the Court may make any other order that APRA applies for.
- (2) The order may be enforced as if it were a judgment of the Court.

159 Civil evidence and procedure rules for declarations and orders

The Federal Court must apply the rules of evidence and procedure for civil matters in proceedings under this Part.

Note: The standard of proof in civil proceedings is the balance of probabilities (see section 140 of the *Evidence Act 1995*).

160 Civil proceedings after criminal proceedings

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 constituted by conduct that is substantially the same as the conduct to which the Court had regard in satisfying itself that the officer failed to take reasonable steps to prevent the insurer contravening the enforceable obligation.

161 Criminal proceedings during civil proceedings

- (1) Proceedings for a civil penalty order against an officer of a private health insurer are stayed if:
- (a) criminal proceedings are started or have already been started against the officer for an offence; and
 - (b) the offence is constituted by conduct that 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 the enforceable obligation.
- (2) The proceedings for the order may be resumed if the officer is not convicted of the offence. Otherwise, the proceedings for the order are dismissed.

162 Criminal proceedings after civil proceedings

Criminal proceedings may be started against a person for conduct that is substantially the same as conduct constituting a contravention of an enforceable obligation regardless of whether:

- (a) a declaration of contravention has been made that specifies the person; or
- (b) an order has been made against the person under this Part.

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

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

- (a) 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
- (b) 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 the enforceable obligation.

However, this does not apply to a criminal proceeding in respect of the falsity of the evidence given by the officer in the proceedings for the civil penalty order.

164 APRA may require person to assist

- (1) A person commits an offence if:
 - (a) APRA requires, in writing, the person to give all reasonable assistance in connection with an application for:
 - (i) a declaration of contravention in relation to a private health insurer; or
 - (ii) a declaration of contravention that specifies an officer of a private health insurer; or
 - (iii) a civil penalty order in relation to an officer of a private health insurer; and

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(b) the person fails to comply with the requirement.

Penalty: 5 penalty units.

Note: If a body corporate is convicted of an offence against this subsection, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the penalty stated above.

- (2) A requirement under subsection (1) is not a legislative instrument.
- (3) APRA may require a person to assist under subsection (1) only if:
- (a) it appears to APRA that the person is unlikely to have:
 - (i) contravened the enforceable obligation to which the application relates; or
 - (ii) committed an offence constituted by the same, or substantially the same, conduct as the conduct to which the application relates; and
 - (b) APRA reasonably suspects or believes that the person can give information relevant to the application.
- (4) APRA cannot require a person to assist under subsection (1) if the person is or has been a lawyer for the person suspected of contravening the enforceable obligation to which the application relates.
- (5) The Federal Court may order a person to comply with a requirement under subsection (1) in a specified way. Only APRA may apply to the Court for an order under this subsection.
- (6) For the purposes of this section, it does not matter whether the application mentioned in subsection (1) has actually been made.

Note: Subsection (1) does 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 9—Miscellaneous

165 Simplified outline of this Part

This Part 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.

166 Relief from liability

- (1) If:
- (a) any of the following proceedings are before a court:
 - (i) proceedings seeking an order against a person under subsection 46(3) in respect of a loss;
 - (ii) proceedings seeking an order against a person under subsection 76(1) in respect of compensation;
 - (iii) proceedings seeking an order against a person for recovery of a loss under section 89;
 - (iv) proceedings seeking an order under Part 8 imposing a liability on a person in respect of a contravention of an enforceable obligation; and
 - (b) it appears to the court that the person has acted honestly, and having regard to all the circumstances of the case, ought fairly to be excused from liability for the loss or compensation, or from being liable under Part 8 in respect of the contravention;
- the court may relieve the person, either wholly or partly, from liability for the loss or compensation, or from being liable under Part 8.
- (2) A person who thinks that proceedings of a kind referred to in paragraph (1)(a) will or may be begun against the person may apply to the Federal Court for relief.

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- (3) On an application under subsection (2), the Federal Court may grant relief under subsection (1) as if the proceedings had been begun in the Court.
- (4) For the purposes of subsection (1) as applying for the purposes of a case tried by a judge with a jury:
 - (a) a reference in that subsection to the court is a reference to the judge; and
 - (b) the relief that may be granted includes withdrawing the case in whole or in part from the jury and directing judgment to be entered for the defendant on such terms as to costs as the judge thinks appropriate.

167 Annual publication of information relating to health benefits funds

- (1) As soon as practicable after 30 September in each year, APRA must publish on its website the following information in respect of the operations, during the financial year ending on 30 June in that year, of each health benefits fund conducted by each private health insurer:
 - (a) premiums payable to the fund;
 - (b) other amounts payable to the fund;
 - (c) fund benefits payable out of the fund;
 - (d) management expenses;
 - (e) other amounts payable out of the fund;
 - (f) the balance of the fund at the end of that financial year;
 - (g) details of how the reserves of the fund have been invested;
 - (h) any other information required by APRA rules made for the purpose of this paragraph.
- (2) APRA must not, under subsection (1), publish personal information relating to a person insured under a policy.

168 Review of decisions

What decisions are reviewable?

