Chapter 2

Principal issues

2.1 The bills follow consultation undertaken by Treasury with industry stakeholders on an exposure draft bill. Submitters noted that many, or all, of their key concerns have been addressed following this consultation.[1] However, stakeholders advised that certain issues of concern to them have not been addressed in the bills or have arisen following the consultation. This chapter examines the issues raised in submissions. In this chapter, the committee's findings and recommendations that address a specific matter immediately follow the discussion of that matter. The committee's overall conclusion is at the end of this chapter.

Efforts to harmonise regulation

2.2 The explanatory memorandum noted that the bills replicate elements of the current PHI Act regime 'with some modifications'. The modifications:

> …harmonise certain provisions with other legislation administered by APRA, reduce duplication, update investigation powers to bring them more into line with the *Regulatory Powers (Standard Provisions) Act 2014*…and allow the regime to operate more efficiently.[2]

2.3 The Assistant Treasurer noted that the harmonisation of the private health insurance (PHI) industry regulatory arrangements with APRA's existing legislative framework 'is consistent with the government's deregulation agenda'.[3]

2.4 Submitters expressed some concern about the efforts to harmonise the regulation of the PHI industry with other industries supervised by APRA. In particular, submitters questioned whether the proposed legislation takes adequate account of the difference in risk presented by the PHI industry compared to other regulated sectors.

2.5 Private Healthcare Australia submitted that, in response to the efforts to seek consistency between the industries APRA regulates, the PHI industry has '[w]herever possible, and for the most part, compromised and accepted APRA's "consistency" positions'. However, Private Healthcare Australia considered that the drive for consistency 'is likely to result in an increase in red tape' for the PHI industry. Private Healthcare Australia added:

> PHI is a 'social' not 'financial' good, with very different underpinnings from other industries regulated by APRA. Unlike other industries, PHI has had NO major failures that have impacted detrimentally on consumers. In fact, a number of consumer protections provisions are inbuilt into product design

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1 See hirmaa, *Submission 1*, p. 2; Bupa, *Submission 2*, p. 1.

2 Explanatory Memorandum, p. 10 [paragraph 1.6].

3 The Hon Josh Frydenberg MP, Assistant Treasurer, *Proof House of Representatives Hansard*, 27 May 2015, p. 14.

> and operation of private health insurance (eg community rating, portability, etc.) outside of the pure prudential framework.[4]

2.6 Similarly, Bupa argued that the 'level of prudential regulation should be proportionate to the risk'. Bupa submitted that the risk in the PHI industry is significantly lower. Bupa stated:

> …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.[5]

2.7 In its submission, APRA advised that it has consulted with the PHI industry on draft prudential standards, rules and reporting standards.[6] APRA assured the committee that the prudential standards 'are based on the principle of minimal change from the existing PHIAC equivalent requirements'. APRA noted:

> This means that there will be little disruption for the private health insurance industry, as substantively the same prudential regulatory requirements will apply following the transfer of PHIAC's prudential supervision responsibilities to APRA.[7]

2.8 APRA added that, as a result of its consultation on the draft prudential standards, rules and reporting standards, amendments that deal with technical matters will be made where appropriate.[8]

Savings expected as a result of the changes

2.9 By reducing the duplication of government agencies, the bills are expected to result in savings for industry. However, industry submitters questioned when the industry would benefit from the expected savings. In particular, it was noted that despite the reduction in the numbers of PHIAC staff, the abolition of PHIAC officeholder positions and likely back-office efficiencies, APRA has proposed that the levies will remain unchanged for the 2015–16 year.[9] Bupa submitted that there 'appears to be no plan to deliver cost efficiencies to the industry in the short term as a result of the merger'.[10]

2.10 The Department of Health submitted that the implementation of the bills is expected to generate savings for the PHI industry, compared to costs that would have otherwise been faced. These savings will arise from increased efficiencies and reduced

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4 Private Healthcare Australia, *Submission 4*, p. 1.

