



## Financial Sector Legislation Amendment (Enhancing Supervision and Enforcement) Bill 2009

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Law and Bills Digest Section

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## Financial Sector Legislation Amendment (Enhancing Supervision and Enforcement) Bill 2009

**Date introduced:** 19 March 2009

**House:** House of Representatives

**Portfolio:** Treasury

**Commencement:** The formal parts commence on Royal Assent; Schedule 1 commences on a single day to be fixed by Proclamation or 6 months after Royal Assent, whichever occurs first; and Schedule 2 commences on the day after Royal Assent.

**Links:** The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

### Purpose

The Bill has two main purposes:

- to make the Australian Prudential Regulation Authority (APRA) responsible for the regulation of non-operating holding companies (NOHCs) of life insurers,<sup>1</sup> and
- to harmonise APRA's powers to seek court injunctions under the *Banking Act 1959* (the Banking Act), the *Insurance Act 1973* (the Insurance Act), the *Life Insurance Act 1995* (the Life Insurance Act) and the *Superannuation Industry (Supervision) Act 1993* (the SIS Act).

### Background

The current role of APRA

According to its website:

The Australian Prudential Regulation Authority (APRA) is the prudential regulator of the Australian financial services industry. It oversees banks, credit unions, building societies, general insurance and reinsurance companies, life insurance, friendly

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1. A conglomerate (or group of related companies) may be headed by a non-operating holding company, while the operations of the conglomerate are actually conducted by a subsidiary company. Each company has separate legal status.

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societies, and most members of the superannuation industry. APRA is funded largely by the industries that it supervises. It was established on 1 July 1998. APRA currently supervises institutions holding approximately \$3.4 trillion in assets for 21 million Australian depositors, policyholders and superannuation fund members.<sup>2</sup>

In fulfilling its role as prudential regulator, APRA is empowered under the Banking Act, the Insurance Act, the Life Insurance Act and the SIS Act to seek a court injunction against a person (usually an officer of a bank or insurance company etc that is subject to APRA's regulatory oversight) who contravenes the prudential regime contained in one of these Acts, including breaching a condition attached to the authorisation or regulation of an APRA-regulated entity. Presently APRA's powers vary between the four Acts, and the amendments contained in Schedule 2 to the Bill seek to harmonise the circumstances in which the Federal Court may grant an injunction.

### How is APRA responsible for regulating body corporates

In order to explain the significance of the measures contained in Schedule 1 to the Bill that bring NOHCs of life insurers under APRA's regulatory umbrella, it may assist to explain how authorised deposit-taking institutions (ADIs), general insurance companies and their NOHCs fall under APRA's regulation and supervision. It may also assist to explain how life insurers themselves (as opposed to their NOHCs) are regulated.

### **Authorised deposit-taking institutions and their NOHCs**

APRA is primarily responsible for supervising banks, credit unions and building societies—in fact any corporation that has been authorised to carry on banking business under the Banking Act. A body corporate that wishes to carry on banking business in Australia may apply to APRA, which may grant authority to a body corporate to carry on banking business in Australia.<sup>3</sup> Where an authority is in force, the body corporate holding such an authority is known as an 'authorised deposit-taking institution' (or ADI for short).<sup>4</sup>

In general, a licence (or authority) is not needed to purchase or establish a bank, but the bank needs an authority from APRA to run its banking business. If the owner of the bank is a NOHC, it may need an authority from APRA.<sup>5</sup> APRA may refuse to grant an authority to the subsidiary bank to carry on banking business unless the NOHC holds an authority.<sup>6</sup>

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2. APRA, 'About APRA Home', <http://www.apra.gov.au/aboutAPRA/>, accessed on 1 April 2009.

3. Subsections 9(2) and (3) of the Banking Act.

4. Section 5 of the Banking Act.

5. Section 11AA of the Banking Act.

6. See the note contained in section 9 of the Banking Act, and also section 11AA.

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## **General insurance companies and their NOHCs**

Division 4 of Part III of the Insurance Act (which includes section 18 quoted below) deals with the authorisation of NOHCs of general insurers. Division 5 of Part III deals with issues connected with directors, senior managers and other representatives of general insurers and authorised NOHCs, such as the fact that disqualified persons may not act as directors or managers of general insurers or authorised NOHCs (section 24). Division 6 deals with other related matters, including where a general insurer or NOHC changes its name or ceases to exist.

Perhaps more importantly, Part IIIA deals with prudential supervision and monitoring of general insurers, authorised NOHCs and their subsidiaries.

