10 June 2015

Dr Kathleen Dermody
Committee Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By upload to http://www.aph.gov.au/Parliamentary_Business/Committees/OnlineSubmission

Dear Dr Dermody

Inquiry into the Private Health Insurance (Prudential Supervision) Bill 2015 and related bills

Bupa welcomes the Senate Economics Legislation Committee's invitation to provide comments on the *Private Health Insurance (Prudential Supervision) Bill 2015 and related bills* (the Bill package).

Bupa would like to thank Treasury and the Department of Health for the manner in which the consultation process with industry was conducted and notes that a number of the key concerns raised during the consultation process have been addressed in the Bill package.

Bupa is supportive of the submission that Private Healthcare Australia has provided the Committee on the Bill package and wishes to provide the following additional comments.

Specific Comments

Private Health Insurance (Prudential Supervision) (Consequential Amendments and Transitional Provisions) Bill 2015 (Consequential Amendments Bill)

Financial Sector Collection of Data Act 2001 (Cth)

Bupa understands from APRA that the need to include the Private Health insurance industry (PHI industry) under the *Financial Sector Collection of Data Act 2001* (Cth) (FSCODA) is required to enable APRA to collect data using the same processes that it does for other industries. One consequence, however, is that the PHI industry will now be subject to penalties regarding provision of data and information to APRA that are significantly higher than those that are currently in place. In particular, for some offences, FSCODA imposes custodial sentences of up to five years. Bupa contends that such penalties represent a significant change to industry regulation and are disproportionate to PHI industry risk, as compared to the other industries APRA regulates. We request that FSCODA be amended to ensure that the penalties imposed on

the PHI industry reflect those that are currently in place. These concerns, raised during consultation, have not been addressed in the Consequential Amendments Bill.

PHIAC Reserves

Bupa notes that the PHIAC Annual Report at 30 June 2014 stated total equity held was $4.9m, of which $4.8m was retained surpluses[1]. Bupa understands from the Department of Health that this amount has increased since the publication of the PHIAC 2013/14 Annual Report.

These reserves have accumulated since 1998 from administration levies[2] collected from the industry by PHIAC. Bupa would appreciate receiving further details about the future of these reserves. We note that the council administration levies for the last quarter of the 2014/15 year were waived[3], in effect returning around $1.7 million to the industry. However, there has been no further confirmation that additional monies will be returned to industry. Instead, it has been stated that the levies will remain unchanged for the 2015/16 year. We believe it would have been appropriate to return to the industry more of the current surplus by reducing the administration levies for the 2015/16 year.

Further, an additional provision has been included in the Consequential Amendments Bill which was not in the exposure draft. The proposed new Division 2, Section 22 of the Private Health Insurance (Council Administration Levy) Bill gives the Assistant Treasurer the power to determine in writing that a specified asset will become the asset of the Commonwealth before the transition occurs. This appears to suggest that the Government can appropriate the PHIAC reserves, made up of levies paid by the industry, in part or full. We seek confirmation that the entire current reserves of PHIAC will be transferred to APRA and noted against the PHI industry.

Interest earned on Risk Equalisation Pool

Section 318-5(f) of the *Private Health Insurance Act 2007* (Cth) (PHI Act) requires "the proceeds from any investments made using Fund money" to be credited to the risk equalisation account. This requirement was not included in the exposure draft of the Consequential Amendments Bill. Bupa understands that interest, however modest, is in fact earned currently. Accordingly, we request that the proposed section 318-5 be amended to reinsert the requirement that any interest earned is credited to the Risk Equalisation Special Account. Otherwise, Bupa seeks clarification as to the treatment of interest earned.

