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Deputy Chairman

18 June 2015

To: All private health insurers and other interested parties

RESPONSE TO SUBMISSIONS ON APRA'S DISCUSSION PAPER "PROPOSED PRUDENTIAL AND REPORTING FRAMEWORK FOR APRA'S SUPERVISION OF PRIVATE HEALTH INSURERS IN AUSTRALIA"

This letter outlines APRA's response to submissions made in relation to the March 2015 consultation paper "Proposed prudential and reporting framework for APRA's supervision of private health insurers in Australia".

The response and the supporting materials are based on the legislation currently before the Parliament. They are being released now to allow the maximum possible time for industry to consider them ahead of their 1 July 2015 effective date. Should amendments be made to the legislation through the Parliamentary process, APRA will consider whether any change is necessary to the materials being released with this letter.

Although APRA has released the response, prudential standards, APRA rules and reporting standards, the relevant legislative instruments will not be determined until the legislation has received Royal Assent.

Summary of APRA's proposals

On 31 March 2015, APRA released a discussion paper outlining its proposed approach to the future prudential and reporting arrangements for private health insurers in Australia. The paper noted that APRA's key objective is to provide for a seamless transition of current requirements administered by PHIAC, so that the same requirements continue to have effect in substance following the transfer of responsibilities to APRA. The discussion paper was accompanied by:

- Seven draft prudential standards:
 - *Prudential Standard HPS 001 Definitions*
 - *Prudential Standard HPS 100 Solvency Standard*
 - *Prudential Standard HPS 110 Capital Adequacy*
 - *Prudential Standard HPS 231 Outsourcing*
 - *Prudential Standard HPS 320 Actuarial and Related Matters*
 - *Prudential Standard HPS 350 Disclosure to APRA*
 - *Prudential Standard HPS 510 Governance*

- Four draft sets of APRA Rules:
 - *Private Health Insurance (Prudential Supervision) Rules 2015*
 - *Private Health Insurance (Registration) Rules 2015*
 - *Private Health Insurance (Risk Equalisation Administration) Rules 2015*
 - *Private Health Insurance (Health Benefits Fund Enforcement) Rules 2015*

- Four draft reporting standards:
 - *Reporting Standard HRS 601 Statistical Data by State*
 - *Reporting Standard HRS 602 Financial and Capital Data*
 - *Reporting Standard HRS 603 Statistical Data on Prosthetic Benefits*
 - *Reporting Standard HRS 604 Medical Specialty Block Grouping Information*

Importantly, while the paper proposed some minor and technical amendments to take into account the changes proposed in the *Private Health Insurance (Prudential Supervision) Bill 2015 (PHI(PS) Bill)*, APRA indicated a firm intention that the substance of any existing obligations of private health insurers will not change on 1 July 2015 following the transfer of supervisory responsibilities to APRA.

Accordingly the paper proposed draft:

- prudential standards that would re-make the existing capital adequacy, solvency and prudential standards for private health insurers as APRA prudential standards. The obligations of private health insurers under the re-made prudential standards would be substantively unchanged from those under the existing capital, solvency and prudential standards contained in the Rules issued by PHIAC.
- APRA Rules that would re-make certain existing Rules made by PHIAC and the Minister for Health in substantively the same form, to ensure that they continue to have effect following the transfer of responsibility to APRA. The operation of the Rules and the obligations of private health insurers would remain unchanged under the proposed APRA Rules.
- reporting standards that would re-make the existing reporting obligations of private health insurers as a series of reporting standards that replicate the reporting currently required by PHIAC. These reporting standards would be made under the *Financial Sector (Collection of Data) Act 2001 (FSCODA)*. Importantly, while the format of the relevant legal instruments would be different to the current PHIAC arrangements, the reporting obligations and methods of reporting would remain unchanged as a result of the proposals. APRA does not intend that these technical changes will cause private health to change any substantive aspect of their current approach to reporting. The forms to be completed, and the instructions thereto, would be substantively unchanged.

