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For Better Health

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Dr Kathleen Dermody,
Committee Secretary,
Senate Economics Legislation Committee,
Parliament House,
CANBERRA ACT 2600

Dear Dr Dermody,

I refer to your email of 4 June 2015 inviting a submission in relation to the Private Health Insurance (Prudential Supervision) Bill 2015 and related bills. I am pleased to provide the following in response.

Medibank Private Limited (Medibank) has previously provided comments to the Treasury in relation to (1) an 'exposure draft' of the Private Health Insurance (Prudential Supervision) Bill 2015 (PHIPS Bill) and (2) 'exposure drafts' of the other Bills referred to in your email. A number of our comments appear to have been adopted into the versions of the Bills now before Parliament, though others were not. For those items not adopted that we consider to be important, we take the opportunity to repeat them now.

Private Health Insurance (Prudential Supervision) Bill 2015

Proposed subsection 130(1)

This provision empowers APRA to appoint a staff member as an inspector to investigate the affairs of a private health insurer if APRA "suspects that … the affairs of the insurer are being … 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 if it suspects that the insurer has contravened an enforceable obligation.

Our concern with this provision relates to the words quoted above. The comment that we originally made was to the effect that there are many things that a private health insurer may legally do but which are not necessarily "in the interests of the policy holders of [its] health benefits fund". For example, an insurer may amend its products so that they will no longer cover a particular treatment; or it may reduce the benefits that it pays for a particular treatment; or it may cease entirely to insure persons under particular products and oblige the cohort of existing insureds with policies in those products to move to policies in other products. Each of these things (along with others that might be said to be contrary to the interests of policy holders) is permitted under the Private Health Insurance Act 2007.

We also cited the fact that the "affairs of the insurer" is a term that is broader than that part of the insurer's affairs that comprise its health insurance business or its health-related business. Private health insurers have been permitted to undertake business other than health insurance business and health-related business since 1 April 2007. Since the term "insurer" effectively

refers to the legal entity, the potential scope of APRA's power to appoint an investigator extends to the situation of the insurer's other, non-private health insurance-related, businesses being conducted in a way that is not in the interests of policy holders, yet is being undertaken with perfect legality.

I take the opportunity to repeat the conclusion of our original comment on this point:

"We recommend that consideration be given to the articulation of further conditions to be satisfied before investigation powers may be invoked: for example, where there is suspicion of acts or omissions that would comprise breaches of the [Private Health Insurance (Prudential Supervision) Act 2015 or of the Private Health Insurance Act 2007].

"In circumstances where those further conditions are not satisfied, we would not seek to exclude APRA's having the power to ask questions and require answers – but the more interventionist powers of an investigation do not seem warranted."

To these we now add two further comments.

First, the proper ambit of proposed subsection 130(1) should be curtailed so that it relates only to that part of the affairs of the insurer that comprise its health insurance business or its health-related business.

Secondly – and most importantly – we draw to the Committee's attention that for private health insurers that are companies limited by shares, it is an obligation of persons involved in the direction and management of the insurer to exercise their powers in the best interests of the company as a whole. In ordinary circumstances, this principle is understood as referring to the interests of shareholders. There is a failure of proposed subsection 130(1) to acknowledge this, and an implication that an insurer's business must always be conducted in a way that gives primacy to the interests of policy holders of its health benefits funds.

We consider that this sets up (at best) ambiguity with reference to, and (at worst) conflict with, common law and the Corporations Act 2001 in relation to how companies that are private health insurers are to be conducted.

We ask that the Committee consider these matters and consider whether modifications to the proposed provision would indeed be desirable, in order to restrict the ambit of and the implications of the provision as currently drafted.

Proposed Part 5

Several provisions in Part 5 of the Bill compel the production of information or records, e.g., subsections 122(1) and (3). Part 6 has similar provisions. The exposure draft version of the Bill upon which we commented, included a provision – numbered in that version as proposed section 149 – dealing with legal professional privilege. It provided that nothing in the Part (i.e., Part 6) affected the right of a person to refuse to answer a question, provide information or a report, or produce a document on the ground of it being privileged.

In our comments to Treasury we drew attention to the absence of a provision in Part 5 corresponding to this provision in Part 6, suggesting that a similar provision to apply in respect of Part 5 would be appropriate, and suggesting further that such a provision should clarify that it mattered not whether the legal professional privilege 'belonged' to the person to whom the

requirement to produce or respond was given or 'belonged' to someone else (e.g., that person's employer).

We commented on the inferences that a Court might subsequently make as to the presumed intention of Parliament should such a provision exist in relation to Part 6 but not in relation to Part 5. It now seems from the absence of any provision in the Bill that corresponds to proposed section 149 of the exposure draft (which may be seen in context at the URL http://www.treasury.gov.au/~/media/Treasury/Consultations%20and%20Reviews/Consultations/2015/Private%20Health%20Insurance%20Bill%202015/Key%20Documents/PDF/ExposureDraftBill.ashx) that the drafters may have preferred to be entirely silent on the matter of legal professional privilege in the whole Bill and to let the common law (e.g., Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission (2002) 213 CLR 543) determine matters.

