

DRAFT



Private Health Insurance (Health Benefits Fund Enforcement) Rules 2015

I, [insert name of delegate], delegate of APRA make these Rules under subsection 172(1) of the *Private Health Insurance (Prudential Supervision) Act 2015*.

Dated: xx June 2015

[To be signed]

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Part 1 – Preliminary

1. Name of Rules

These Rules are the *Private Health Insurance (Health Benefits Fund Enforcement) Rules 2015*.

2. Commencement

These Rules commence:

- (a) if the Rules are registered before the day on which the Act commences – at the same time as the Act commences; or
- (b) if the Rules are registered on or after the day on which the Act commences – on the date on which the Rules are registered.

3. Definitions

Note: Terms used in these Rules have the same meaning as in the Act – see section 13 of the *Legislative Instruments Act 2003*. These terms include:

applied Corporations Act provision
APRA
external manager
health benefits fund
private health insurer
responsible insurer
voluntary deed of arrangement

In these Rules:

Act means the *Private Health Insurance (Prudential Supervision) Act 2015*.

Corporations Act means the *Corporations Act 2001*.

PHIAC means the Private Health Insurance Administration Council.

Part 2 – Procedure relating to voluntary deeds of arrangement

4. Interpretation

In this Part, a reference to a creditor of a health benefits fund includes a policy holder of the fund.

5. Convening of meetings

The external manager of a health benefits fund may convene a meeting of the creditors of the fund to consider the possibility of the responsible insurer executing a deed of arrangement proposed by the external manager.

6. Procedure for convening of the meeting

- (1) If the external manager decides to convene a meeting to consider the possibility of the responsible insurer executing a deed of arrangement proposed by the external manager, the external manager must:
 - (a) give notice to APRA at the same time that the manager gives notice to the creditors; and
 - (b) give written notice of the meeting to as many of the creditors as reasonably practicable; and
 - (c) cause notice of the meeting to be published:
 - (i) in a national newspaper; or
 - (ii) in each jurisdiction in which the business of the fund is carried on – in a daily newspaper that circulates generally in that jurisdiction;

at least 14 business days before the meeting.
- (2) The notice given to creditors and the APRA under subrule (1) must be accompanied by:
 - (a) a report by the external manager about the business, property, affairs and financial circumstances of the fund; and
 - (b) a statement setting out details of the proposed deed of arrangement; and
 - (c) a statement setting out the external manager's opinion as to why it would be in the interests of the creditors of the fund for the responsible insurer to execute such a deed of arrangement.
- (3) If:
 - (a) telephone or electronic conference facilities are expected to be available at the place where the meeting is to be held; and

- (b) the external manager considers that, having regard to all the circumstances, it will be appropriate to use those facilities, the notice of the meeting must:
 - (i) set out the relevant telephone number; and
 - (ii) indicate that a person, or the proxy of a person, who wishes to participate in the meeting by telephone must give to the external manager, not later than the second-last working day before the day on which the meeting is to be held, a written statement setting out:
 - (A) the name of the person and of the proxy (if any); and
 - (B) an address to which notices to the person or proxy may be sent; and
 - (C) a telephone number at which the person or proxy may be contacted; and
 - (D) a facsimile transmission number (if any) to which notices to the person or proxy may be sent; and
 - (E) that a person, or the proxy of a person, who participates in the meeting by telephone must pay any costs incurred by the person or proxy in participating and is not entitled to be reimbursed for those costs from the assets of the fund.

7. Conduct of the meeting

- (1) The external manager is to preside at a meeting convened under this rule.
- (2) Such a meeting may be adjourned from time to time at the discretion of the external manager, but may not be adjourned to a day more than 30 days after the first day on which the meeting was held.
- (3) If a person, or a person's proxy, who wishes to participate in a meeting by means of telephone conference facilities, has given the external manager a statement in accordance with subparagraph 6 (3) (b) (ii), the external manager must take all reasonable steps to ensure that the person, or the person's proxy, is contacted before the start of the meeting on the telephone number provided by that person.
- (4) The external manager must also take all reasonable steps to ensure that the person or proxy can hear the proceedings, and can be heard, by means of those facilities.
- (5) A person who, or whose proxy, participates in the meeting by telephone under this rule is taken to be present in person at the meeting.