The paper also outlined proposals for certain data to be made non-confidential by APRA, to allow for the continued publication and dissemination of that data in the same way as currently undertaken by PHIAC.

Submissions received

APRA received twelve submissions in response to the consultation. Two of these submissions were marked as confidential and part of another was marked as confidential.

The ten submissions that were not marked as confidential (including the non-confidential part of one submission) have been uploaded onto APRA's website.¹

Feedback from submissions can be grouped into three key categories:

- technical feedback on the draft prudential standards, APRA Rules and reporting standards;
- feedback on APRA's proposals in relation to data non-confidentiality; and
- feedback on other matters relating to the transition, including availability of AAT review and the future of the standard operating procedures.

Feedback on the draft prudential standards, APRA Rules and reporting standards

APRA received limited feedback on the draft prudential standards, APRA Rules and reporting standards, much of it dealing with technical matters. This feedback has been incorporated where appropriate into the updated prudential standards, APRA Rules and reporting standards, along with minor errors and clarifications identified by APRA and PHIAC.

Specifically:

- Minor wording clarifications have been made and errors corrected across a number of standards and Rules.
- The definition of 'premium income estimate' has been moved from *HPS 110 Capital Adequacy* to *HPS 001 Definitions* as it is used in both the capital adequacy and solvency standards.
- A definition of 'improper discrimination' has been inserted into the Registration Rules.
- The Prudential Supervision Rules have been updated to also refer to the *Private Health Insurance Act 2007* in a number of areas, to better reflect the status quo, specifically in Rules 7(1)(b)(ii)(A), 8(1)(a), 12(1)(e)(i) and 13(1)(a).
- In the interests of retaining the status quo, APRA did not propose in the discussion paper to adopt standard wording regarding "adjustment and exclusion" powers across all prudential standards. Where the current standards already had wording designed to accomplish the same goal, APRA proposed to rely on that wording. Submissions argued that these inconsistencies should be removed. Accordingly, the wording of this paragraph has been standardised across the proposed prudential standards.
- Paragraph 23 of draft *HPS 231 Outsourcing* (which required that an outsourced service provider to comply with certain requests from APRA) has been deleted to align the application of that prudential standard with the PHI(PS) Bill. On a prospective basis only, future outsourcing agreements will be required to include

¹ These submissions are available on APRA's website:

<http://www.apra.gov.au/PHI/consultations/Pages/Proposed-prudential-and-reporting-framework-for-PHIs-March-2015-Submissions.aspx>

provisions allowing for APRA access to the premises of the outsourced service provider. This provides for continuation of an approach similar to that currently in place where the PHIAC standard provides for PHIAC to access the premises of the service provider on request.

- An existing issue with missing words in rule 11 of the *Private Health Insurance (Prudential Supervision) Rules 2015* has been rectified.

Some items of feedback were received that would require more significant structural or content change to *HPS 510 Governance* and *HPS 231 Outsourcing*. Regarding HPS 510, it was suggested that APRA move the definition of “independent director” into the body of the standard. For HPS 231, it was suggested that APRA move the definition of “outsourcing arrangement” to earlier in the standard. In both cases, making the changes would require consequential changes to other parts to the drafting to retain readability. Further wording changes were suggested to various prudential standards and APRA Rules which, while they may have merit, would change the overall intention that the proposed APRA standards reflect the status quo. Accordingly, the vast majority of these changes have not been adopted at this time. They have, however, been added to APRA’s register of matters to consider when an appropriate future opportunity arises to review the standards and APRA Rules.

None of the changes reflected in the final versions of these documents change the substance of the proposals consulted on by APRA. APRA also notes that it will approach the administration of these requirements in a facilitative way during transition if any unintended consequences be identified during implementation.

