

10 June, 2015

Committee Secretariat
Senate Standing Committee on Economics
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: economics.sen@aph.gov.au

Dear Sir / Madam

Private Health Insurance (Prudential Supervision) Bill 2015 [Provisions] and related bills

hirmaa welcomes the opportunity to make a submission to the Senate Standing Committee on Economics regarding the Private Health Insurance (Prudential Supervision) Bill 2015 [Provisions] and related bills.

hirmaa represents 18 community-based private health insurers, comprising both industry or employer focused "restricted access" insurers and "open" insurers serving particular regions. hirmaa constituents are predominantly not-for-profit and generally identify as mutuals. One of hirmaa's constituent members is a for-profit insurer owned by a mutual, not-for-profit organisation.

A full list of hirmaa members is included as Annexure A.

Since its formation in 1978, hirmaa has advocated for the preservation of competition, believing it to be fundamental to Australians having access to the best value health care services. hirmaa has done this by:

- promoting legislation, regulations, policies and practices which increase the capacity of its member organisations to deliver best value health care services; and,
- advocating for the preservation of a competitive market, which we see as essential to the integrity and viability of the PHI industry.

A number of characteristics distinguish the hirmaa member funds. They:

- are value-based as opposed to being profit-based;
- continue to offer various levels of insurance at highly competitive premiums;
- optimise benefit entitlements and premiums;
- continue to tangibly grow their membership numbers, in recent years above the industry average;
- in terms of the restricted insurers, have their unique nature acknowledged in the Private Health Insurance Act 2007.

hirmaa has been an active participant in the consultation sessions over this package of legislation and in summary, we are satisfied that the Bills as presented to the Parliament, achieve the Government's over-arching aim of ensuring a smooth transition from PHIAC to APRA.

Throughout the consultation process, hirmaa highlighted a limited number of areas that we considered needed review or further clarification and we are satisfied that our key concerns have been addressed in the Bills as presented to the Parliament. This submission will outline these key areas in the section – *‘Key issues in consultation and outcomes’*.

We are grateful to have the opportunity to comment on these important issues and trust the comments below are helpful to the Committee’s deliberations.

If further information is required, questions may be directed to:

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Yours faithfully

MATTHEW KOCE
Chief Executive Officer

Prudential regulation in private health insurance

In our initial submission to the Treasury dated 28 January 2015, hirmaa made the following points on prudential regulation in our industry (excerpt below):

Summary of hirmaa's position on prudential regulation

hirmaa considers that a vibrant, competitive private health insurance industry is vital to ensuring Australians have access to quality healthcare services representing the best value for money. To that end, hirmaa considers that regulation of private health insurers – including prudential supervision – should not impact the capacity or capability of its member organisations to continue to serve their communities. In particular, regulation should not disadvantage smaller private health insurers or disproportionately affect their ability to compete with larger insurers.

hirmaa considers that its members provide, primarily, a service to assist individuals and families to provide for and manage their healthcare expenditure. Whilst hirmaa supports effective prudential supervision of private health insurers, it considers private health insurance a functionally different service to general insurance carrying a fundamentally different risk profile. Whilst hirmaa does not necessarily object to harmonisation of regulatory approaches between private health insurance, general insurance and other APRA supervised financial services, it does not consider harmonisation alone is necessarily a sufficient reason to justify changes in regulation.

hirmaa supports the Australian Government's deregulation agenda and acknowledges the Government's commitment to budget savings by reducing duplication, improving coordination and increasing efficiency in government bodies. With respect to the transition of prudential supervision from PHIAC to APRA, hirmaa is keen to ensure that:

- Firstly, the transition does not affect the capacity or capability of its member organisations to serve their communities by imposing additional costs or regulatory burdens disproportional to the prudential risks of its members' businesses.
- Secondly, the transition does not result in a "one-size-fits-all" approach to prudential supervision of private health insurers, general insurers and other APRA supervised entities. Differences in the nature of the services and their risk profile must be reflected in the supervisory approach.
- Thirdly, the overall effectiveness of prudential supervision of private health insurers is maintained through the transition (particularly by ensuring that there is not a loss of "corporate memory" and regulatory expertise as a result of discontinuity of personnel).

With respect to the concerns highlighted in the above excerpt, hirmaa is satisfied that the package of legislation as presented to the Parliament, will not:

1. Materially affect the capacity or capability of our member organisations to serve their communities by imposing additional costs or regulatory burdens:

Over time, the industry expects to benefit from a modest reduction in the industry-levy that funds the prudential supervision of the industry.