- (1) Each of the following decisions is a **reviewable decision**.
-

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| 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 |
| 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 paragraph 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 paragraph 96(1)(a), (b) or (c) | section 99 |
| 11 | to give a direction to terminate the appointment of a person as appointed actuary | section 115 |

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Reconsideration of decision by APRA

- (2) A person affected by a reviewable decision who is dissatisfied with the decision may request APRA to reconsider the decision.
- (3) The request must:
 - (a) be made by written notice given to APRA within 21 days after the day on which the decision first comes to the notice of the person, or within such longer period as APRA determines in writing; and
 - (a) set out the reasons for making the request.
- (4) Upon receiving the request, APRA must reconsider the decision and may confirm or revoke the decision, or vary the decision in a way that APRA considers appropriate.
- (5) If APRA does not confirm, revoke or vary a decision within 21 days after the day on which APRA received the request, APRA is taken, at the end of that period, to have confirmed the decision under subsection (4).
- (6) If APRA confirms, revokes or varies a decision before the end of the period referred to in subsection (5), APRA must, by notice served on the person who made the request:
 - (a) tell the person of the result of APRA's reconsideration of the decision; and
 - (b) set out the findings on material questions of fact; and
 - (c) refer to the evidence or other material on which those findings were based; and
 - (d) give APRA's reasons for confirming, revoking or varying the decision, as the case may be.

AAT review of decision

- (7) Applications may be made to the Administrative Appeals Tribunal for the review of decisions of APRA that have been confirmed or varied under subsection (4).
- (8) If a decision is taken, by subsection (5), to be confirmed, section 29 of the *Administrative Appeals Tribunal Act 1975* applies as if the prescribed time for making application for review of the

decision were the period beginning on the day on which the decision is taken to be confirmed and ending on the 28th day after that day.

Operation and implementation of a decision that is subject to a request for reconsideration

- (9) If a person makes a request under subsection (2) in respect of a reviewable decision, section 41 of the *Administrative Appeals Tribunal Act 1975* applies as if the making of the request were the making of an application to the Administrative Appeals Tribunal for review of that decision.

169 Statements to accompany notification of decisions

- (1) If a reviewable decision is made and written notice of the decision is given to a person affected by the decision, the notice is to include a statement to the effect that:
- (a) the person may, if dissatisfied with the decision, seek a reconsideration of the decision by APRA in accordance with subsection 168(2); and
 - (b) a person whose interests are affected by the decision may, subject to the *Administrative Appeals Tribunal Act 1975*, if dissatisfied with a decision made by APRA upon that reconsideration confirming or varying the first-mentioned decision, apply to the Administrative Appeals Tribunal for a review of the decision so confirmed or varied.
- (2) If APRA confirms or varies a decision under subsection 168(4) and gives to a person written notice of the confirmation or variation of the decision, the notice is to include a statement to the effect that a person whose interests are affected by the decision may, subject to the *Administrative Appeals Tribunal Act 1975*, if dissatisfied with the decision so confirmed or varied, apply to the Administrative Appeals Tribunal for review of the decision.
- (3) A failure to comply with subsection (1) or (2) of this section in relation to a decision does not affect the validity of the decision.

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170 Approvals, determinations etc. by APRA

If:

- (a) a provision of this Act refers to an approval given, determination made or other act or thing done by APRA; and
- (b) there is no other provision of this Act expressly authorising APRA to give the approval, make the determination or do the act or thing;

APRA is authorised to give the approval, make the determination or do the act or thing.

171 Powers of Federal Court

A provision of this Act conferring a power on the Federal Court does not affect any other power of the Court conferred by another provision of this Act or otherwise.

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

Approved forms

- (1) A notice, statement, application or other document under this Act is in the *approved form* if:
 - (a) it is in the form approved in writing by APRA for that kind of notice, statement, application or other document; and
 - (b) it contains the information that the form requires, and is accompanied by any other documentation that the form requires; and
 - (c) if the form requires the form to be signed by a person or persons—it is signed by the person or persons in accordance with any applicable requirements specified in the form; and
 - (d) the form is given in a manner that complies with any applicable requirements specified in the form.
- (2) Requirements specified in a form referred to in paragraph (1)(c) or (d) may include requirements relating to the giving of forms by electronic means.

Note: For example, a form may include requirements relating to electronic signatures, or for the use of specified software.

- (3) The approved forms must be publicly available on APRA's website.

Other documents

- (4) APRA rules may impose requirements relating to the manner in which other documents (being documents that are not required to be in an approved form) are to be given under this Act.
- (5) Requirements specified in APRA rules referred to in subsection (4) may include requirements relating to the giving of documents by electronic means.

Note: For example, APRA rules may include requirements relating to the use of specified software.

173 Delegation by Minister

The Minister may, in writing, delegate all or any of his or her functions or powers under this Act to an SES employee, or an acting SES employee, in the Department.

174 APRA rules

- (1) APRA may, by legislative instrument (and subject to subsection (3)), make rules (***APRA rules***) prescribing matters:
- (a) required or permitted by this Act to be prescribed by APRA rules; or
 - (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) APRA rules may provide for APRA to exercise powers and discretions under the rules.
- (3) To avoid doubt, APRA rules may not do the following:
- (a) create an offence or civil penalty;
 - (b) provide powers of:
 - (i) arrest or detention; or

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- (ii) entry, search or seizure;
 - (c) impose a tax;
 - (d) set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act;
 - (e) directly amend the text of this Act.
- (4) APRA may, under section 15 of the *Australian Prudential Regulation Authority Act 1998*, delegate the power to make, vary or revoke APRA rules, but only if the delegation is to:
- (a) an APRA member (within the meaning of that Act); or
 - (b) an APRA staff member who is an executive general manager or equivalent.