The term ‘*authorised NOHC*’ is defined to mean a body corporate:

- (a) authorised under section 18; and
- (b) that is a NOHC of a general insurer or general insurers.<sup>7</sup>

The term ‘*general insurer*’ is defined as ‘a body corporate that is authorised under section 12 to carry on insurance business in Australia’ and includes a foreign general insurer.<sup>8</sup> Section 12 sets out how a body corporate applies to APRA for authority to carry on insurance business in Australia and also empowers APRA to authorise the applicant to carry on insurance business in Australia. The authorisation must be in writing and may be subject to conditions.<sup>9</sup>

Section 18 of the Insurance Act provides that a NOHC of a general insurer may apply to APRA for an authorisation. The NOHC may need an authority because APRA may refuse to grant a subsidiary an authority under section 12 without the holding company first being authorised by APRA.

## **Life companies**

As mentioned above, APRA is already responsible for supervising life companies (including friendly societies) registered under the Life Insurance Act, but the Bill provides APRA with responsibility for regulating the NOHCs of life companies that are currently outside its bailiwick.<sup>10</sup> As the Assistant Treasurer stated in his second reading speech:

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- 7. Section 3 of the Insurance Act.
  - 8. Section 11 of the Insurance Act.
  - 9. Section 13 of the Insurance Act.
  - 10. The term ‘*life company*’ is defined in the Dictionary (contained in the Schedule to the Life Insurance Act) as ‘a company that is carrying on life insurance business in Australia’. In this digest, the term is used interchangeably with the term ‘*life insurer*’.

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This measure is consistent with the Insurance Core Principle ICP17 of the International Association of Insurance Supervisors on Group-wide supervision, which is that '[t]he supervisory authority supervises its insurers on a solo and a group-wide basis'.<sup>11</sup>

Mr Bowen went on to say:

International experience has demonstrated the interconnection between companies in a corporate conglomerate, including between prudentially regulated entities and unregulated entities. This measure will strengthen the prudential regulation of life insurance conglomerates in line with the regulation of other financial conglomerates.<sup>12</sup>

In 2003, the International Association of Insurance Supervisors (IAIS) explained the need to supervise all companies within a conglomerate, saying:

17.1. Supervision of insurers, who are part of a wider insurance group or conglomerate, whether domestic or international, should not be limited to the solo supervision of that insurer. The operations of other group companies, including any holding companies if applicable, are taken into account in assessing the totality of the risk exposures of the insurers, insurance groups and conglomerates. The fact that such an insurer is part of a group generally alters, often considerably, its risk profile, its financial position, the role of its management, and its business strategy. As a consequence, there should be legal provisions and effective supervision that adequately meet the changed profile of the insurer, ensuring adequate group wide assessment and supervisory action as appropriate.<sup>13</sup>

As at December 2008, there were 32 life companies registered with APRA.<sup>14</sup> While there is no reliable data available about the number of life insurer NOHCs that currently exist or are likely to be authorised under the changes proposed in the Bill, there are unlikely to be many NOHCs, given the small number of life companies under APRA's oversight. By way of comparison, there are only 15 NOHCs of general insurers authorised under section

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11. The Hon Chris Bowen MP, Minister for Competition Policy and Consumer Affairs, and Assistant Treasurer, 'Second reading speech: Financial Sector Legislation Amendment (Enhancing Supervision and Enforcement) Bill 2009', House of Representatives, *Debates*, 19 March 2009, p. 3238, <http://www.aph.gov.au/hansard/reps/dailys/dr190309.pdf>, accessed on 14 April 2009.

12. *ibid.*, p. 3239.

13. International Association of Insurance Supervisors, *Insurance Core Principles And Methodology*, October 2003, p. 30, [http://www.iaisweb.org/\\_temp/Insurance\\_core\\_principles\\_and\\_methodology.pdf](http://www.iaisweb.org/_temp/Insurance_core_principles_and_methodology.pdf), accessed on 14 April 2009.

14. APRA, *Statistics: Quarterly Life Insurance Performance*, December 2008 (issued 1 April 2009), p. 9, [http://www.apra.gov.au/Statistics/upload/LI-Quarterly-Performance\\_Dec-2008.pdf](http://www.apra.gov.au/Statistics/upload/LI-Quarterly-Performance_Dec-2008.pdf), accessed on 7 April 2009.

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18 of the Insurance Act, compared with the fact there are 132 general insurance entities regulated by APRA (as at June 2008).<sup>15</sup> If such statistics for general insurers are replicated in the life insurance industry, the changes proposed by the Bill are unlikely to create any significant increase in APRA's workload—although they will mean that the NOHCs of life insurers will have to comply with the administrative and regulatory requirements imposed on them by APRA, and will thus be subject to supervision by APRA.