If the Committee agrees with this approach as an appropriate means of ensuring that rights to legal professional privilege are not abrogated by any of the provisions of the proposed Act, we would respectfully request that this be referenced expressly in the Committee's report to Parliament in relation to the proposed Bill.

Proposed section 122

Our comments previously provided to Treasury in relation to the equivalent provision of the exposure draft version of the Bill (proposed section 121) were taken up in part only. We had expressed the view that the drafting should be corrected so as to ensure that any evidence the disclosure of which was compelled by subsections (1) and (3) could be used against the person who was being compelled to disclose it only for disqualification proceedings under what is now proposed section 120. In our view, this point has not yet been adequately dealt with.

It would be open to Parliament to determine that the highest priority is that a person who should be disqualified under proposed section 120 does not fail to be disqualified on the basis of the relevant information being held back by that person; and, further, to determine that the same evidence may indeed be used against the person in other proceedings (though that would not, we believe, be its usual practice).

As a second option, it would also be open to Parliament to determine that the highest priority is that a person who should be disqualified under proposed section 120 does not fail to be disqualified on the basis of the relevant information being held back by that person; that it must be disclosed; but that once disclosed it could be used against that person only for those disqualification proceedings.

And a third option is for Parliament to determine that while it is important for such information to be disclosed, if to do so would also tend to criminate the person in respect of other matters too, then the person is permitted to claim a privilege against self-incrimination and to refuse to make the relevant disclosure that might, if made, expose him or her to disqualification under proposed section 120.

Subsections (1) and (3) each fail to limit the abrogation of the rule against self-incrimination to circumstances where it would tend only to make the person liable to a penalty by way of disqualification. This suggests that the third option described above has been excluded.

And there is no provision within the proposed section 122 that would prevent that evidence being used against the person in respect of other proceedings. This suggests that the second option is being excluded too.

(You should be aware that the reference in subsection (4) to "subsection 112(6)" is limited in effect because it applies only to circumstances where section 112 may be invoked, i.e., requirements imposed on current or former appointed actuaries of a private health insurer, whereas sections 120 and 122 are clearly relevant to the role of "officer" too. And the reference in subsection (4) to subsection 149(2) is ineffective since the latter operates only in respect of matters that fall under subsection 149(1), i.e., the answering of a question, provision of information, etc. "under this Part" – which is Part 6. Since proposed section 122 falls into Part 5 of the Act, subsection 149(2) gives no protection to the further use of information or records the production of which has been compelled under section 122. Proposed subsection 149(2) does not give any protection in respect of matters arising under Part 5. The reference to subsection 149(2) in proposed subsection 122(4) seems to be redundant.)

If it is – unusually – Parliament's intention to allow the use of evidence the disclosure of which has been compelled under proposed section 122 to be used in respect of proceedings other than disqualification proceedings against that same person, then we recommend that this be stated expressly. The redundant reference to subsection 149(2) by subsection 122(4) and the limited reference to subsection 112(6) in that same subsection do not give such an effect.

If it is intended that either the second or the third option described above should be objectives, then we recommend that the Committee consider whether the following amendments to the provisions would be in order:—

(a) in the case of the second option — stating that proposed subsections 122(1) and (3) apply even in circumstances where the same information might tend to criminate the person in respect of other offences or proceedings, but that the information may not be used in such proceedings; and

(b) in the case of the third option – stating that proposed subsections 122(1) and (3) do not apply if the same information might tend to criminate the person in respect of other offences or proceedings but apply if it is only the penalty of disqualification under proposed section 120 to which the person is exposed.

General comments on drafting of Notes

It is our view that subsection 4B(3) of the Crimes Act 1914 is capable of application only if an offence is described in such terms as to be capable of being committed by both an individual legal person or a body corporate. If the offence is written in such terms that it can only be committed by a body corporate, then there is no possible application of the provision. Likewise, if the offence is written in such terms that it can be committed only by an individual legal person, there is no possible application of the provision. In each of those two circumstances, the penalty expressed in the provision is the penalty that applies, without any 'multiplying out' as provided for by that provision of the Crimes Act.

We suggested to Treasury that all Notes in the Bill making mention of this provision of the Crimes Act should be reconsidered with this in mind. It seems to us that this has not occurred. The Committee will no doubt take its own advice on the correct interpretation and application of that provision of the Crimes Act. If it should agree with our interpretation, then it will behove

the Committee also to have regard to the following provisions of the Bill as examples of where a Note mentions this concept of multiplied penalties (inappropriately, in our view):—

(a) Proposed subsection 95(1): This provision makes it an offence for a private health insurer to become aware of having contravened a prudential standard or another matter that materially affects* its financial position and fails to notify this to APRA as soon as practicable in writing. The penalty is expressed as being "30 penalty units". The Note states that if a body corporate is convicted of an offence against the subsection, subsection 4B(3) of the Crimes Act allows a court to impose a fine of up to 5 times that stated penalty. In fact, all private health insurers must be bodies corporate. It is impossible for a private health insurer not to be a body corporate. It is therefore impossible for the offence – which is limited to private health insurers – to be committed by an individual. The penalty that Parliament approves for such an offence can therefore only be interpreted as a penalty that is appropriate for bodies corporate.