5 Bupa, *Submission 2*, pp. 6–7.

6 These drafts, and an accompanying discussion paper, were issued on 31 March 2015.

7 APRA, *Submission 3*, p. 1.

8 APRA, *Submission 3*, p. 4.

9 Bupa, *Submission 2*, p. 6; Private Healthcare Australia, *Submission 4*, p. 5.

10 Bupa, *Submission 2*, p. 6.

back-office expenses. However, the Department emphasized that these savings will occur 'over time'. The Department provided the following explanation:

> Before these savings can be realised…a number of expenses related to the transfer of functions to APRA must be dealt with. Once all of these transitional expenses have been finalised any administrative savings will be passed onto industry.[11]

2.11 Treasury added that APRA's ongoing supervisory costs for the PHI industry 'will be transparently communicated in the Government's annual consultation paper on the Financial Institutions Supervisory Levies'. Treasury noted that this process:

> …will provide the private health insurance industry with the opportunity to engage with the Government on the industry's total levy payable, as well as the distribution of the levy within the private health insurance industry.[12]

Application of the *Financial Sector (Collection of Data) Act 2001*

2.12 Under section 3 of the *Financial Sector (Collection of Data) Act 2001* (FS(CoD) Act), APRA may collect information for the purpose of:

- assisting the prudential regulation or monitoring of bodies in the financial sector;
- enabling APRA to publish information;
- assisting another financial sector agency to perform its functions or exercise its powers; and
- assisting the Minister to formulate financial policy.

2.13 The FS(CoD) Act covers financial sector entities, which include bodies regulated by APRA within the meaning of subsection 3(2) of the *Australian Prudential Regulation Authority Act 1998* (APRA Act). As the bills would amend the APRA Act to provide that a private health insurer will be a body regulated by APRA, APRA will have the power to collect data from the insurer under the FS(CoD) Act.[13]

2.14 Submitters questioned whether the penalties available for certain offences under the FS(CoD) Act were appropriate for the PHI industry. Bupa submitted that the penalties regarding the provision of data and information to APRA under the FS(CoD) Act are 'significantly higher than those that are currently in place' for the PHI industry. Bupa argued that some of the penalties, such as custodial sentences of up to five years for certain offences, 'represent a significant change to industry regulation and are disproportionate to PHI industry risk, as compared to the other industries APRA regulates'.[14]

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11 Department of Health, *Submission 5*, p. 4.

12 Treasury, *Submission 7*, Attachment 1, p. 2.

13 Explanatory Memorandum, p. 135 [paragraphs 11.44–11.45].

14 Bupa, *Submission 2*, pp. 1–2.

2.15 A similar point was made by Private Healthcare Australia. It provided the following statement:

> We do not understand why these new custodial sentences have been introduced to a compliant industry that has had no major failures to the detriment of consumers. We would like to see these additional penalties removed from the PHI industry.[15]

2.16 Bupa called for the FS(CoD) Act to be amended to ensure that the penalties imposed on the PHI industry 'reflect those that are currently in place'.[16] Private Health Care added that, at a minimum, the custodial sentence imposed by section 13B of the FS(CoD) Act for disclosing an APRA reporting standard should not be applied to private health insurers as this offence 'reduces transparency'.[17]

2.17 Under subsections 13(1) and (1A) of the FS(CoD) Act, the reporting standards determined by APRA are published unless APRA considers, on reasonable grounds, that the standard includes confidential information, the publication of which is likely to have a detrimental effect on the stability of the financial system or the stability of one or more financial institutions. The information to be contained in the reporting documents must also be required urgently by APRA for certain prescribed purposes.

2.18 The offence under section 13B of the FS(CoD) Act provides a protection against the inappropriate disclosure of the decision to make the standard and the confidential information it contains. The penalties associated with unauthorised disclosure are also clearly communicated to the entity. Under subsection 13A(2), APRA must, in writing, explain the effect of section 13B when providing an entity with a reporting standard that is protected from unauthorised disclosure.