Neither the term '*Non-Operating Holding Company*' nor the abbreviation 'NOHC' is currently used in the Life Insurance Act (see discussion of the main provisions of the Bill below).

### Basis of policy commitment

In June 2008, the Rudd Government announced its intention to bring NOHCs of life insurers under APRA's regulatory umbrella.<sup>16</sup> In discussing a number of reforms designed to permit regulators to manage financial stability effectively in the current economic times, the Treasurer said:

The reforms will also provide for the judicial management of general insurers and bring non-operating holding companies in the life insurance sector into the regulatory net and remove potential legal barriers to the recapitalisation of a failing institution. These are sensible enhancements to our existing regulatory arrangements, and the government will bring forward legislation to enact these proposals as part of the package of measures that I am announcing today. It is important that the government ensures that APRA and the RBA [Reserve Bank of Australia] have the tools they need to act swiftly and effectively to resolve and, if possible, to avoid any crisis in a regulated institution.

This is particularly important with our key financial institutions, where instability in one can quickly spread through the system and create instability in other, otherwise sound, entities.<sup>17</sup>

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15 APRA, 'Authorised Non-Operating Holding Companies', <http://www.apra.gov.au/General/Authorised-Non-Operating-Holding-Companies.cfm>, accessed on 7 April 2009, and APRA, *Statistics: Half Yearly General Insurance*, June 2008 (issued 5 February 2009), p. 12, <http://www.apra.gov.au/Statistics/upload/GI-Half-Yearly-publication-2008-06.pdf>, accessed on 7 April 2009.

16. The Hon Wayne Swan MP, Treasurer, 'Ministerial Statements: Financial Stability', House of Representatives, *Debates*, 2 June 2008, pp. 3970–3977, <http://www.aph.gov.au/hansard/reps/dailys/dr020608.pdf>, accessed on 1 April 2009.

17. *ibid.*, p. 3976.

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The actual contents of the Bill were announced on 2 March 2009 in a joint press release by the Hon Chris Bowen MP, Assistant Treasurer, and Senator Nick Sherry, Minister for Superannuation and Corporate Law.<sup>18</sup> They said:

... In this difficult environment, we are ensuring that APRA has access to full information about the financial entities it regulates and can respond quickly and decisively to prudential concerns ...

APRA currently regulates the NOHCs of general insurers and authorised deposit-taking institutions (ADIs). Under this Bill, it will have the power to register and supervise the NOHCs of life insurance companies and enforce their compliance with prudential requirements.

With the passage of the Bill, APRA will be able to seek a consistent and comprehensive range of injunctions from the Federal Court of Australia on prudential matters, and this power will apply to ADIs, general insurance, life insurance and superannuation.

The move to bring life insurance NOHCs within APRA's regulatory umbrella makes sense, given that APRA is already responsible for the regulation of other NOHCs. Many insurance businesses are conducted through a combination of holding and subsidiary companies, some of which APRA is currently responsible for, and some of which it is not (but arguably should be).

The inclusion of life insurance NOHCs under APRA's regulatory umbrella also reflects the spirit of several recommendations made by the HIH Royal Commissioner in 2003—albeit in the context of general insurance companies—particularly the idea that APRA should be in a position to know the true financial health of associated companies:

39 I recommend that the Australian Prudential Regulation Authority monitor the financial condition of corporate groups, including those with foreign operations. Pending the development of the proposed prudential standard on supervision of corporate groups, APRA should use existing powers to require groups to provide any information it considers necessary to perform this role.

40 I recommend that the Australian Prudential Regulation Authority take steps to ensure that it effectively exchanges with relevant foreign regulators information and intelligence on the operations of Australian insurers with international operations.

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18. The Hon Chris Bowen MP, Assistant Treasurer, and Senator Nick Sherry, Minister for Superannuation and Corporate Law, 'Government enhances Prudential Regulator's Supervisory and Enforcement Power', *Press Release*, 2 March 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FSVWS6%22>, accessed on 30 March 2009.

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41 I recommend that the Australian Prudential Regulation Authority modify the prudential standards to require the annual production by an authorised general insurer's approved actuary of a report on the overall financial condition of the insurer.