[1] PHIAC. 2014/ Annual Report 2013-14. Page 48. Available at http://phiac.gov.au/wpcontent/uploads/2014/10/PHIAC-Annual-Report-2013-14.pdf

[2] PHIAC. 2014/ Annual Report 2013-14. Page 42. Available at http://phiac.gov.au/wpcontent/uploads/2014/10/PHIAC-Annual-Report-2013-14.pdf

[3] Department of Health, Private Health Insurance Circular PHI 31/15 dated 19 May 2015. Available at http://www.health.gov.au/internet/main/publishing.nsf/Content/B11FC97B6E6E2988CA257E4A002429DD/$File/31%20-%2015.pdf

Repayment of collapsed levy

Bupa notes that wording of new section 54H of the *Australian Prudential Regulation Authority Act 1998* (Cth) (APRA Act) under the Consequential Amendments Bill enables the repayment by APRA to industry of collapsed levies collected. During the consultation process, Bupa sought confirmation that the Risk Equalisation Rules will be amended to ensure that, in returning any repaid amounts to the industry, the calculations of return will be based on the original calculation for the payment of the levy by each insurer. The current draft Rules do not specify this, nor does the Explanatory Memorandum. Bupa seeks confirmation that the Rules will make this clear.

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

Scope of directions power

During the consultation process, Bupa also raised concerns regarding the scope of APRA's directions powers under section 97 of the PHIPS Bill, which do not seem to have been addressed. The directions powers do not reflect those currently held by PHIAC, but those which APRA has in relation to Life Insurance, despite the differences between the Life Insurance industry and PHI, including the additional regulatory requirements set in the PHI Act. One of Bupa's concerns was that a number of the proposed directions may place an insurer at risk of breaching other obligations under the PHI Act. In particular:

(a) Section 97(1)(f) refers to "financial accommodation" and this term is not defined. An ordinary reading of "financial accommodation" could extend to waiving a waiting period or agreeing to suspend a policy. Bupa does not believe it necessary for APRA to give directions on these matters, because they are adequately dealt with by the regulatory requirements under the PHI Act.

(b) Section 97(1)(g) refers to "not to issue or renew any policy, undertake any liability under any policy or collect any premium". This kind of direction may result in an insurer being in breach of the community rating principle given we are generally not permitted to refuse to insure or renew a policy. Further, unlike general insurance, private health insurance cannot be characterised as a fixed term contract between the insurer and policyholder. Rather, once the policy commences, it continues until either party terminates. In this sense, the concept of "renewing" a policy does not apply to PHI.

(c) Section 97(1)(t) enables a direction to amend the rules of a PHI insurer. There is a risk that the amendment APRA requires could result in a breach of an obligation under the PHI Act, such as the coverage or community rating requirements. It is also important to note that under the PHI Act, the Minister for Health may disallow any changes to an insurer's rules that the Minister considers may breach the Act. As such, any proposed change to an insurer's rules that APRA may direct could be subject to disallowance by the Minister for Health.

Bupa again proposes the following:

- including a clear definition of "financial accommodation";

- amending subsection 97(1)(g) to remove the words "not to issue or renew any policy" and providing greater clarification as to whether the remaining words are intended to enable APRA to direct an insurer not to pay benefits under a policy, which it is otherwise contractually obliged to do; and

- including a provision which provides a clear defence for non-compliance with a direction, if such compliance will result in a breach of the PHI Act by the insurer or alternatively a defence to a breach of the PHI Act if it is as a result of compliance with a direction by APRA.

Revocation or variation of a direction given by APRA

Section 99 of the PHIPS Bill enables APRA, by written notice to a health insurer, to revoke or vary a direction given under section 96. Bupa submits that an insurer should be able to request that APRA consider the revocation or variation of a 96 direction and that APRA be required to consider such a request. Bupa requests the PHIPS Bill be amended to enable a health insurer to apply to APRA to have a direction given under section 96 revoked or varied.

AAT reviewable decisions

Bupa notes that an APRA decision has been removed from section 168 of the PHIPS Bill (compared to the exposure draft) and will not be AAT reviewable. This decision relates to an APRA decision to refuse to agree to the variation or revocation of an enforceable undertaking provided under section 152 of the PHIPS Act. Currently, this is a PHIAC decision reviewable by the AAT under section 328-5 of the PHI Act. Bupa wishes to emphasise that any change to appeal rights for the industry is a substantial change to the current regime. Instead, we believe that all appeal rights must remain in place following the merger of PHIAC into APRA.