2.19 Treasury submitted that the penalties in the FS(CoD) Act 'largely resemble' the penalties in the PHI Act. Moreover, Treasury stated:

> Given the Government's decision to transfer the prudential regulation of the private health insurance industry to APRA it is appropriate that APRA administered legislation that applies to all industries regulated by APRA also apply to the private health industry. It would be inappropriate and inefficient to grant exemptions to particular industries in relation to general legislation.[18]

2.20 The offence that provides for custodial sentences of up to five years is contained in section 17D of the FS(CoD) Act. Treasury observed that 'this provision is applicable only where an attempt has been made to give false or misleading information to an auditor'. Treasury submitted that the provision is modelled on

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15 Private Healthcare Australia, *Submission 4*, p. 4.

16 Bupa, *Submission 2*, pp. 1–2.

17 Private Healthcare Australia, *Submission 4*, p. 4.

18 Treasury, *Submission 7*, Attachment 1, p. 1.

section 1309 of the *Corporations Act 2001* and 'does not apply in relation to the audit of business-as-usual reporting documents'.[19]

PHIAC reserves

2.21 Subitems 22(3) and (4) of part 2 of schedule 2 to the Consequential Amendments Bill[20] would provide that the Minister with responsibility for APRA may make a determination, in writing, that specified assets or liabilities of PHIAC will become assets of the Commonwealth before the transition occurs. Bupa advised that this provision was not in the exposure draft and, therefore, has not been subject to consultation. Bupa stated that this provision:

> …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.[21]

2.22 The explanatory memorandum provided the following clarification of this proposed transitional provision:

> It is expected that all assets and liabilities held by [PHIAC] immediately before the transition time will transfer to APRA and such a determination would only be made should unforeseen circumstances arise.[22]

2.23 Treasury advised that the provision is intended to 'provide flexibility should assets or liabilities be identified that should not transfer to APRA'. Nevertheless, Treasury confirmed that the government intends 'to credit all remaining cash reserves (as an asset of PHIAC) held by PHIAC at 30 June 2015, to the APRA Special Account'.[23]

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19 Treasury, *Submission 7*, Attachment 1, p. 1.

20 In its submission, Bupa referred to these provisions as the 'proposed new Division 2, Section 22 of the Private Health Insurance (Council Administration Levy) Bill'. The *Private Health Insurance (Council Administration Levy) Act 2003* would be repealed following the passage of the Consequential Amendments Bill.

21 Bupa, *Submission 2*, p. 2. A similar point was made by the Private Healthcare Australia: see *Submission 4*, p. 5.

22 Explanatory Memorandum, p. 180 [paragraph 11.319].

23 Treasury, *Submission 7*, Attachment 1, p. 3.

Interest earned on the risk equalisation pool

2.24 Item 147 of the Consequential Amendments Bill would replace the Private Health Insurance Risk Equalisation Trust Fund with a Private Health Insurance Risk Equalisation Special Account. The explanatory memorandum advised that the conversion of the fund into a special account is required because PHIAC was legally separate from the Commonwealth and could hold money on its own behalf and separately from the consolidated revenue fund. Although APRA is also legally separate from the Commonwealth, it holds all money on behalf of the Commonwealth.[24]

2.25 Section 318-5 of the PHI Act currently provides that the proceeds from any investments made using fund money would be paid into the fund. This requirement is not included for the special account. Bupa submitted that it understands 'interest, however modest, is in fact earned currently' by the fund. Bupa argued that any interest earned should similarly be credited to the special account.[25]

2.26 Although the proceeds from any investments made using fund money are currently paid into the fund, a special account notionally sets aside amounts within the consolidated revenue fund for expenditure on specific purposes. According to guidance published by the Department of Finance, interest is not generally retained in special accounts.[26] Treasury confirmed that APRA 'does not earn interest on any money that it collects'.[27]

Scope of APRA's directions power

2.27 Bupa advised that during the departmental consultation process, it raised concerns regarding the scope of APRA's directions power under clause 97 of the Prudential Supervision Bill. Bupa explained that the proposed directions power does 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.[28]

24 Explanatory Memorandum, p. 157 [paragraphs 11.187–11.188].

25 Bupa, *Submission 2*, p. 2.

26 Department of Finance, 'An Introduction to Special Accounts', *Finance Circular*, no. 2009/01, www.finance.gov.au/sites/default/files/FC-2009-01.pdf (accessed 11 June 2015), p. 4.