42 I recommend that the Commonwealth Government amend the Insurance Act 1973 to extend prudential regulation to all discretionary insurance-like products—to the extent that it is possible to do so within constitutional limits.<sup>19</sup>

Similarly, the Financial System Inquiry, chaired by Stan Wallis, recommended in its final report in 1997:

Recommendation 51: The APRC should be empowered to access operations of other non-regulated entities in the group. The APRC should have clear powers to verify intra-group exposures and otherwise be satisfied as to the adequacy of separation of the regulated financial entity from other financial operations within the group, including any holding companies and affiliates such as merchant banks and finance companies.<sup>20</sup>

### Committee consideration

The Bill has been referred to the Senate Economics Committee for inquiry and report by 7 May 2009.<sup>21</sup> The reason for the referral was stated as follows:

Examine the provisions of the bill that relate to the regulation on non-operating holding companies of life insurance companies and the provisions of the bill that relate to the harmonisation of powers for APRA to seek court injunctions.<sup>22</sup>

The closing date for submissions was 13 April 2009, and none has yet been made available to the public.

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19. Justice Neville Owen, 'Policy Recommendations', *The Failure of HIH Insurance*, April 2003, [http://www.hihroyalcom.gov.au/finalreport/Front%20Matter,%20critical%20assessment%20and%20summary.HTML#\\_Toc37086538](http://www.hihroyalcom.gov.au/finalreport/Front%20Matter,%20critical%20assessment%20and%20summary.HTML#_Toc37086538), accessed on 6 April 2009.
  20. Financial System Inquiry (the Wallis Inquiry), Final report, March 1997, <http://fsi.treasury.gov.au/content/FinalReport.asp>, accessed on 20 April 2009.
  21. Selection of Bills Committee, Report No. 4 of 2009, 19 March 2009, p. 3 and Appendix 4 at p. 8, [http://www.aph.gov.au/Senate/committee/selectionbills\\_ctte/reports/2009/rep0409.pdf](http://www.aph.gov.au/Senate/committee/selectionbills_ctte/reports/2009/rep0409.pdf), accessed on 30 March 2009. Details of the inquiry are at [http://www.aph.gov.au/Senate/committee/economics\\_ctte/fsla\\_09/info.htm](http://www.aph.gov.au/Senate/committee/economics_ctte/fsla_09/info.htm), accessed on 30 March 2009.
  22. Selection of Bills Committee, Report No. 4 of 2009, op cit., p.8.

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### **Position of significant interest groups/press commentary**

To date, there has been no public comment on the Bill by significant interest groups such as the Investment and Financial Services Association (IFSA), which represents life insurers and fund managers in Australia, nor bodies such as the Insurance Council of Australia, which represents the interests of the Australian general insurance industry.<sup>23</sup>

### **Coalition/Greens/Family First policy position/commitments**

Similarly, there has been no public comment on the Bill by the minor parties or independents. In his response to the Treasurer's statement on financial stability on 2 June 2008 (see above), when among other things the Treasurer foreshadowed the Government's intention to bring life insurer NOHCs into the regulatory net, the Leader of the Opposition, the Hon Malcolm Turnbull MP said: 'The Treasurer has outlined a number of measures in his statement which we welcome in principle. We will need to see the detail of them all, and I am sure he will make those available in due course'.<sup>24</sup> However, it is not entirely clear if Mr Turnbull was referring to the measures aimed at NOHCs of life insurers or if he was referring to the other measures mentioned by the Treasurer, such as the bank deposit guarantee.

### **Financial implications**

The financial impact of including life insurance NOHCs under the APRA regulatory umbrella is expected to be 'low'.<sup>25</sup> As stated in the Explanatory Memorandum for the Bill:

APRA's supervision of life insurance NOHCs is expected to be funded by industry on a user-pays basis. APRA is also expected to incur time and resource costs in developing new standards for life insurance NOHCs, however, these costs are not expected to be significant.<sup>26</sup>

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23. The website of the Investment and Financial Services Association is available at <http://www.ifsa.com.au/>, accessed on 9 April 2009, and the website of the Life Insurance Council is available at <http://www.insurancecouncil.com.au/>, accessed on 9 April 2009.

24. The Hon Malcolm Turnbull MP, Leader of the Opposition, 'Ministerial Statements: Financial Stability' (reply), House of Representatives, *Debates*, 2 June 2008, pp. 3977–3981, particularly p. 3978, <http://www.aph.gov.au/hansard/refs/dailys/dr020608.pdf>, accessed on 1 April 2009.

25. Explanatory Memorandum, Financial Sector Legislation Amendment (Enhancing Supervision and Enforcement) Bill 2009, p. 3.

26. *ibid.*, pp. 3–4.