A number of matters were raised in submissions where, while no changes to the draft standards or Rules have been made, clarification by APRA may assist:

- As noted in the discussion paper, the risk equalisation jurisdictions will, in future, be set by the Minister for Health. Therefore the part of the current *Private Health Insurance (Health Benefits Fund Administration) Rules* dealing with this has not been carried across into a new APRA Rule.
- Although the FSCODA will allow for APRA to make reporting standards for private health insurers, APRA has only proposed to re-make the existing PHIAC reporting obligations so that the status quo continues post-transfer. Any further change to the reporting arrangements would be the subject of consultation at a future time.
- The intention of APRA’s proposed *HPS 001 Definitions* is to house definitions that are referred to in more than one other prudential standard. Accordingly, not all definitions are included - definitions used in only one prudential standard are located within that standard for ease of reference.
- A number of submissions queried the continued relevance of the requirement in *HPS 350 Disclosure to APRA* for private health insurers to notify APRA when a decision is made to terminate a person’s complying health insurance policy in certain circumstances. As APRA has adopted the status quo for transition, this requirement has been retained. APRA will review the continued need for this requirement the next time the relevant prudential standard is amended.
- Some submissions queried whether APRA’s proposed definition of ‘senior management responsibilities’ in *HPS 001 Definitions* for the purposes of section 4 of

the PHI(PS) Bill would have any impact on insurers. This definition (read in conjunction with the new definition of “officer”) continues the status quo and hence there is no change to existing requirements.

- Submissions argued that APRA’s proposal to insert a paragraph into *HPS 510 Governance* allowing for APRA to adjust and exclude prudential requirements in relation to a specific private health insurer would increase burden on the industry. APRA does not consider that this proposal results in fundamental change. It makes consistent across the framework a power that PHIAC currently has for many standards. As noted in the discussion paper, these powers allow for flexible application of the prudential framework and, in many cases, exercising the powers will remove an impediment rather than add additional requirements. The powers are not used without discussion with the relevant insurer, and are not used without transparency regarding the reasons for the adjustment. A decision to exercise this power is reviewable both within APRA and via judicial review.
- It was argued that changes to the Registration Rules to set as a criterion for registration that “APRA can be satisfied that the rules of the applicant do not permit improper discrimination in relation to the applicant’s complying health insurance policies” creates a substantially different outcome to the status quo. This provision substantively replicates the status quo in subsection 126-20(4) of the *Private Health Insurance Act 2007*, which provides:

“The Council must refuse the application if the rules of the applicant permit improper discrimination in relation to the applicant’s complying health insurance policies. For the purposes of this subsection, the Council must consult the Secretary of the Department.”

Whether the rules of an applicant permit improper discrimination is a relevant factor to take into account in considering whether a private health insurer should be registered under the PHI(PS) Bill. The Registration Rules properly state that APRA will consult with the Department of Health on this matter, given their primary responsibility for the requirements relating to improper discrimination.

- It was also suggested that the application of the proposed *HPS 231 Outsourcing* is too broad, on the basis that it applies to the total private health insurer not the health benefits fund. This application mirrors the existing PHIAC Outsourcing Standard.

Feedback on APRA’s proposals in relation to data non-confidentiality

As noted in the Discussion Paper, post-transition APRA intends to continue to publish and disseminate data in the way PHIAC currently does. Industry unanimously supported APRA’s position that the existing data publication and dissemination should continue.

Secrecy provisions under the APRA Act regarding entity level data

In order to give effect to APRA’s intention to continue the current publication and dissemination of data, APRA is required to give consideration to the *Australian Prudential Regulation Authority Act 1998* (APRA Act) and particularly the secrecy provision in section 56. Under section 56 of the APRA Act, data submitted to APRA under FSCODA is protected information. It therefore cannot be released by APRA at entity level unless:

- APRA determines it to be non-confidential (under the process outlined in section 57 of the APRA Act); or
- the release falls squarely within another exception under section 56 of that Act (such as by consent of each affected party).

These section 56 protections will apply to all data submitted to APRA under the reporting standards other than data that is already in the public domain. They are provided for the protection of private health insurers and their confidential information.

Accordingly, APRA consulted on two options in the discussion paper:

- making a section 57 determination of non-confidentiality; and
- requesting the consent of each private health insurer.