27 Treasury, *Submission 7*, Attachment 1, p. 3.

28 Bupa, *Submission 2*, p. 3.

2.28 Bupa added that certain proposed directions could, in its view, 'place an insurer at risk of breaching other obligations under the PHI Act'.[29] The directions that Bupa highlighted were as follows:

- Paragraph 97(1)(f), which refers to 'financial accommodation'. Bupa noted that this term is not defined, but it considered an ordinary reading of the term 'could extend to waiving a waiting period or agreeing to suspend a policy'. Bupa argued that it is not necessary for APRA to give directions on these matters 'because they are adequately dealt with by the regulatory requirements under the PHI Act'.
- Paragraph 97(1)(g), which would enable APRA to direct an insurer 'not to issue or renew any policy, undertake any liability under any policy or collect any premium'. Bupa argued that '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'. Bupa added that the concept of renewing a PHI policy may not occur in practice, as unlike general insurance policies, PHI continues until either party terminates the policy.
- Paragraph 97(1)(t) would allow APRA to issue a direction to amend the rules of an insurer. Bupa argued that this could 'result in a breach of an obligation under the PHI Act, such as the coverage or community rating requirements'.[30]

2.29 Further, Bupa argued that although clause 99 of the Prudential Supervision Bill allowed APRA to revoke or vary a direction, APRA should be required to consider requests from insurers for the revocation or variation of a direction.[31]

2.30 The circumstances where APRA can issue a direction are limited. Under clause 96, APRA can only give a private health insurer a direction of the kind listed in clause 97 if APRA reasonably believes that:

- the insurer has contravened, or is likely to contravene, an enforceable obligation;
- the direction is necessary in the interests of policy holders or prospective policy holders of the private health insurer; or
- for a range of specific reasons related to preserving the interests of policy holders and the insurer's financial position.

2.31 Treasury noted that the scope of APRA's direction-making powers, including the meaning of the term 'financial accommodation' in this context, is 'limited by the extrinsic materials, including the Explanatory Memorandum'. Treasury referred to paragraphs 5.33 of the Explanatory Memorandum, which specifies that APRA:

> …would generally only give a direction where there is a serious prudential concern. For example, a direction not to issue a policy or to refrain from

29 Bupa, *Submission 2*, p. 3.

30 Bupa, *Submission 2*, p. 3.

31 Bupa, *Submission 2*, p. 4.

> providing financial accommodation would normally only be given to prevent the insurer from increasing its exposures where there is a serious financial concern that affects the interests of policy holders.[32]

2.32 Further, directions given that relate to contraventions or likely contraventions of relevant legislation, or the direction being necessary in the interests of policy holders or prospective policy holders of the insurer, are reviewable decisions under clause 168.[33]

Investigations by APRA

2.33 Clause 130 of the Prudential Supervision Bill provides that APRA may appoint an APRA staff member to be an inspector to investigate the affairs of a private health insurer. APRA would be permitted to do this only 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 conducted by the insurer; or
- the insurer has contravened an enforceable obligation.[34]

2.34 Bupa argued that the wording of this clause 'is significantly wider than the circumstances set out in section 194-1 of the PHI Act' and 'represents a change to the current prudential regulation of the PHI industry'. Bupa observed that 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'.[35]

2.35 Similarly, Medibank Private argued that the 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' is not appropriate. Medibank Private suggested that this provision could conflict with common law and the *Corporations Act 2001* with respect 'to how companies that are private health insurers are to be conducted'.[36]

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32 Treasury, *Submission 7*, Attachment 1, p. 3.

33 Explanatory Memorandum, p. 72, [paragraph 5.25]. This was also noted in Treasury's submission: see *Submission 7*, Attachment 1, p. 3.