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The Explanatory Memorandum also mentions the cost of life insurance NOHCs complying with APRA's prudential regime, saying that they may be liable to pay a financial institutions levy. Such compliance costs are not quantified.<sup>27</sup>

The Explanatory Memorandum deals separately with the financial impact of Schedule 2 of the Bill, which harmonises APRA's powers to seek court injunctions under the various prudential legislation mentioned at the start of this digest. Both the financial impact and the compliance cost impact of the measures are estimated to be 'nil', because 'APRA's supervision of prudentially regulated entities [is] expected to be funded by industry on a user-pays basis'.<sup>28</sup>

## Main provisions

### Schedule 1—Non-operating holding companies of life insurers

#### Part 1—Main amendments

##### Registration of NOHCs of life insurers

Item 21 inserts **proposed Division 2 into Part 3** of the Life Insurance Act. It deals with the registration of NOHCs of life companies and comprises **proposed sections 28A, 28B, 28C and 28D**.

It is unnecessary to go into much detail about the amendments contained in **proposed Division 2 of Part 3** of the Life Insurance Act because it is in very similar terms to Division 4 of Part III of the Insurance Act. The provisions which currently make up that Division have been largely unaltered since their insertion into the Insurance Act by the *General Insurance Reform Act 2001* and are not the current subject of legislative reform.

The main difference between the two Divisions is that **proposed Division 2 of Part 3** of the Life Insurance Act deals with the *registration* of NOHCs of life insurers, whereas Division 4 of Part III of the Insurance Act deals with the *authorisation* of NOHCs of general insurers. In part this distinction can be explained by the fact that Part 3 of the Life Insurance Act deals with the *registration* of life companies (and their NOHCs), whereas Part III of the Insurance Act deals with the *authorisation* of general insurers (and their NOHCs) to carry on insurance business—although the genesis of the distinction remains unclear.<sup>29</sup>

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27. *ibid.*

28. *ibid.*, p. 5.

29. Similarly, Division 1 of the Banking Act deals with the granting of *authority* to carry on banking business, and Division 1AA deals with the granting of *authority* to be a NOHC of an ADI. Only the Life Insurance Act uses the term 'registration' instead of 'authority'.

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**Proposed section 28A** deals with the registration of NOHCs of life companies, and **proposed section 28B** provides that APRA may impose conditions on the registration. **Proposed section 28C** sets out the circumstances when APRA may revoke the registration of a NOHC, including where ‘it would be contrary to the public interest for the registration to remain in force’ (**proposed paragraph 28C(1)(b)**) or where ‘it would be contrary to the interests of the policy owners of any life company that is a subsidiary of the registered NOHC for the registration to remain in force’ (**proposed paragraph 28C(1)(d)**). APRA must give the company written notice of its intention to revoke the registration, and the company must be given at least 90 days to make written submissions in response—unless APRA forms the view that complying with this requirement would result in a delay that would be contrary to the interests of either the public or policy owners of any subsidiary life company (**proposed subsections 28C(2) and (3)**).

There is no equivalent provision in the Life Insurance Act dealing generally with the revocation of the registration of life companies—although similar provisions to those contained in the Bill are found in section 21 of the Insurance Act and apply to the NOHCs of general insurance companies.<sup>30</sup>

Under existing section 26 of the Life Insurance Act, APRA may cancel the registration of a defunct life company, and under existing section 27, a life company may voluntarily deregister itself. Further, under existing subsection 230B(1), APRA may give a life company a direction in a variety of circumstances, including where:

- (h) the company is conducting its affairs in an improper or financially unsound way; or
- (i) the failure to issue a direction would materially prejudice the interests of policy owners or prospective policy owners of the company; or
- (j) the company is conducting its affairs in a way that may cause or promote instability in the Australian financial system.<sup>31</sup>

If the company fails to comply with the direction, it may be guilty of an offence under section 230F, and the Federal Court may also make an injunction under section 235. The decision to give a direction under section 230B may also be reviewable under section 236 of the Life Insurance Act. In such a case, the decision may be reviewed by the body

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30. In the case of section 21 of the Insurance Act, APRA may revoke the authorisation of a NOHC where ‘it would be contrary to the *national interest* for the authorisation to remain in force’ (paragraph 21(1)(b)). This seems to be a much higher test than that in **proposed paragraph 28C(1)(b)** where APRA may revoke the registration of a NOHC where ‘it would be contrary to the *public interest* for the registration to remain in force’.

31. Subsection 230B(1) is the subject of some minor drafting changes contained in **item 136** of the Bill, but the substance of paragraphs (h), (i) and (j) remains the same.