- (6) A quorum for the meeting consists of:
- (a) if the number of persons entitled to vote exceeds 2 – at least 2 of those persons; or
 - (b) if only one person is, or 2 persons are, entitled to vote – that person or those persons,
- present in person or by proxy.
- (7) A meeting may be held if all the persons who are entitled to attend, and to vote at, the meeting agree, even if it has not been convened in accordance with these Rules.
- (8) If, within 30 minutes after the time appointed for a meeting:
- (a) a quorum is not present; or
 - (b) the meeting is not otherwise sufficiently constituted,
- the meeting is adjourned:
- (c) to the same day in the next week, at the same time and place; or
 - (d) to the day (not being less than 7 or more than 21 days after the day on which the meeting is adjourned) and at the time and place that the external manager thinks are most convenient for the majority of persons entitled to attend the meeting.
- (9) The external manager must, without delay, give written notice of the adjournment to the persons to whom notice of the meeting must be given under rule 6.
- (10) If within 30 minutes after the time appointed for the adjourned meeting:
- (a) a quorum is not present; or
 - (b) the meeting is not otherwise sufficiently constituted,
- the adjourned meeting lapses.
- (11) A resolution is carried if:
- (a) a majority of the creditors voting (whether in person or by proxy) vote in favour of the resolution; and
 - (b) the value of the debts owed by the fund to those voting in favour of the resolution is more than half the total debts owed to all the creditors voting (whether in person or by proxy).

8. Matters that may be decided at the meeting

At meetings convened in accordance with these Rules, the creditors must resolve:

- (a) that the responsible insurer execute:
 - (i) the deed of arrangement proposed by the external manager; or
 - (ii) a different deed of arrangement as that originally proposed by the administrator; or
- (b) to reject the deed.

9. External managers recommendations to APRA

- (1) If the creditors have made a resolution referred to in paragraph 8 (a), the external manager must recommend in the report to APRA under section 59 of the Act, that APRA approve the execution of the deed, unless subrule (2) applies.
- (2) The external manager must not recommend that APRA approve the execution of the deed if:
 - (a) the deed has been varied by the meeting and the external manager is not satisfied that the varied deed is, in the circumstances, still protective of the interests of the policy holders of the fund; or
 - (b) the deed limits the rights of a creditor or creditors unless, in the opinion of the external manager, the fund is insolvent or likely to become insolvent at some future time.
- (3) For paragraph (2) (b), a deed will be taken to limit the rights of a creditor or creditors if it involves:
 - (a) removing or limiting the right of a creditor to the payment of a debt or other liability, or removing or limiting a creditor's entitlement to an asset; or
 - (b) delaying the right of a creditor to make or enforce a claim for the payment of a debt or other liability, or delaying the right of a creditor to make or enforce the creditor's entitlement to an asset.

10. Actions APRA may take

- (1) If APRA is satisfied that the execution of the deed as recommended in the report of the external manager will, in the circumstances, be in the interests of policy holders of the fund, APRA must, by written notice:
 - (a) inform the external manager that it approves the execution of the deed; and
 - (b) request the preparation of the deed for execution.

- (2) If APRA is not satisfied that the execution of the deed as recommended in the report of the external manager will be, in the circumstances, in the interests of policy holders of the fund, APRA must, by written notice:
- (a) inform the external manager to that effect; and
 - (b) request that the external manager:
 - (i) seek another meeting of the creditors to consider a further voluntary deed of arrangement; or
 - (ii) examine other possible courses of action,and, on the basis of that further meeting or examination, to make a further report to APRA under section 59 of the Act within a time specified by APRA.
- (3) If the external manager provides a further report to APRA in accordance with paragraph (2) (b), this rule, other than subparagraph (2) (b) (i), applies in respect of that report as if it were the original report of the external manager.

Part 3 – Modifications of terms in applied Corporations Act provisions

11. Modifications

For subparagraph 50 (1) (b) (ii) and subsection 55 (2) of the Act, if an applied Corporations Act provision includes a term specified in rule 12, the provision applies as if a reference to the specified term were a reference to the term as modified by rule 12.