In the discussion paper, APRA expressed a preference for the section 57 option, on the grounds of APRA's experience with the consent option in other industries.²

Dissemination and publication of entity specific data

There are 3 main ways in which entity specific data is disseminated under the existing PHIAC regime.³ Each raises slightly different issues in relation to data confidentiality:

- **The annual report on the operations of private health insurers**, currently required under section 264-15 of the *Private Health Insurance Act 2007*. Such a report will, in future, be required to be published by APRA under the *Private Health Insurance (Prudential Supervision) Act 2015*. Accordingly, the issue of confidentiality does not arise as an exemption applies under section 56 of the APRA Act (subsection 56(3)).
- **The annual State of the Health Funds report published by the Private Health Insurance Ombudsman (PHIO)**. PHIO will be prescribed in the APRA Regulations as an agency to whom APRA may provide protected information under one of the exceptions to the section 56. APRA will therefore be able to pass the necessary data to the PHIO to allow them to prepare the report, and PHIO will be required under its own legislation to publish the report.

No further action is necessary to allow the continued publication of these reports.

- **The distribution of data currently collected on the PHIAC 1 approved form**. PHIAC distributes the data collected on the PHIAC 1 approved form to each of the private health insurers, as well as to three industry bodies, Private Healthcare Australia, hirmaa and the Australian Health Services Alliance, as entity level data. The continued distribution of this data requires APRA to identify an appropriate exemption under section 56 or to make a determination under section 57.

² For completeness, APRA has also given consideration to the use of section 56(5)(b) of the APRA Act to authorise the release of the data. Section 56(5)(b) provides that it is not an offence if the disclosure of protected information or the production of a protected document by a person if that disclosure is to another person and is approved by APRA by instrument in writing. It is not APRA's preferred approach to rely on section 56(5)(b) for regular, systematic disclosures of information.

³ Note that APRA is able to provide entity-level data to the Department of Health under section 56(5)(a) of the APRA Act.

PHIAC currently relies on section 323-25 of the *Private Health Insurance Act 2007*, which provides that the Council may disclose information to a person(s) who is expressly or impliedly authorised by the person to whom the information relates (e.g. a particular insurer) to obtain it to provide this data to these parties.

Submissions supported the continued distribution of this data but were divided regarding the merits of the two approaches consulted on in the discussion paper.

- Submission feedback on making a section 57 determination of non-confidentiality:

As noted in the discussion paper, under section 57, APRA proposed to determine the data to be non-confidential. A consequence of a non-confidentiality determination is that such data would be subject to freedom of information requests under the *Freedom of Information Act 1982* (FOI Act). Accordingly, even if the data is not published by APRA, such data would need to be released by APRA if a request under the FOI Act was made. Some submissions raised concerns about that potential outcome noting commercial detriment may arise from the relevant information being in the public domain.

- Submission feedback on requesting the consent of each private health insurer:

Under the alternative consent approach using section 56(4)(b), each insurer would be asked to provide a one-off written consent to the release of their data on an ongoing basis to the other private health insurers, Private Healthcare Australia, hirmaa and the Australian Health Services Alliance. Refusal to give consent by any insurer would mean that the distribution would cease. This could also occur under the current approach adopted by PHIAC, where an insurer withdrawing their consent would disrupt the dissemination process.

In light of the concerns raised in submissions in relation to the use of section 57 and the support expressed in both submissions and industry discussions for the consent option, APRA has decided to adopt the consent option to allow the distribution of data to be collected under *Reporting Form HRF 601.0 Statistical Data by State* (previously PHIAC 1) in future. Over time, APRA will continue to monitor the effectiveness of these processes and may, if appropriate, reconsider the use of a determination under section 57.

Given that this approach replicates the status quo, and given also that submissions and discussions with individual insurers and industry bodies have shown strong (and unanimous) support for the continuation of the existing dissemination of data, APRA anticipates that consent will be readily forthcoming. It is relevant to note that each insurer that has commented on the question of whether they would give consent indicated that they would.