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which made the original decision (eg APRA), and can be the subject of a further review to the Administrative Appeals Tribunal (the AAT): section 236.<sup>32</sup>

Under **item 157** of the Bill, section 236 will be amended to include the following decisions as reviewable decisions:

- (gb) a refusal of an application for registration of a body corporate under section 28A;
- (gc) a decision to impose conditions, or additional conditions, on a NOHC registration;
- (gd) a decision to vary conditions imposed on a NOHC registration;
- (ge) a decision to revoke under section 28C a NOHC registration

In any event, a person who is aggrieved by a decision made under an enactment (including any of the prudential legislation), may apply for a review of the decision under the *Administrative Decisions (Judicial Review) Act 1977*. The grounds for such a review are set out in section 5 of that Act.<sup>33</sup> ‘Judicial review’ involves the review of questions of law, whereas a review by the AAT (see above) involves a consideration of the merits of administrative action, particularly findings of fact and the policy behind the decision, rather than the lawfulness of the original decision.<sup>34</sup>

### **Prudential requirements and standards**

The provisions contained in **Schedule 1 to the Bill** that set out the prudential requirements that will apply to NOHCs of life insurers are consistent with the prudential requirements that already apply to life companies. Both types of body corporate will be required to register under the Life Insurance Act and to comply with any conditions that APRA may attach to the registration.<sup>35</sup> Both types of body corporate must also comply with the prudential standards set by APRA and be subject generally to APRA’s supervision regime, including reporting obligations.<sup>36</sup> Under **item 15** of Schedule 1, one of the conditions that

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32. For the text of section 236, see [http://www.austlii.edu.au/au/legis/cth/consol\\_act/lia1995144/s236.html](http://www.austlii.edu.au/au/legis/cth/consol_act/lia1995144/s236.html), accessed on 16 April 2009.

33. For the text of section 5, see [http://www.austlii.edu.au/au/legis/cth/consol\\_act/adra1977396/s5.html](http://www.austlii.edu.au/au/legis/cth/consol_act/adra1977396/s5.html), accessed on 16 April 2009.

34. For further discussion of the distinction between judicial and merits review, see *Butterworths Concise Australian Legal Dictionary*, Third Edition, LexisNexis Butterworths, Australia, 2004.

35. See **item 21**.

36. See, for example, **items 129–156**.

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APRA may impose on the registration of a body corporate as a life company may be the registration of its holding company (if any): **proposed subsection 22(1A)**.

Many of the amendments contained in **Schedule 1** are simply consequential upon the commencement of the substantive measures contained in the Schedule. For example, a number of items in Schedule 1 replace the words ‘this Act’ with a specific reference to ‘section 21’ of the Life Insurance Act (being the provision requiring the registration of life companies, as distinct from **proposed section 28A** requiring the registration of their NOHCs).<sup>37</sup> Other provisions in Schedule 1 amend existing provisions in the Life Insurance Act to include references to NOHCs of life insurers alongside existing references to life companies.<sup>38</sup>

**Items 129–134** amend existing section 230A, which provides that APRA may make prudential standards for life companies. The amendments contained in these provisions of the Bill make it clear that if APRA determines or varies a standard, it must give a copy of the standard or variation (or revocation) to any registered life company or registered NOHC of a life insurer to which the standard applies. Similarly, **item 136** amends subsection 230B(1) to make it clear that APRA may give a direction to any life company or registered NOHC if APRA has reason to believe the body corporate has contravened, or is likely to contravene, a provision of the Life Insurance Act or the *Financial Sector (Collection of Data) Act 2001*. **Item 138** amends subsection 230B(2) to set out the kinds of direction that APRA may give a body corporate, including a direction to comply with relevant legislation; to remove a director or senior manager from office; to order an audit of the body corporate’s affairs; or not to pay a dividend. None of the detail contained in **items 136 and 138** is significantly different to the current provisions as they apply to life companies, but the amendments include reference to NOHCs and tidy up the drafting of the existing provisions.

**Items 182 and 184** amend the Dictionary contained in the current Schedule to the Life Insurance Act to insert a definition for the term ‘*Non-Operating Holding Company*’ and the abbreviation ‘NOHC’, neither of which is currently used in the Life Insurance Act. The definition of the term ‘*Non-Operating Holding Company*’ is identical to that contained in the Banking Act and the Insurance Act, being a body corporate:

- (a) of which the first body corporate is a subsidiary; and
- (b) that does not carry on a business (other than a business consisting of the ownership or control of other bodies corporate); and
- (c) that is incorporated in Australia.<sup>39</sup>

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37. See, for example, items 4, 6, 8–12, and 17–20.