12. Specified terms

- (1) The following terms are modified as set out in this rule:
 - (a) ***board of the company***, in relation to a responsible insurer, is modified to mean, as the case may be for a particular insurer:
 - (i) the board of directors; or
 - (ii) committee of management; or
 - (iii) other governing body; and
 - (b) ***company*** is modified to mean the responsible insurer; and
 - (c) ***company secretary*** is modified to mean in relation to a responsible insurer that is not a company within the meaning of the Corporations Act, the secretary of the insurer or person who carries out the role similar to a company secretary; and
 - (d) ***creditor***, in relation to a fund, is modified to include a policy holder of the fund; and
 - (e) ***director*** or ***director of a company*** or ***of a fund***, for a responsible insurer that is not a company within the meaning of the Corporations Act, is modified to include a member of the committee of management, or other governing body, of the insurer; and
 - (f) ***deed of company arrangement*** is modified to mean a voluntary deed of arrangement agreed on at a meeting convened under the *Private Health Insurance (Health Benefits Fund Enforcement) Rules 2015*; and
 - (g) ***lodge*** is modified to include that the document to be lodged must be lodged at the same time with APRA; and
 - (h) ***officer*** is modified to mean an 'officer' within the meaning of that word in the *Private Health Insurance (Prudential Supervision) Act 2015*; and
 - (i) ***resolution***, in relation to creditors and policy holders, is modified to mean a resolution agreed on at a meeting convened under the

Private Health Insurance (Health Benefits Fund Enforcement) Rules 2015.

- (2) References in an applied Corporations Act provision to Parts or Divisions of the Corporations Act are taken to also include a reference to the *Private Health Insurance (Prudential Supervision) Act 2015* and the *Private Health Insurance (Health Benefits Fund Enforcement) Rules 2015*.

Part 4 – Modifications of Part 5.3A and Division 7A of Part 5.6

13. Modifications for subparagraph 50 (1) (b) (ii) of the Act

For subparagraph 50 (1) (b) (ii) of the Act, the applied Corporations Act provisions mentioned in this Part are modified as set out in this Part.

14. Subsection 440D (1)

Despite subsection 50 (4) of the Act, the reference in subsection 440D (1) of the Corporations Act to 'the company' is not to be taken as a reference to 'the fund'.

Note: Subsection 56 (2) of the Act provides for the matters that the external manager or the Court must have regard.

15. Subsections 440J (2) and (3)

omit the subsections

16. Subsection 441B (2)

omit

437C, 440B, 440F or 440G

insert

440B, or section 70 of the Private Health Insurance (Prudential Supervision) Act 2015,

17. Subsection 441B (3)

omit

437D

insert

74 of the Private Health Insurance (Prudential Supervision) Act 2015,

18. Section 441C

omit the section

19. Section 441E

omit

437C or 440B

insert

440B, or section 70 of the Private Health Insurance (Prudential Supervision) Act 2015,

20. Subsection 441F (2)

omit

437C or 440B

insert

440B, or section 70 of the Private Health Insurance (Prudential Supervision) Act 2015,

21. Subsection 441F (3)

omit

437D

insert

74 of the Private Health Insurance (Prudential Supervision) Act 2015,

22. Subsection 441G (2)

omit the subsection

23. Section 441J

omit

437C or 440C

insert

440C, or section 70 of the Private Health Insurance (Prudential Supervision) Act 2015,

24. Subsection 442D (2)

omit the subsection

25. Subsection 442F (1)

omit

this Act

insert

the *Private Health Insurance (Prudential Supervision) Act 2015* and any applied Corporations Act provision as modified.

26. Subsection 442F (2)

omit the subsection

27. Subsections 444A (1), (2) and (3)

omit the subsections

substitute

(1) This section applies where, at a meeting of creditors convened under the *Private Health Insurance (Health Benefits Fund Enforcement) Rules 2015*, a fund's creditors resolve that the responsible insurer execute a voluntary deed of arrangement.

(2) The external manager of the fund is to be the administrator of the deed, unless the creditors, by resolution passed at the meeting, appoint someone else to be administrator of the deed, and APRA, by notice in writing, approves the resolution.

(3) If APRA, by notice in writing, has approved the execution of the deed, the administrator of the deed must prepare an instrument setting out the terms of the deed.

28. Paragraph 444A (4) (b)

Despite subsection 50 (4) of the Act, the second occurring reference in paragraph 444A (4) (b) of the Corporations Act to 'the company' is not to be taken as a reference to 'the fund'.