APRA will work with the private health insurers and other relevant parties to ensure current data sharing arrangements can continue. To ensure the confidentiality of insurers' data is protected however, it is an offence for such a party to disclose the information further without APRA's prior written consent. Disclosure without APRA's consent may constitute a breach of the APRA Act.⁴

⁴ Refer to section 56(2) of the APRA Act. Note that this does not prevent a private health insurer from providing the data to their auditor and Appointed Actuary.

Publication of aggregate data

PHIAC currently publishes a range of aggregate statistics. These include:

- Privately insured with hospital cover;
- Quarterly statistics;
- Membership and coverage;
- Gap payment and medical benefit statistics;
- The PHIAC A report;
- Prostheses;
- Medical services; and
- Statistical trends in membership.

APRA's secrecy provision permits APRA to disclose aggregate data where it is not possible to identify information about a particular regulated entity from that data (subsection 56(7) of the APRA Act). APRA applies a set of confidentiality protection measures to its statistical publications to ensure that information relating to an individual institution cannot be identified. In particular, as part of its process for publishing aggregate statistics, APRA considers whether any item in the publication potentially breaches confidentiality because it represents the data of a single insurer or is dominated by the data of one or two insurers.

In order to resolve any potential confidentiality concerns with the publication of aggregate data, at the same time as seeking consent as outlined above, APRA will also seek the consent of each insurer in relation to any instances going forward where the data published at aggregate level would otherwise breach APRA's confidentiality measures. This consent will relate only to the continued publication of aggregate statistics that are currently published by PHIAC.

APRA anticipates that this consent would be readily forthcoming given that this data is currently made public by PHIAC and industry has strongly endorsed continuing the current approach to release of data. Failure to provide consent will result in the need for APRA to mask any data items that would result in a breach of confidentiality, reducing the completeness of the publications, or to seek consent on a case-by-case basis.

Other matters

A number of submissions raised issues related to APRA's ongoing approach to supervision and enforcement matters for private health insurers. In particular, submissions raised the future approach to:

- the Standard Operating Procedures (SOPs) promulgated by PHIAC to provide guidance on how certain enforcement powers might be exercised. In particular, industry has requested that APRA clarify the future application of the SOPs; and
- review of APRA decisions.

APRA's general supervisory approach is forward-looking, primarily risk-based, consultative, consistent and in line with international best practice. Our approach to supervision involves identifying the key risks taken by supervised institutions, ensuring these risks are adequately measured, managed and monitored and assessing the ability of these institutions to access financial resources to withstand potential losses. APRA is conscious of the impact its supervisory interventions can have on the operations of a supervised institution and these are generally well discussed with the institution before APRA takes action. These interventions may include imposing requirements (with or without legal force) on a supervised institution, making recommendations or suggestions and taking enforcement action. It is critical that APRA's interventions are proportionate to the prudential outcome desired.

Enforcement refers to a special category of supervisory activity where specific intervention and remedial actions are pursued. These usually occur where APRA forms the view that an institution does not have the ability or willingness to rectify serious identified weaknesses that may threaten its financial viability or safety. Enforcement activities are critical to ensuring financial promises to beneficiaries continue to be met.

Standard operating procedures

As noted above, the SOPs provide guidance on how certain enforcement powers might be exercised by PHIAC. APRA has considered the SOPs and compared them to APRA's enforcement approach. They are broadly consistent with APRA's current practices and approach to taking enforcement action.

Review of APRA decisions

There are a range of review mechanisms for APRA decisions that will be available to private health insurers:

- In all cases, an insurer can apply to APRA for internal reconsideration of a decision. This is a streamlined, low cost and less legalistic review mechanism than judicial review or review by the Administrative Appeals Tribunal (AAT).
- For many decisions, an application may be made to the AAT for review.
- Rights to judicial review of decisions are also available in certain circumstances.

In APRA's experience, applications to the AAT are extremely rare. In APRA's view, this outcome is a demonstration of the effectiveness of APRA's consultative supervisory approach outlined above.