34 Prudential Supervision Bill, subclause 130(1).

35 Bupa, *Submission 2*, p. 4.

36 Medibank Private, *Submission 6*, p. 2.

2.36 Medibank Private suggested that clause 130 should be qualified by a requirement that for the powers to be invoked, there must be a 'suspicion of acts or omissions that would comprise breaches of the *Private Health Insurance (Prudential Supervision) Act 2015* [i.e. the Prudential Supervision Bill] or of the *Private Health Insurance Act 2007*'.[37]

2.37 The explanatory memorandum stated that the provisions in subclause 130(1) reflect subsection 194-1(2) and paragraph 214-1(1)(a) of the PHI Act. Treasury submitted that the proposed investigation powers for APRA:

> …do not depart from the *Private Health Insurance Act 2007*. The new provisions combine the powers in Divisions 194 and 214 of the *Private Health Insurance Act 2007* (which will be repealed under the Consequential Amendments and Transitional Provisions Bill) as explained in paragraphs 7.7, 7.18 and 7.19 of the Explanatory Memorandum.[38]

Committee comment

2.38 The committee notes that paragraph 214-1(1)(a) of the PHI Act, on which subclause 130(1) is modelled, is contained in part 5-3 of the PHI Act. Part 5-3 of the PHI Act deals with the enforcement of health benefits fund requirements and has a stated purpose that covers the part, which is outlined in section 211-5. The committee also notes that other divisions in the Prudential Supervision Bill contain clauses that specify the purposes for which powers may be exercised.[39]

2.39 The committee does not expect that APRA would be able to exercise its powers for purposes other than for its functions provided by the bills. However, it may assist the PHI industry and other readers of the legislation, if a clause were inserted into division 3 of part 6 of the Prudential Supervision Bill that explained the purpose of the division.

Data provision and confidentiality

2.40 Some concerns were expressed by submitters about the proposed arrangements for the provision of data. Private Healthcare Australia submitted that the legislation should include:

> …a simple legislative provision to ensure that the regulator continues to provide detailed quarterly data provided for over 25 years to the individual health funds and Private Healthcare Australia, while ensuring this data remains confidential and unable to be the subject of any Freedom of Information requests.[40]

37 Medibank Private, *Submission 6*, p. 2.

38 Treasury, *Submission 7*, Attachment 1, p. 4.

39 For example, subclause 127(1) states that the 'powers in this Division may only be exercised: (a) for the purposes of this Act; or (b) for the purposes of the risk equalisation levy legislation.

40 Private Healthcare Australia, *Submission 4*, p. 3.

2.41 APRA advised that the FS(CoD) Act will enable APRA to collect 'all the data currently collected by PHIAC'.[41] APRA noted that its reporting standards (of which drafts were issued on 31 March 2015) would 're-make the existing reporting obligations of private health insurers as a series of reporting standards that replicate the reporting by private health insurers that is currently required by PHIAC'. APRA provided the following statement on this matter:

> 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 insurers to change any substantive aspect of their current approach to reporting. The forms to be completed, and the instructions thereto, are substantively unchanged.[42]

2.42 The Department of Health noted that the Prudential Supervision Bill would require APRA to continue the annual publication of information relating to health benefits funds.[43] Further, APRA will continue to provide the data that PHIAC made available to insurers. The Department stated:

> This includes the reports known as 'PHIAC 1' and 'PHIAC 2' which were provided to insurers on a quarterly basis. It is acknowledged that this data helps to build industry knowledge of market shares and activity levels, age and gender profiles of membership, and claims experience which have an important impact on market performance.[44]

2.43 APRA advised that it intends to 'continue to disseminate and publish data on a similar basis to that currently undertaken by PHIAC'. The discussion paper issued by APRA on 31 March 2015 outlined proposals for certain data to be made non-confidential by APRA. According to APRA, this would allow for the continued publication and dissemination within the confidentiality of data obligations imposed by section 56 of the APRA Act.[45] However, APRA noted that it had initially proposed to continue to share insurer-specific industry data 'using a mechanism that would not require consent from each insurer by determining the data to be non-confidential'. Following consultation with the industry, APRA 'now proposes to adopt a similar process to the current one', which will involve seeking explicit consent from each insurer. APRA submitted that it considered 'this will largely allay residual industry concerns regarding potentially commercially sensitive information being made public'. APRA added:

> To provide clarity and certainty for the industry, APRA intends to release a public response to submissions and our proposed final requirements in the

41 APRA, *Submission 3*, p. 3.

42 APRA, *Submission 3*, p. 4.

43 See Prudential Supervision Bill, clause 167.

44 Department of Health, *Submission 5*, p. 6.

45 APRA, *Submission 3*, p. 4.

> week commencing 15 June 2015. These proposed final requirements will necessarily be subject to any changes necessary to comply with the final form of the legislation.[46]

Guidance published by APRA

2.44 PHIAC has published a series of documents known as Standard Operating Procedures (SOPs) to assist the PHI industry in understanding the obligations under the PHI Act and PHIAC's options for monitoring and, where necessary, intervening in the affairs of an insurer. PHIAC has published five SOPs, which address the following topics:

- SOP1—accepting a written undertaking given by a private health insurer;
- SOP2—giving a PHIAC direction;
- SOP3—information acquisition powers;
- SOP4—appointing an inspector to a private health insurer; and
- SOP5—appointment of an external manager.[47]

2.45 Private Health Australia advised that the SOPs, which were drafted by PHIAC in consultation with the industry, both reduced confusion and increased goodwill between the regulator and the industry. Private Health Australia submitted that APRA has stated that the SOPs align with its enforcement approach. Therefore, Private Health Australia considered 'it should be a simple process for APRA to update the SOPs and/or map them to its proposed approach'. Private Health Australia advised that it has:

> …asked APRA to provide the proposed new process for dealing with regulatory issues and a map of how the SOPs align with APRA's proposed approach and await a response.[48]

2.46 However, Private Health Australia is concerned that the SOPs will not be updated. It claimed that:

> Any attempt to remove/not update the SOPs introduces unnecessary confusion. The industry has a strong preference to continue using the SOPs, as they have been a useful and successful regulatory tool.[49]

2.47 In its submission, APRA responded to industry concern about the SOPs. In outlining its general supervisory and enforcement approach, APRA emphasised that it 'is conscious of the impact of its supervisory interventions can have on the operations of a supervised institution and these are generally well discussed with the

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46 APRA, *Submission 3*, p. 6.

47 PHIAC, 'Powers of the Council', http://phiac.gov.au/industry/regulatory-framework/enforcement/ (accessed 11 June 2015).

48 Private Healthcare Australia, *Submission 4*, p. 4.

49 Private Healthcare Australia, *Submission 4*, p. 4.

institution before APRA takes action'. APRA also noted that 'it is critical that APRA's interventions are proportionate to the prudential outcome desired'.[50]

2.48 On the specific SOPs, APRA submitted that it has considered the documents and compared them to its enforcement approach. APRA considered that the SOPs 'are broadly consistent with APRA's current practices and approach to taking enforcement action'. However, APRA stated that it 'does not see a need to update the SOPs following the changes in legislation'. Rather, APRA intends to keep the SOPs available on APRA's website and will have regard to them when considering enforcement action 'to the extent that they remain relevant under the revised legislation'.[51]

Committee comment

2.49 Although the committee has no concerns with APRA's overall approach to its new functions and its ability to perform these functions effectively, the committee has taken note of the evidence received about PHIAC's Standard Operating Procedures. The committee understands that the continuation of particular series of documents may not be necessary under the new regulatory arrangements. However, having PHIAC's guidance published on APRA's website and considered by APRA 'to the extent that they remain relevant under the revised legislation',[52] does not appear to be an adequate outcome. The committee considers that it would assist industry to adjust to the new regulatory arrangements if APRA developed clear guidance that either updated or replaced PHIAC's Standard Operating Procedures.

Recommendation 1

2.50 Following the commencement of the regime for the prudential regulation of private health insurers by the Australian Prudential Regulation Authority (APRA), APRA should develop and publish guidelines that seek to assist the private health insurance industry to understand their obligations and the regulatory options available to APRA.