In relation to the above, please note that the presumption in subsection 4B(1) is overridden by the "contrary intention" that appears in subsection 126-10(1) of the Private Health Insurance Act 2007, which provision allows only for a Corporations Act company to apply for registration as a private health insurer, by paragraph 18(2)(b) of the Private Health Insurance (Transitional Provisions and Consequential Amendments) Act 2007 and by proposed subsection 12(1) of the PHIPS Bill.

Please also note that subsection 4B(3) of the Crimes Act permits a Court to impose a pecuniary penalty of up to 5 times more than the stated amount only "if the contrary intention does not appear and the court thinks fit" and if there actually is a pecuniary penalty that could be imposed by the Court on a natural person convicted of the same offence. Since the offence can only be committed by a private health insurer and since a private health insurer cannot be a natural person, there is no penalty that could be imposed on a natural person at all. The application of subsection 4B(3) is impossible, and the inclusion of this Note in relation to proposed subsection 95(1) and similar provisions in the Bill is inappropriate.

[* Incidentally, we take the opportunity to note that the term "affects" lacks the necessary negative connotation that ought to be part of a provision such as this. Alternative terminology such as "materially and adversely affects" or "materially prejudices" would be preferable, and we ask the Committee to consider this as a separate comment on this particular provision. We did not previously observe this point in our submissions on the exposure draft versions of the Bills.]

(b) Proposed subsection 112(3): This provision makes it an offence for a person to be given notice under proposed subsection 112(1) and to fail to comply with that notice. Under proposed subsection 112(1), APRA may give a notice to a person who is or was the appointed actuary of a private health insurer. Currently, subsection 160-5(1) of the Private Health Insurance Act 2007 and item 3 of Schedule 2 to the Private Health Insurance (Insurer Obligations) Rules 2009 by implication require that the appointed actuary of a private health insurer should be an individual legal person and that it cannot be a body corporate.

The Committee may be in a position to have Treasury advise as to whether or not they intend for a private health insurer's appointed actuary ever to be permitted to be a legal person other than a natural person. If such an intention is disclaimed, then it is unreasonable to suppose that the offence in proposed subsection 112(3) could ever be committed by a body corporate, and the Note that follows that provision is not required.

(c) Proposed subsection 104(3): This presents a slightly different version of the example at paragraph (b) above. The offence is committed by officers of private health insurers. We recognise the possibility of a corporate entity being deemed to be a 'shadow director' of another body corporate, however we don't see that it is possible for such an entity to have "duties" within the meaning of proposed paragraph 104(3)(b) of the PHIPS Bill. Accordingly, we don't see how the offence in this subsection could be committed by someone other than a natural person. We consider that the Note which follows this provision and which refers to subsection 4B(3) of the Crimes Act is misconceived.

These are merely examples of provisions, and the problem appears in various other provisions of the Bill.

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

Proposed Schedule 1, item 154

We previously commented on an exposure draft version of this Bill. At that time, items 135 and 136 rather confusingly provided for:

(a) the insertion of two new paragraphs "(d)" and "(e)" after paragraph "323-10(1A)(c)" of the Private Health Insurance Act 2007, which paragraphs were to refer to "APRA" and "an APRA member or APRA staff member (within the meaning of the Australian Prudential Regulation Authority Act 1998)"; and

(b) the repeal of paragraphs 323-10(2)(d) and (e) of the Private Health Insurance Act 2007.

Given that there is no subsection 323-10(1A) in the Private Health Insurance Act 2007, we queried whether this was intended to be a reference to subsection (2) and whether the two items, 135 and 136, should have been re-ordered, thus first deleting the corresponding paragraphs (d) and (e) of subsection (2) and then inserting the new ones that referenced APRA and APRA staff members.

Subsection 323-10 exists to permit certain specified persons to exchange information relating to private health insurers or their directors or officers, including (currently) "a member of the Council" – that is, PHIAC – and "a person employed, or a consultant engaged, by the Council". It seemed logical that the references to PHIAC were merely to be updated so that they referred to APRA.

We note that in the version of this Bill that has been introduced to Parliament, item 154 of proposed Schedule 1 (reflecting item 136 of the exposure draft that we previously saw) merely deletes paragraphs 323-10(2)(d) and (e) of the Private Health Insurance Act 2007. No paragraphs replacing them and referring to APRA rather than PHIAC are to be included.

We take the opportunity merely to suggest that the Committee seek confirmation as to whether the formal exclusion of APRA and APRA staff from the scope of section 323-10(2) of the Private Health Insurance Act 2007 is deliberate, or whether there has been some further oversight in the effort to correct the mistaken reference to subsection (1A) of that section. We apprehend that it may have been determined that the relevant paragraphs are redundant on the basis of wider powers within the Australian Prudential Regulation Authority Act 1998 to disclose and receive similar information, but we have no way of knowing whether this is in fact correct.

I trust the above is of use to the inquiry. Should you require further information, please do not hesitate to contact me.

Yours sincerely,

James Connors
Head of Government and Regulatory Affairs