Consistent with the relevant legislation for other APRA-regulated industries, the PHI(PS) Bill does not provide for AAT review of certain types of decisions. In particular, it does not provide for AAT review of supervisory decisions made under APRA prudential standards.

Some submissions argued that decisions made under prudential standards should be made subject to AAT review. In particular, submissions referred to the three decisions identified in the discussion paper where the current PHIAC prudential standards provide for AAT review, being:

- review, under subclause 6(4) of the Solvency Standard, of a solvency supervisory adjustment amount, determined by PHIAC under subclause 6(1);
- review, under subclause 12(5) of the Capital Adequacy Standard, of a capital adequacy supervisory adjustment amount, determined by PHIAC under subclause 12(1); and
- review, under section 14 of the Governance Standard, of a determination by PHIAC not to approve a person as an independent director or not to approve a person as chairperson of a board.

The submissions further argued that certain other prudential powers should also be subject to AAT review.

Based on APRA's experience with other industries, it is critical that APRA can act with certainty and in a timely manner to address identified prudential concerns, particularly where they relate to financial safety and stability concerns. Thus, as a matter of principle, APRA does not agree that supervisory decisions of this type should be subject to AAT review. In APRA's view, the review rights specified in the PHI(PS) Bill, together with APRA's internal review processes and the availability of judicial review, provide an appropriate set of checks and balances on APRA decision making.

Continued availability of information

Submissions noted the importance of the continued availability of the current information (for industry, consumers and others). APRA will continue to collect all the data currently collected by PHIAC and will continue to publish all of the PHIAC statistical publications. APRA has important public information functions enshrined in section 3 of FSCODA which provides that one of the objects of that Act is to enable APRA to collect data for the purposes of publication. APRA's website includes extensive statistical publications relating to other industries regulated by APRA.

In addition to statistical publications, PHIAC currently provides a variety of consumer information on its website:

- Much of this information is provided via a click-through link to the Private Health Insurance Ombudsman (PHIO) website, www.privatehealth.gov.au. These arrangements will be continued. For example, the link to the "comparison tool" for consumers to compare private health insurers on www.privatehealth.gov.au will be maintained⁵ as will the link to FAQs on www.privatehealth.gov.au.
- Much of the remaining consumer information will continue to be provided directly by APRA. For example, the list of registered private health insurers will continue to be published; and the consumer statistics will continue to be provided. The responsibilities for the update and hosting of the www.privatehealth.gov.au website

⁵ Note that the comparison is not based on PHIAC data but instead on the Standard Information Statements (SIS) private health insurers are required to make available to the public.

will transfer to the Office of the Commonwealth Ombudsman ('OCO'). The OCO will retain all consumer information on the www.privatehealth.gov.au website as is.⁶

Next steps

Together with this letter, APRA has released prudential standards, APRA Rules and reporting standards. These materials are available on APRA's website at:

<http://www.apra.gov.au/PHI/Pages/Prudential-and-reporting-framework-for-APRAs-supervision-of-private-health-insurers-in-Australia-June-2015.aspx>

As noted above, these materials are based on the legislation currently before Parliament. Should amendments be made to that legislation, APRA will consider whether any change is necessary to the prudential standards, APRA rules or reporting standards.

APRA will not determine the relevant legislative instruments until after the legislation has received Royal Assent.

APRA will write separately to each insurer to obtain relevant consents as outlined in this letter to allow continued dissemination of data:

- to each private health insurer (and the other parties discussed in this letter) for the data to be collected on HRF 601.0; and
- in relation to aggregate industry data (where a data item represents the data of a single insurer or is dominated by the data of one or two insurers).

To assist insurers in providing the necessary consents, APRA will provide a template consent document which insurers can complete and return to APRA.

If you have any questions on this letter, please contact Peter Kohlhagen (02 9210 3363 or peter.kohlhagen@apra.gov.au).

Yours sincerely



⁶ The Department's submission to the Senate Inquiry into the PHIO Bill addressed this, as did the Minister's introduction speech and the speech when it was introduced into the Senate. These are all publicly available.