Review of APRA's decisions

2.51 An area that attracted comment from industry stakeholders is the ability to seek reviews of APRA's decisions. These stakeholders are concerned that the changes would result in reduced transparency of prudential decisions, as fewer decisions will be reviewable by the Administrative Appeals Tribunal (AAT). Private Healthcare Australia wrote:

> The number of decisions that are AAT reviewable has decreased while regulatory powers have increased…[W]e believe that all existing decisions

50 APRA, *Submission 3*, p. 5.

51 APRA, *Submission 3*, p. 5.

52 APRA, *Submission 3*, p. 5.

> that are AAT reviewable should remain so and new regulatory powers should be AAT reviewable.[53]

2.52 Clause 168 of the Prudential Supervision Bill lists decisions that are reviewable.[54] Under this clause, a person may request APRA to reconsider the decision and, if the decision is confirmed or varied following that process, an application can be made to the AAT for the AAT to review the decision.

2.53 Bupa advised that a decision by APRA under clause 152 to refuse to consent to a private health insurer withdrawing or varying an enforceable undertaking would not be reviewable under the new regulatory arrangements, although a similar decision under the PHI Act currently is reviewable.[55] Bupa submitted that it:

> …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.[56]

2.54 Private Healthcare Australia also called for decisions made by APRA under Prudential Standards HPS 100 (Solvency Standard), HPS 110 (Capital Adequacy) and HPS 510 (Governance) to be reviewable decisions.[57]

2.55 APRA addressed the issue of reviewable decisions in its submission. First, APRA noted that an insurer can apply to APRA for internal reconsideration of any decision. APRA noted that this is 'a streamlined, low cost and less legalistic review mechanism than AAT or judicial review'. Second, APRA noted that many decisions are reviewable by the AAT and, in certain circumstances, rights to judicial review of decisions are also available.[58]

2.56 On the decisions reviewable by the AAT, APRA noted that applications to the AAT for reviews of APRA decisions 'are extremely rare'. APRA stated that this outcome demonstrates the effectiveness of the consultative supervisory approach it takes when carrying out its functions.[59] However, APRA acknowledged that the Prudential Supervision Bill does not permit AAT review of certain types of decisions, such as supervisory decisions made under APRA prudential standards. APRA submitted that this is consistent with the relevant legislation applied to other industries regulated by APRA. Further, APRA argued that, based on its experience supervising other industries:

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53 Private Healthcare Australia, *Submission 4*, p. 3.

54 The term 'reviewable decision' is not included in clause 4 (which provides a list of defined terms used in the legislation). It may be useful if the following words were included in clause 4: 'reviewable decision has the meaning given in section 168'. This approach is used in other Acts, such as the *Aged Care Act 1997*.

55 See PHI Act, section 328-5, table item 33.

56 Bupa, *Submission 2*, p. 4.

57 Private Healthcare Australia, *Submission 4*, p. 3.

58 APRA, *Submission 3*, p. 6.

59 APRA, *Submission 3*, p. 6.

> …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 [Prudential Supervision] 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.[60]

2.57 Treasury responded to Bupa's specific concern that a decision by APRA to refuse to consent to a private health insurer withdrawing or varying an enforceable undertaking would not be reviewable under the new regulatory arrangements. Treasury provided the following observations:

> Enforceable undertakings are a remedy that APRA can use as an alternative to pursuing legal action in court. Insurers can decide not to enter into an enforceable undertaking.
>
> APRA requires certainty when entering into enforceable undertakings to ensure that APRA can use enforceable undertakings to finalise issues and to avoid ongoing litigation.[61]

Court power of disqualification

2.58 Clause 120 of the bill would provide that, following an application by APRA, the Federal Court may disqualify a person from being an officer or appointed actuary of an insurer, if the court is satisfied that the person is:

- not a fit and proper person; and
- the disqualification is justified.