29. Paragraph 444A (4) (d)

omit the paragraph

substitute

(d) to what extent the company is to be released from its debts in so far as the debts are debts of the fund

Despite subsection 50 (4) of the Act, the reference in paragraph 444A (4) (d) of the Corporations Act to 'the company' is not to be taken as a reference to 'the fund'.

30. Paragraph 444A (4) (i)

omit

deed

insert

deed;

(j) the number of policy holders of the fund, and the total amount owing to policy holders.

31. Subsection 444A (5)

omit the subsection

32. Section 444B

Despite subsection 50 (4) of the Act, the references in section 444B of the Corporations Act to 'the company' are not to be taken as references to 'the fund'

33. Subsection 444B (2)

omit

The company

insert

If APRA, by notice in writing, has approved the execution of the deed, the company

34. Subsection 444B (4)

omit

437C

insert

70 of the Private Health Insurance (Prudential Supervision) Act 2015

35. Subsection 444B (5)

Despite subsection 50 (4) of the Act, the reference in subsection 444B (5) of the Corporations Act to 'the proposed administrator' is not to be taken as a reference to 'the external manager'.

36. Subsection 444B (7)

omit the subsection

37. Subsection 444C (1)

omit

section 439A

insert

the Private Health Insurance (Health Benefits Fund Enforcement)
Rules 2015

Despite subsection 50 (4) of the Act, the reference in subsection 444C (1) of the Corporations Act to 'the company' is not to be taken as a reference to 'the fund'.

38. Paragraphs 444D (2) (a) and (3) (a)

Despite subsection 50 (4) of the Act, the references in paragraphs 444D (2) (a) and (3) (a) of the Corporations Act to 'the company' are not to be taken as references to 'the fund'.

39. Subsection 444E (4)

omit the words after the colon

substitute

property, in relation to the fund, includes property used for the purposes of the business of the fund.

40. Subsections 444F (1) and (2)

Despite subsection 50 (4) of the Act, the references in subsections 444F (1) and (2) of the Corporations Act to 'the company' are not to be taken as references to 'the fund'.

41. Subsection 444F (2)

omit

Subject to subsection 441A (3), the

insert

The

42. Subsection 444F (4)

omit the subsection

substitute

The Court may order the owner or lessor of property that is used for the purposes of the business of the fund not to take possession of the property or otherwise recover it.

43. Section 444G

Despite subsection 50 (4) of the Act, the reference in section 444G of the Corporations Act to 'the company' is not to be taken as a reference to 'the fund'.

44. Section 444H

After the word 'debt', *insert*

that is a debt of the fund.

Despite subsection 50 (4) of the Act, the first occurring reference in section 444H of the Corporations Act to 'the company' is not to be taken as a reference to 'the fund'.

45. Section 445A

omit the section

substitute

(1) A deed of company arrangement may be varied by a resolution passed at a meeting of the company's creditors convened under section 445F, but only if:

- (a) the variation is not materially different from a proposed variation set out in the notice of the meeting; and
- (b) APRA, having regard to a recommendation of the administrator of the deed given to APRA, and any other information APRA thinks relevant, approves the variation.

(2) In deciding whether to approve the variation, APRA may:

- (a) request the administrator to provide further information relating to the variation or the recommendation; and
- (b) engage any person to assist it in evaluating assessments made, or projections relied on, by the administrator in relation to the recommendation.

(3) In this section, despite paragraph 50 (4) (b) of the *Private Health Insurance (Prudential Supervision) Act 2015*:

- (a) references to 'the administrator' are not to be taken as references to 'the external manager'; and
- (b) ***administrator*** means the administrator of the voluntary deed of arrangement agreed on under the *Private Health Insurance (Health Benefits Fund Enforcement) Rules 2015*.

46. Paragraph 445D (1) (b)

omit

subsection 439A (4)

insert

the Private Health Insurance (Health Benefits Fund Enforcement)
Rules 2015

47. Paragraph 445D (2) (b)

omit the paragraph

48. Section 445E

omit the section

49. Subsection 445G (1)

omit

ASIC

insert

APRA

50. Subsection 447A (2)

omit the subsection

51. Paragraphs 447A (4) (a) and (d)

Despite subsection 50 (4) of the Act, the references in paragraphs 447A (4) (a) and (d) of the Corporations Act to 'the company' are not to be taken as references to 'the fund'.