Investigations by APRA

The wording in section 130 of the PHIPS Bill in relation to the circumstances under which APRA can commence an investigation into a private health insurer is significantly wider than the circumstances set out in section 194-1 of the PHI Act. This represents a change to the current prudential regulation of the PHI industry.

In particular, section 130(1)(a) permits the commencement of an investigation if APRA reasonably suspects that "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". An insurer may take a large number of actions which it is legally entitled to do, but which could be viewed as not being in the interests of individual policy holders. Bupa still considers that this subsection should be qualified by a requirement that the conduct must also constitute a breach of the PHIPS Act itself.

General Comments

Consultation

Bupa acknowledges that Treasury has done its best to provide industry with the opportunity to contribute feedback. Rather, Bupa has a general concern regarding the period of time afforded

to industry consultation on the Bill package. The transfer of prudential supervision to APRA represents a substantial change for the industry. While it was announced as part of the 2014/15 Budget measures in May 2014, industry consultation on the legislative package commenced in mid January 2015. The timeframes have been extremely tight, which constrains a comprehensive and best practice review. For example, consultation on both the PHIPS Bill and the remaining four bills was less than 3 weeks consultation. Finally, the industry has not been provided with the proposed changes to the subordinate legislation that the Department of Health will continue to manage, but which require amendment due to the transition.

Smaller Government outcome

Bupa understands that the *Smaller Government* rationale in the 2014-15 Budget is to focus on delivering cost savings for the Government (including through harmonisation) and notes that the Assistant Treasurer, in his second reading on the Bill package, has stated that "The abolition and merger of statutory bodies, including the Council, is expected to improve coordination and accountability and reduce the costs associated with separate governance arrangements on industry." Bupa also notes that the merger of the Private Health Insurance Ombudsman (PHIO) into the Commonwealth Ombudsman will occur on 1 July 2015.

Bupa is uncertain how the changes to the PHI industry regulators, PHIO and PHIAC, will deliver cost savings to the Government or how efficient it is to move regulatory responsibility for the PHI industry from one Department and one Minister to three Departments and three Ministers. In fact it would seem to Bupa that the effect of both this Bill package and the merger of PHIO may be to create more distinctly separate governance arrangements for the industry with no discernible benefits for the industry or consumers.

Efficiency for industry

The Health Portfolio Budget Statement Paper 10 for the 2014-15 Budget also stated a key reason for the merger of PHIAC and APRA was to "remove duplication and reduce impost on industry"[4]. This creates a clear expectation that cost savings will be delivered to the industry and the regulatory burden on industry will be reduced as a result of this change. However, it now seems from the Assistant Treasurer's second reading speech in relation to the PHIPS Bill that this change is primarily focused on streamlining government bodies and reducing duplication of government agencies[5]. While the Assistant Treasurer has stated in his second reading speech that there are expected to be some savings to industry over time[6] it is not clear when these savings will materialise.

[4] Department of Health. 2014. Budget Related Paper No. 1.10 Outcome 6 – Private Health. Page 119. Available at http://www.health.gov.au/internet/budget/publishing.nsf/Content/2014-2015_Health_PBS

[5] Private Health Insurance (Prudential Supervision) Bill 2015 SECOND READING SPEECH, Hon Josh Frydenberg, page 3. Available at file://internal/DFS$/SYD-RESTRICTED_MOEUSERLIBRARIES/coraxt/Downloads/p150527708.pdf p.3

[6] Private Health Insurance (Prudential Supervision) Bill 2015 SECOND READING SPEECH, Hon Josh Frydenberg, page 2. Available at file://internal/DFS$/SYD-RESTRICTED_MOEUSERLIBRARIES/coraxt/Downloads/p150527708.pdf p.2

In particular, there again appears to be no plan to deliver cost efficiencies to the industry in the short term as a result of the merger, noting that levies are to remain unchanged for 2015/16 year. This is somewhat surprising given:

- APRA's statements that there is no intention to increase regulation for the industry, at least for the period 1 July 2015 – 30 June 2016;
- there will be reductions in the current PHIAC staff levels, confirmed by the Assistant Treasurer's second reading speech which stated "nearly 80 percent" of PHIAC staff are expected to transfer to APRA[7];
- removal of the PHIAC Board; and
- potential efficiencies from back office shared services.