2.59 Clause 122 of the bill would provide that a person cannot refuse to give evidence in proceedings arising under the Prudential Supervision Bill or refuse to do something that is a requirement under the Prudential Supervision Bill on the grounds that doing so would lead to a disqualification order being made against the person under clause 120. The explanatory memorandum advised:

> This means that a person does not receive the benefit of 'use immunity' in subsections 112(6) and 149(2) in relation to a disqualification order. Accordingly, the evidence given may be used in disqualification proceedings. This is reasonable because a disqualification order is not a criminal penalty, and is it important to ensure that the policy holders' interests are not risked by an insurer employing an inappropriate officer or actuary.[62]

2.60 Medibank Private submitted that the drafting should be amended to ensure that any evidence from a disclosure that was compelled by subclauses 122(1) and (3)

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60 APRA, *Submission 3*, p. 6.

61 Treasury, *Submission 7*, Attachment 1, p. 4.

62 Explanatory Memorandum, p. 92 [paragraph 6.54].

could only be used against the person who was being compelled to disclose it for disqualification proceedings under clause 120.[63]

Committee comment

2.61 The assessment of legislative proposals against a set of accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary propriety, is a task undertaken by the Senate Standing Committee for the Scrutiny of Bills. When examining bills or draft bills, this committee takes into account any comments on the bills published by the Scrutiny of Bills Committee.[64] However, given the short timeframe for this inquiry, the Scrutiny of Bills Committee's comments on these bills were not available when this report was being prepared.

2.62 The committee notes that clause 122 is similar in form to other statutes that remove penalty privilege, such as section 1349 of the Corporations Act. In 2007, the Scrutiny of Bills Committee considered a bill that introduced section 1349 of the Corporations Act—the Scrutiny of Bills Committee concluded that the section 'strikes a reasonable balance between the competing interests of obtaining information and protecting individuals' rights'.[65]

References to subsection 4B(3) of the *Crimes Act 1914*

2.63 In its submission, Medibank Private referred to the notes inserted beneath every offence provision that state:

> If a body corporate is convicted of an offence against this subsection, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the penalty stated above.

2.64 Medibank Private pointed out that subsection 4B(3) of the *Crimes Act 1914* appears to be 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'. Medibank Private suggested that:

> 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.[66]

2.65 The explanatory memorandum stated that the note 'has been inserted for every offence provision to assist the reader'. However, the explanatory memorandum also addressed the issue referred to by Medibank Private. It stated that:

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63 Medibank Private, *Submission 6*, p. 3.

64 Senate Standing Order 25(2A).

65 Senate Standing Committee for the Scrutiny of Bills, *Alert digest*, 2007, no. 6, p. 26.

66 Medibank Private, *Submission 6*, p. 4.

> Whilst it may appear that some offences only apply to body corporates or natural persons, the operation of Part 2.4 of the *Criminal Code Act 1995* (Criminal Code) applies where a person aids, abets, counsels or procures the commission of an offence, the offence provision can apply to that person whether they are a natural person or a body corporate.[67]

2.66 Similar explanatory notes exist in other legislation. For example, subsection 8(1) of the *Banking Act 1959* provides that a body corporate (other than the Reserve Bank of Australia or an authorised deposit-taking institution) is guilty of an offence if it carries on any banking business in Australia. The second explanatory note that follows the offence contains the same text regarding the application of subsection 4B(3) of the Crimes Act to body corporates as the notes contained in the Prudential Supervision Bill.

Committee view

2.67 The transfer of PHIAC's prudential regulation functions to APRA is a sensible measure that will, over time, result in lower costs for the PHI industry without weakening regulatory oversight. The committee considers that the bills should be passed.

2.68 The committee notes that submitters have expressed various minor concerns about particular provisions in the bills and the guidance available at this time. It is not unusual that upcoming changes to regulatory arrangements will lead to some apprehension among regulated entities that are familiar with the existing framework. The committee is hopeful that this report and the submissions received from APRA, the Department of Health and Treasury will allay the majority of the PHI industry's concerns. Further, the committee is confident that APRA will constructively engage with industry and take a common-sense approach to performing its new regulatory functions so that, over time, any remaining concerns will be mitigated.

Recommendation 2

2.69 The committee recommends that the bills be passed.

Senator Sean Edwards

Chair

67 Explanatory Memorandum, p. 21 [paragraph 3.8].