2. Materially impact the overall effectiveness of prudential supervision of private health insurers through the transition (particularly by ensuring that there is not a loss of "corporate memory" and regulatory expertise as a result of discontinuity of personnel):

We note the Assistant Treasurer's second reading speech that acknowledges that nearly 80% of PHIAC's staff is expected to transfer to APRA from 1 July 2015.

We have arrived at these positions through our extensive consultations with APRA, the Department of Health and the Treasury.

With respect to our concerns over a "one-size-fits-all" approach to the prudential supervision of private health insurers, general insurers and other entities, hirmaa notes that APRA will not seek to make substantive changes to regulatory settings in PHI before 1 July 2016. APRA has also reassured industry that thorough consultation will take place over any proposed changes.

Key issues in consultation and outcomes

In our submission dated 28 January 2015, it was noted as an overarching comment, that the Exposure Draft replicated many of the prudential supervision provisions currently set out in the *Private Health Insurance Act 2007* (Cth) and introduced few wholly new legislative provisions.

However, we did highlight a limited number of issues (below) throughout the consultation. hirmaa is satisfied that the Bills as presented to the Parliament address these concerns.

1. Prudential supervision Bill; Part 9, section 167: Carrying over of Sections 264-10(5) & 265-15 of the PHI Act.

hirmaa's position throughout the consultation was that the public information functions contained in section 264-10(5) and section 264-15 of the Private Health Insurance Act 2007 (PHIA) be retained in full. These sections place an obligation under Law on the Regulator to publish statistics and an annual report on the operations of private health insurers.

hirmaa stressed the importance and value of the public information function carried out by PHIAC and requested that these functions continue to be detailed, in their present form, in the Bill.

It was the Treasury's initial intention not to carry these existing provisions over into the new legislation, however, following consultation, the specific obligation to produce an annual report on the Operations of Private Health Insurers has been carried over in Part 9, Section 167.

The public information functions of the Council are referenced in the explanatory memorandum with explicit indication that these will continue following the transition to APRA.

hirmaa is satisfied that these provisions ensure PHIAC's public information functions are carried over by APRA. This will enable consumers to continue to make informed decisions about their private health insurance coverage.

Explanatory Memorandum, PHI (Prudential Supervision) Bill 2015:

Annual publication of information relating to health benefits funds

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

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

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

2. Prudential Supervision Bill: Division 5 - Section 46 (3), and Division 8, 76 (1) & Division 9, 89

The Exposure Draft of the Bill substantially reflected section 152-10 of the PHIA making directors jointly and severally liable for a loss to a health benefits fund (where there has been a failure to comply with an APRA notice in respect of a contravention of Part 3 resulting in a loss to a health benefits fund). hirmaa does not support this imposition of directors' liability for loss.

Joint and several liability for loss is qualitatively different from other forms of sanction (civil penalty, disqualification etc.) and there is uncertainty in other legal contexts of how a "due diligence" defence applies where a director did not participate in a relevant process or decision.

hirmaa asked for a general exculpatory provision, providing a discretion for relief from liability where a person has acted honestly and, having regard to all the circumstances of the case, ought fairly to be excused.

As a consequence, the Bill as presented to the Parliament includes a reference to section 166: relief from liability which is consistent with the Corporations Act. Note: the same outcome applies to Division 8, Section 76 and Division 9, Section 89, as advocated for by hirmaa.

We are satisfied that this addresses our concerns and that this will aid insurers to continue to recruit capable and effective directors and officers. We note that the negative impact of onerous liability provisions on the recruitment and retention of directors is well documented.¹

¹ Australian Institute of Company Directors, *Impact of Legislation on Directors* (November 2010).

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.
- (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: For relief from liability, see section 166.

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*).

Private Health Insurance (Prudential Supervision) Bill 2015 – Section 166

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.

- (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.

ANNEXURE A
HIRMAA MEMBERS

ACA Health Benefits Fund Ltd

Defence Health Ltd

Health Care Insurance Ltd

Health Partners Ltd

Latrobe Health Services Ltd

Lysaght Peoplecare Ltd

Mildura Health Fund

Navy Health Ltd

Phoenix Health Fund Ltd

Police Health Ltd

Queensland Country Health Ltd

Queensland Teachers' Union Health Fund Ltd

Railway and Transport Health Fund Ltd

Reserve Bank Health Society Ltd

St Luke's Medical & Hospital Benefits Association Ltd

Teachers Federation Health Ltd

The Doctors' Health Fund Ltd

Westfund Ltd