38. See, for example, **items 71, 75, 77 and 79**.

39. See section 5 of the Banking Act and section 3 of the Insurance Act.

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## Part 2—Consequential amendments

Part 2 of Schedule 1 (being **items 188–223**) makes minor amendments to a variety of Acts, primarily to:

- (a) include reference to NOHCs registered under the Life Insurance Act (as a result of the amendments contained in Part 1 of Schedule 1 to the Bill)<sup>40</sup>, or
- (b) confine the operation of various provisions of the listed Acts to life companies, as distinct from their NOHCs.

For example, following the amendment proposed in **item 195**, only a company registered as a life company under section 21 of the Life Insurance Act (and not a body corporate registered as a NOHC of a life insurer under **proposed section 28A**) will be eligible under section 283AC of the *Corporations Act 2001* (the Corporations Act) to be a trustee in relation to the issue, sale or transfer of debentures. Similarly, by the amendment proposed in **item 208**, the definition of the term ‘*life insurance company*’ in section 121AB of the *Income Tax Assessment Act 1936* (the ITAA 1936) will be confined to life companies and will not include their NOHCs. Such a restriction reflects the fact that the definition of ‘*general insurance company*’ in section 121AB is confined to general insurance companies and does not include their NOHCs either.

The Acts which are to be amended by Part 2 are:

- *Australian Prudential Regulation Authority Act 1998*
- *Authorised Non-operating Holding Companies Supervisory Levy Imposition Act 1998*
- *Corporations Act*
- *Financial Institutions Supervisory Levies Collection Act 1998*
- *Financial Sector (Business Transfer and Group Restructure) Act 1999*
- *Financial Sector (Collection of Data) Act 2001*
- *Financial Sector (Shareholdings) Act 1998*
- *First Home Saver Accounts Act 2008*
- *ITAA 1936*
- *Income Tax Assessment Act 1997*
- *Insurance Acquisitions and Takeovers Act 1991*

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40. See, for example, the revised definition of ‘*authorised NOHC*’ in section 7 of the *Financial Institutions Supervisory Levies Collection Act 1998*. The term will be redefined to include a registered NOHC (as defined in the Life Insurance Act) alongside an authorised NOHC under the Banking Act or the Insurance Act.

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- *Insurance Act 1973*
- *Life Insurance Supervisory Levy Imposition Act 1998*
- *Pooled Development Funds Act 1992*
- *Retirement Savings Accounts Act 1997*
- *Social Security Act 1991*
- *Superannuation Industry (Supervision) Act 1993*
- *Superannuation (Unclaimed Money and Lost Members) Act 1999*, and
- *Veterans' Entitlements Act 1986*.

## Schedule 2—Injunctions

As stated by the Assistant Treasurer in his second reading speech, the harmonised provisions in Schedule 2 to the Bill 'will enable APRA to seek a comprehensive and consistent set of injunctions in appropriate circumstances'.<sup>41</sup>

**Part 1** amends section 65A of the Banking Act to bring the provision into line with the injunction provisions in other prudential legislation. The existing provision is not particularly different from the 'ideal' (wide-ranging and harmonised) provision (such as either exists or is to be inserted in all the prudential legislation by Schedule 2), and so only minor amendments need to be made to existing section 65A.

**Part 2** amends section 129D of the Insurance Act by repealing the existing provision in its entirety and substituting the 'ideal' injunction provision. Currently APRA may only seek an injunction against a general insurer where the insurer has failed to comply with a determination of the Superannuation Complaints Tribunal. The amended provision will empower APRA to seek injunctions against insurance companies in a much broader range of circumstances, including a contravention of the Insurance Act, the Insurance Regulations 2002 or the prudential standards applicable to general insurers; a contravention of a condition imposed or specified under the Insurance Act; or a contravention of a direction given by APRA under the Insurance Act. The conduct may involve the realisation of one of these things; an attempt to do one of these things; the aiding and abetting of one of these things; and/or a conspiracy to engage in one of these things. The amended version of section 129D of the Insurance Act will be in virtually identical terms to the amended version of section 65A of the Banking Act.<sup>42</sup>

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41. The Hon Chris Bowen MP, 'Second reading speech', op. cit., p. 3239.

