Private Healthcare Australia
Better Cover. Better Access. Better Care.

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Hon Dr Michael Armitage
CHIEF EXECUTIVE OFFICER

Ms Laura Johnson
Manager, Insurance and Superannuation Unit
Financial System and Services Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Laura,

Private Health Insurance Changes

Thank you for the opportunity to comment on the latest package of proposed legislation to transfer the functions of the Private Health Insurance Administration Council (PHIAC) to the Australian Prudential Regulation Authority (APRA).

Private Healthcare Australia is the Australian private health insurance industry's peak representative body that represents 21 health funds throughout Australia and collectively covers approximately 97% of the private health insurance industry. Private health insurance today provides healthcare benefits for over 13 million Australians.

Our goal is to ensure that private health insurance members receive the best possible healthcare at the best possible prices.

Thank you for the consultation sessions that you have run to help explain the changes to the industry and your many discussions with our staff. This letter steps through the issues we raised during those meetings and discussions and some of the action items you agreed to take away.

Following review of the exposure draft material, we are keen to continue to work with you to ensure

- cost savings are fully passed on to industry and not diluted by additional implementation costs;
- regulation on the industry decreases rather than increases;
- the risk of unintended consequences are reduced, given the highly technical nature of consequential and transitional amendments; and
- all current appeal rights are maintained and ongoing appeal rights are in proportion to the proposed expanded regulatory powers in the exposure draft material.

We note in the absence of an Explanatory Memorandum to accompany the Bills it has been challenging to understand the impact of the Bills and potential flow on impacts. This results in a higher risk of unintended consequences.

Match Appeal Powers with Regulatory Powers

The number of APRA decisions that are reviewable by the Administrative Appeals Tribunal (AAT) has decreased. In the context of increased regulatory impost on industry as part of the PHIAC to APRA transition, we would argue that a decrease in AAT reviewable decisions is unfair

and inappropriate. We acknowledge that in some instances judicial review is available; however, we note this is a more costly and time consuming process than the AAT process. We suggest:

- all decisions that are currently reviewable by the AAT should continue to be fully AAT reviewable (on all grounds); and
- all NEW regulatory powers should be fully AAT reviewable (on all grounds).

Examples

- We understand that under section 95 of the *Private Health Insurance (Prudential Supervision) Bill*, APRA will be able to give certain directions to health funds where it has formed a reasonable view that one of the grounds in subsection 95(1) has been met. This replaces the current ability of PHIAC to give solvency, capital and prudential directions (sections 140-20, 143-20 and 163-20 of the Private Health Insurance Act 2007 (PHI Act)). The decision to give such a direction (or to refuse to vary or revoke such a direction) will only be reviewable by the AAT (pursuant to Items 9 and 10 in the table at section 167) if the basis for the direction was subsection 95(1)(a) to (c). The implication is that a direction given by APRA on a ground in subsection 95(1)(d) to (i) cannot be reviewed by the AAT. This narrows the scope of when such directions can be challenged when compared to the current ability to challenge directions given by PHIAC. We respectfully request that the text from "...on a ground..." to the end of the paragraph be deleted (as shown in red below). This change will restore the right for health insurers to challenge the direction irrespective of the basis for it being given.

Item	Decision	Provision under which decision is made
...		
9	to give a direction under section 95	section 95
10	to refuse to vary or revoke a direction that was given under section 95	section 98
...		

- We understand that under subsection 91(4) of the PHI(PS) Act, prudential standards can allow APRA the discretion to (among other things) adjust or exclude specific prudential requirements in relation to a specific health insurer or class of health insurers. This appears to mirror the current ability of PHIAC to make a declaration that either solvency or capital standards do not apply to a particular health insurer (see sections 140-15 and 143-15 of the PHI Act 2007). However, we cannot find an equivalent right within the PHI(PS) Act that allows a health insurer to seek an AAT review of the decision to refuse to grant such relief or to challenge any conditions imposed on such a declaration. We respectfully request that the ability to seek AAT review of such decisions be reinstated.