52. Paragraph 447A (4) (e)

omit

ASIC

insert

APRA

53. Subsection 447B (1)

omit

ASIC

insert

APRA

54. Sections 447D and 447E

Despite subsection 50 (4) of the Act, references in sections 447D and 447E to the administrator of a voluntary deed of arrangement, including a deed varied in accordance with an applied Corporations Act provision as modified, are to be read as referring to the administrator of the deed.

55. Subsection 447E (3)

omit

ASIC

insert

APRA

56. Subsection 450A (1)

omit

436A, 436B or 436C

insert

51 of the Private Health Insurance (Prudential Supervision) Act
2015

57. Subsection 450A (2)

omit the subsection

substitute

(2) As soon as practicable, and in any event before the end of the next business day, after appointing an external manager under section 51 of the *Private Health Insurance Act 2015*, APRA must give written notice of the appointment to the responsible insurer.

58. Subsection 450A (3)

omit

436A, 436B or 436C

insert

51 of the Private Health Insurance (Prudential Supervision) Act
2015

59. Subsection 450A (4)

omit the subsection

60. Paragraph 450C (b)

omit

of the company's creditors

insert

policy holder

Despite subsection 50 (4) of the Act, a reference in section 450C of the Corporations Act to 'the company' is not to be taken as a reference to 'the fund'.

61. Subsection 568 (1)

Despite subsection 50 (4) of the Act, the second reference in subsection 568 (1) of the Corporations Act to 'the company' is not to be taken as a reference to 'the fund'.

62. Paragraph 568 (1) (h)

Despite subsection 50 (4) of the Act, the reference in paragraph 568 (1) (h) of the Corporations Act to 'the company' is not to be taken as a reference to 'the fund'.

63. Subsections 568 (1AA) and 568 (9)

Despite subsection 50 (4) of the Act, references in subsection 568 (1AA) and subsection 568 (9) of the Corporations Act to 'the company' are not to be taken as references to 'the fund'.

64. Subsection 568D (1)

Despite subsection 50 (4) of the Act, the reference in subsection 568D (1) of the Corporations Act to 'the company' is not to be taken as a reference to 'the fund'.

Part 5 – Modifications of sections 128 and 129

65. Modifications for subsection 55 (2) of the Act

For subsection 55 (2) of the Act, the applied Corporations Act provisions mentioned in this Part are modified as set out in this Part.

66. Sections 128 and 129

In sections 128 and 129 of the Corporations Act:

company means a private health insurer.

officer includes:

- (a) for a private health insurer that is a company within the meaning of the Corporations Act – a director of the company; and
- (b) for any other private health insurer – a member of the committee of management, or other governing authority, of the insurer; and
- (c) if a person has been appointed as a receiver of the property of a private health insurer and manages, or has, under the terms of the receiver's appointment, power to manage, the affairs of the insurer – the receiver.

67. Subsection 129 (2)

omit

from ASIC

68. After subsection 129 (5)

insert

(5A) For a private health insurer that is not a company within the meaning of the Corporations Act, a person may assume that a document has been duly executed by the insurer if the document appears to have been signed in accordance with subsection 129A (1).

69. After subsection 129 (6)

insert

(6A) For a private health insurer that is not a company within the meaning of the Corporations Act, a person may assume that a document has been duly executed by the insurer if:

- (a) the common seal of the insurer appears to have been fixed to the document in accordance with subsection 129A (2); and
- (b) the fixing of the common seal appears to have been witnessed in accordance with that subsection.

70. After section 129

insert

129A Execution of documents (including deeds) by a private health insurer that is not a company

(1) A private health insurer that is not a company within the meaning of the Corporations Act may execute a document without using a common seal if the document is signed by 2 directors or by 2 members of the management committee, or other governing body, of the insurer.

(2) A private health insurer that is not a company within the meaning of the Corporations Act and that has a common seal, has executed a document if the seal is fixed to the document and the fixing of the seal is witnessed by 2 directors or by 2 members of the management committee, or other governing body, of the insurer.

Part 5 – Transition arrangements

Any approval, determination or other exercise of discretion by PHIAC under *Private Health Insurance (Health Benefits Fund Enforcement) Rules 2007* as they existed prior to 1 July 2015 will continue to have effect following 1 July 2015 as though exercised pursuant to a corresponding power under these Rules.