42. See the discussion of Part 1 of Schedule 2 to the Bill in the immediately preceding paragraph.

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**Part 3** amends section 235 of the Life Insurance Act by repealing the existing provision in its entirety and substituting the ‘ideal’ injunction provision. The terms of the revised provision are almost identical to, but differ slightly from, the terms of revised section 129D of the Insurance Act. Under **proposed section 235** of the Life Insurance Act, the scope of conduct giving rise to the granting of an injunction is expanded to include conduct that would constitute a contravention of a direction given not only by APRA but also by the Australian Securities and Investments Commission (ASIC) under the Life Insurance Act.<sup>43</sup> As ASIC is jointly responsible with APRA for the supervision of life companies, it seems sensible to make specific reference to ASIC in the context of the circumstances when the Federal Court may grant an injunction under the Life Insurance Act. Further, under the revised provision, APRA will be able to seek an injunction against NOHCs of life insurers, whereas the present provision allows it only to seek an injunction against a life insurer.

**Part 4** amends section 315 of the SIS Act, which is the injunction provision in that Act. In its current form, it is very similar to the ‘ideal’ injunction provision contained in the Bill for all of the prudential legislation, and so only minor amendment is needed to harmonise the provision with the injunction provisions in other prudential legislation. Under the amendments to subsection 315(1), the scope of conduct giving rise to the granting of an injunction is expanded to include not only conduct that constitutes a contravention of the SIS Act but also conduct that contravenes a condition imposed on a Registrable Superannuation Entity (RSE) under a RSE licence, or a direction given under the SIS Act by ASIC or APRA or the Commissioner of Taxation (whichever entity is responsible for the administration of the relevant provision of the SIS Act under which the condition was imposed).<sup>44</sup> As is the case with the other prudential Acts, revised section 315 will apply not only to completed actions, but also to activities such as attempts to contravene the SIS Act; aiding and abetting; and conspiring to contravene the SIS Act—although it should be noted that this is already the case with the present drafting of section 315 too.

**Part 5** amends the *First Home Saver Accounts Act 2008* (the FHSA Act) to include a provision dealing with injunctions for the breach of conditions attached to authorisations

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43. In relation to the types of directions that APRA may give under the Life Insurance Act, see section 230B. Under subsection 230D(1), APRA may publish in the Gazette notice of any direction made under section 230B. The notice must include the name of the life company given the direction and a summary of the direction. Under section 198, ASIC may give a life company written notice requiring the company to submit to ASIC any form of proposal or policy document ordinarily used by the company in Australia. It may also direct the company to provide the information in a different form.

44. From 1 July 2004, trustees of registrable superannuation entities (RSEs) must hold a Registrable Superannuation Entity licence (RSE licence) issued by APRA. For further details about RSE licences, see APRA, ‘Superannuation Licensing’, <http://www.apra.gov.au/Superannuation/Superannuation-Licensing.cfm>, accessed on 15 April 2009.

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granted under the FHSA Act for a person or entity to act as a first home saver account (FHSA) provider. The difficulty with the amendment is that the provision is not spelt out in full (which would make it more readily accessible to a user of the FHSA Act), but relies on a cross-reference to subsection 114(2) and section 315 of the SIS Act.<sup>45</sup> The effect of the amendment is that superannuation trustees that offer FHSAs who contravene (or attempt to contravene etc) the FHSA Act or conditions imposed on their authorisation as a FHSA provider may become subject to a Federal Court injunction. There is currently no injunction provision in the FHSA Act.

**Part 6** states that the amendments made by Schedule 2 apply to applications for injunctions made on or after the date Schedule 2 commences, regardless of whether the conduct, refusal or failure that gives rise to the application occurred before or after that commencement date.

## **Concluding comments**

As mentioned above, the Bill brings NOHCs of life insurers under APRA's regulatory and supervisory umbrella, but a distinction continues to be maintained between life companies and their NOHCs for other purposes, including taxation, corporations law and the first home saver accounts regime. The reason for maintaining the distinction is not always obvious—although it must be said that usually NOHCs of life insurers are treated in the same way as NOHCs of general insurers and ADIs.

The Bill also streamlines and harmonises APRA's powers to seek court injunctions against entities under its regulation and control. Currently APRA's powers to seek injunctions depend on the Act under which it is operating and the type of entity against which it seeks the injunction. Quite properly and sensibly, given that all the entities involved are subject to APRA's oversight, the Bill standardises and consolidates APRA's powers across the spectrum of prudential legislation.

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45. Subsection 114(2) of the FHSA Act provides that the provisions of the SIS Act apply to FHSA providers in the same way that they apply to RSE licensees. See also the discussion of Part 4 of Schedule 2 to the Bill immediately above.

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