Reduce Regulatory Powers

The proposed legislation increases the regulatory powers of APRA, comparted to current PHIAC powers. Noting that the industry has had no failure to the detriment of members, this is unnecessary and seems to contravene the "reducing red tape" objectives behind the change.

1. APRA has been given new powers to change insurers' registration by notification. As discussed at consultation, this is inappropriate and the status quo should remain.

Schedule 2, Part 1, Division 1 of the proposed Private Health Insurance (Prudential Supervision)(Consequential Amendments and Transitional Provisions Bill 2015 gives APRA the power to vary the registration terms and conditions of the Private Health Insurer (s3(3)). At the Roundtable held on 8 April 2015, APRA clarified that the intention of this section was to "clean up" any old terms and conditions that were no longer applicable.
The current mechanism remains appropriate, whereby the onus to vary any registrations terms and conditions falls with the private health insurer.

2. We note APRA's powers have been extended beyond PHIAC's current powers regarding Rules that are not related to prudential regulation. The Minister now must consult APRA regarding health insurance Rules. There is no explanation for this additional power nor is there a corresponding right for private health insurers to be consulted.
On the other hand, we understand from our discussions with the relevant Government agencies that consultation by APRA and/or Treasury with the Health portfolio will exclusively be addressed in the Statement of Expectations and Memoranda of Understanding.
Could you please explain this difference?

3. The provision allowing PHIAC to waive the late payment penalty has been removed. However, APRA has assured us that they powers still remain. Please explain clearly in the Explanatory Memorandum where penalty waivers are now covered.

Financial Sector (Collection of Data) Act

The Bills continue to apply the Financial Sector (Collection of Data) Act ("CoD Act") to health insurers. We understood from our discussions with you previously that this would be removed, given the health insurance is not part of the financial sector. Our previous comments are attached for your information.
Health is widely acknowledged not to be part of the financial sector. As noted in our submission on the last Bill, it is inappropriate to apply the CoD Act to health insurers.

4. We remain concerned around the potential impacts in the longer term on the industry of its inclusion under the regulation of the CoD Act, particularly around the potential for a substantial increase in penalties. The penalties under the CoD Act for failure to provide information are considerably higher than those that apply under the current PHI Act, and include new custodial sentences for some offences.
We seek confirmation that the current penalties for offences around the provision of information, statistics and data to PHIAC will not be increased in any way as a result of the application of the CoD Act to the industry.

5. It looks like the CoD Act's application to private health insurers has been extended and now covers information disclosure.
This is likely to create confusion as information disclosure is covered under the Minister for Health.
Please remove this additional impost on the industry.

Collapsed Insurer Levy – Remove Additional Charges and Regulation

The legislation introduces new levies and regulation. This is contrary to the legislations objectives and should be removed.

6. Additional capacity for APRA to increase its impost on the industry by charging to administer the collapsed insurer levy. This is inappropriate given that the purpose of the changes is to reduce, not increase impost on the industry.

We understand that it is more expensive to explore other options, all of which are paid for under the current levy.
Please remove this additional cost.

7. Additional regulation can now be implemented around the collapsed insurer levy without Parliamentary scrutiny.
We note that the levy has never been applied. Therefore, it is concerning that the Bill is imposing so many additional regulations around this previously unnecessary and therefore unused levy.
Please remove the additional regulation or provide context on why such additional, new regulation is deemed necessary.

Reinstate Transparency Regarding Industry Monies

The legislation significantly reduces transparency around monies paid by the industry to APRA. We note that at our recent consultation meeting, Treasury undertook to ensure that transparency remains.

8. Section s318-5 of the PHI Act provides that proceeds from the investment of Risk Equalisation Funds are credited to the Risk Equalisation Trust Fund. However, the proposed amendments to s318-no longer require proceeds from the investment of risk equalisation funds to be credited to the risk equalisation account. Please restore crediting of proceeds from the investment of Risk Equalisation funds.
If this is not the case, please clarify in the legislation or EM how the interest will be treated.