We continue to seek clarification as to when the industry may expect to see cost savings and a reduction of the industry's regulatory burden.

Regulatory impact on industry

Bupa still considers that a regulatory impact statement in relation to the Bill package should be prepared. This would help to ensure that the manner in which the APRA regulatory framework is implemented and that any changes beyond 2016 will not in result in substantial or unplanned impact.

Bupa is also concerned about APRA seeking to harmonise regulation of the PHI industry with other industries which APRA regulates, given the substantial differences between the PHI industry and financial sector industries. APRA does not intend to adopt the current Standard Operating Procedures (SOPs) that PHIAC has in place with the industry, but to regulate the industry in accordance with the APRA Supervision Blueprint and an industry specific regulatory framework.

We believe that the level of prudential regulation should be proportionate to the risk and that taking an approach that is not aligned with the risk will simply increase the regulatory costs for industry, leading to increased premiums and no additional benefit for consumers. We note that unlike the risk of a collapse of a life insurer or superannuation fund, the risk to consumers of a collapse of a private health insurer would be minimal due to a combination of regulatory framework including community rating, portability, the risk equalisation pool and the existence of a high quality universal public health system. Further the split of policy responsibility between Treasury and Health, with no codified obligation on either APRA or Treasury to consult with the Health Minister in relation to any changes to be made to the prudential regulation, we believe raises a risk that the flow on impact of prudential changes on other areas including operating costs for insurers may be overlooked in a drive to ensure efficiency within APRA.

Therefore, we seek confirmation that where APRA is considering harmonising standards, rules or reporting requirements, changes will only be made that are consistent with the Government's stated policy on regulation, that it only be used where "absolutely necessary and should not be

[7] Private Health Insurance (Prudential Supervision) Bill 2015 SECOND READING SPEECH, Hon Josh Frydenberg, page 2. Available at file://internal/DFS$/SYD-RESTRICTED_MOEUSERLIBRARIES/coraxt/Downloads/p150527708.pdf p.2

the default position in dealing with public policy issues."[8]. Further we seek reassurance that extensive consultation and a regulatory impact statement will be required, as a matter of practice for all changes to the prudential regulation of the PHI industry.

Again, Bupa is simply concerned to ensure that there is a careful consideration of the potential increase in the industry's regulatory burden by APRA and Treasury.

About Bupa Australia and New Zealand

As part of the international Bupa Group, Bupa's Australian and New Zealand businesses share a common purpose of longer, healthier, happier lives. We are focussed on providing sustainable healthcare services, support and advice to people throughout their lives, and on leading the industry in the promotion of preventive health and wellness.

We provide a wide variety of services for more than 5 million customers across Australia and New Zealand. In Australia, we provide health insurance and aged care services, as well as delivering healthcare services. These include, GP services (through Bupa Medical GP) health coaching (through Bupa Health Dialog), corporate health services (through Bupa Wellness), eye care (through Bupa Optical) and dental (through Bupa Dental Corporation). In addition, Bupa Medical Visa Services provides visa medical examinations to approximately 250,000 people annually across Australia and other visa and migration services to the Department of Immigration and Border Protection. In New Zealand, Bupa has rest homes, retirement villages, personal medical alarms and a brain rehabilitation business.

Yours sincerely,

Head of Government, Policy and Regulatory Affairs
Bupa Australia and New Zealand

[8] Liberal Party.2013. Boosting productivity and reducing regulation. Page 13. Available at http://lpawebstatic.s3.amazonaws.com/Policies/ProdPolicy10Jul13.pdf