9. Monies paid by the industry will be credited to the generic APRA Special Account.
To meet Government's objectives for the legislation, a special PHI account should be created and this account must be transparent to payers (the industry).

Reduce Costs to Industry

The Bills introduce no cost savings either for Government or the industry. However, they impose additional compliance and administrative costs on Government and the industry. This seems incongruous.

We note that significant savings will occur through PHIAC staff redundancies, Board fees, and other administrative savings.

Please reduce the industry levies, in line with the policy decision behind these Bills. Using the Government "efficiency dividend" would be a useful comparator.

Reduce Red Tape

The policy decision was to move the PHIAC functions to APRA to reduce costs and regulation. However the proposed Bill goes much further than this and proposes to regulate the private health insurance industry in line with regulation of the Australian financial services industry. APRA states that this significant increase in red tape is for "consistency" with the financial services it regulates. As an established and experienced regulator, APRA is able to differentiate between its regulated industries. PHI is already heavily regulated, more so than many other APRA-regulated industries. Regulation of PHI should not further increase.

It is important to note that the Australian private health insurance industry has had no major industry failures to the detriment of consumers. Therefore, the current regulation is working and no additional regulation is warranted. In fact, if anything, regulation should reduce NOT increase.

Please Provide an Explanation for Changes

As we noted for the PHIPS Bill, the industry continues to be concerned that there is little or no explanation for why the individual changes in the proposed Bill are thought to be necessary and how they are likely to affect the industry and its members.

Given the lack of explanation for the changes, it is unclear whether these are unintended consequences, or clear policy decisions to expand Government's regulatory powers, combined with a reduction in appeal rights for insurers being regulated. We query why an increase in regulatory power would be matched by a decrease in appeal rights?

Reduce Industry Levies

The stated purpose of the changes is to achieve cost savings. However, there is no explanation of what the expected cost savings are, or how these will be achieved. The cost of the levy on the industry will increase, due to additional levies and charges.

Complete Legislative Package

We note that time is running very short for a 1 July 2015 start date and various parts of the legislative package are still outstanding:

- provisions to ensure no changes will take effect before 1 July 2016;[1]
- explanatory memorandum to the current exposure draft documents;
- a regulatory impact statement to explain the changes and how they will affect Government administration of the industry, including costs to the industry and members and the industry's goals of providing access to the best possible care at the best possible prices;
- changes to all of the relevant *Private Health Insurance Rules*;
- full explanatory material that details the proposed changes, why they are considered necessary, how they differ from current regulation,
- updated *PHIPS Bill*, as per our discussions with the Minister's Office; and
- updated Standard Operating Procedures, invaluable tools which have greatly benefited both PHIAC and the industry. APRA has acknowledged that some of PHIAC's procedures are better than APRA's and the industry views Standard Operating Procedures are one of these better procedures.

It is very difficult to provide comments on one isolated part of this package of changes without access to the complete package.

The currently available material still does not provide details about some fundamental aspects of private health insurance industry regulation or how its regulation will be affected, including:

- premium change process – we discussed a "statement of best practice" with the Department and Minister, with in-principle agreement;
- current standard operating procedures issued by PHIAC after substantial industry consultation;
- industry analysis performed by PHIAC but not yet finalised or published;
- annual report on insurers – which has been published every year for 40 years and should be published every year by December;

[1] The Medibank prospectus, released on 25 November 2014 by the Australian Government states "As at the Prospectus Date, APRA has not determined its approach to prudential regulation of the PHI industry except that it does not intend to make any changes to the existing capital and solvency standards for private health insurers before 1 July 2016."

- state of the health funds report;
- risk equalisation;
- how the current $6.5m PHIAC surplus will be applied – noting that $6.5m is approximately twelve full months of levies on the industry; and
- reporting/industry statistics.

We asked these questions during the consultation sessions. The Treasury, the Department of Health and APRA are unable to provide clarity on these issues, as much of the necessary detail has not been finalised. It is concerning that the scope of the changes seem to not be fully comprehended by either the new nor the old regulator, just a few short months before the changes are proposed to take effect.

At the latest consultation session, the Government agencies present agreed to provide the following information. Clearly, this information is necessary for us to provide detailed feedback:

- map decisions and grounds that are currently AAT reviewable compared to proposed regime;
- map current versus proposed money paths and ensure that transparency is maintained (including what is done with interest on all monies collected, repayment mechanisms to insurers, etc); and
- ensure that current information provided to insurers and publicly are retained.

We remain concerned that the exposure draft material will result in increased industry regulation, contrary to the Government's stated objective to reduce red tape and regulation. Given that there is no proposed reduction in the levy on the industry, we query whether the proposed Bill as currently drafted will fulfil the Government's objectives.

Given that we have access to only part of the package, our current comments are interim in nature. We look forward to receiving the rest of the package of regulatory changes so that we can provide you with our full comments and feedback.

We are keen to meet with you to further discuss ways to ensure that the PHIAC to APRA legislative package reduces red tape and unnecessary regulation. Please contact me on 6202 1000 with any queries.

Yours sincerely,

Michael Armitage

HON DR MICHAEL ARMITAGE
CHIEF EXECUTIVE OFFICER
15.4.15

Attached: previous comments regarding Financial Sector (Collection of Data) Act
Technical errors

ATTACHMENT ONE - Financial Sector (Collection of Data) Act

We understand that the *Financial Sector (Collection of Data) Act* (CoD Act) will be broadened to apply to private health insurance. This is more complex than simply setting out reporting requirements under the new APRA Rules.

The CoD Act only applies to a small number of APRA-regulated sectors and currently excludes the following sectors:

- approved deposit taking institutions;
- life insurance; and
- general insurance.

In fact the CoD Act only seems to apply to finance bodies, investment banks and financial sector business subsidiaries.[2] It is inappropriate to extend this Act to private health insurance given a lack of similarities between private health insurance and the sectors regulated by the CoD Act.

Including private health insurance in the small number of sectors governed by the CoD Act appears to run counter to division of Ministerial responsibilities in the proposed Bill. Under the proposed Bill, the Treasurer (the Minister under the CoD Act) has the power to make determinations regarding prudential regulation alone for private health insurance. All other policymaking powers for private health insurance remain with the Minister for Health. However, the objects of the CoD Act (section 3) enable the collection of information to assist the "Minister to make financial policy". It seems inappropriate to empower APRA to collect private health insurance information that does not relate to the prudential regulation of private health insurers. The responsibility to collect general private health insurance information resides with the Minister for Health. Any additional powers will result in duplication and additional regulation and red tape.

References to the CoD Act should be removed from the Exposure Draft and replaced with a section stating what data the industry needs to supply. A section, rather than a whole new Act, is far simpler and involves less red tape than applying a whole new Act to the industry.

[2] http://www.apra.gov.au/NonReg/Pages/Registered-Financial-Corporations-list.aspx

ATTACHMENT TWO – Technical Errors in the PHI(PS)(CATP) Bill

During our review we identified what we believe are three typographical errors as follows:

- On page 31 of the exposure draft at paragraph 135, it seeks to insert additional bullet points (d) and (e) **after** s323-10(1A)(c) in the PHI Act. There is not currently a s323-10(1A) within the PHI Act. We are not sure what this reference should read and would appreciate your clarification on what the correct reference should read so that we can assess the impact.
- On page 36 at paragraph 160, it seeks to change a reference in the PHI(PS) Act [note we understand this is still in draft form] to the "*Legislation Act 2003*" – we were unable to find any such Act. We believe the original reference to the *Legislative Instruments Act 2003* is correct but would appreciate your clarification.
- On page 48 at section 16(**2**), it appears that subsection (c) should be moved to section 16(**3**) which deals with the Collapsed Insurer Special Purpose Account. We would appreciate if you could clarify if our understanding is correct.