



# Information Acquisition Powers

## Standard Operating Procedure

The key legislative powers from the *Private Health Insurance Act 2007* and the *Private Health Insurance (Insurer Obligation) Rules 2009* discussed in this paper include:

- Section 169-5 Annual reporting and notification requirements
- Section 172-1 Private health insurers to comply with the Council's requirements
- Section 191-1 Seeking an explanation from a private health insurer
- Section 194-1 Investigations, including notices to give information, produce documents, give oral evidence and examine books
- Section 264-10 Functions of the Council
- Section 323-1 Prohibition on disclosure of information
- Schedule 1 Governance Standard
- Schedule 2 Appointed Actuaries Standard
- Schedule 3 Disclosure Standard

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### Disclaimer

This publication is issued as a general guide as to how the Private Health Insurance Administration Council (**Council**) acquires information from private health insurers. The Council reserves the right to take action other than as set out in this publication should the need arise. This publication does not constitute legal advice and the Council disclaims any liability for any loss or damage arising out of any use of this paper. The Council encourages private health insurers to seek independent advice and to exercise care in relation to any material contained in this paper.

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## About the Private Health Insurance Administration Council

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1. The Private Health Insurance Administration Council (**the Council**) is an independent Statutory Authority that regulates registered private health insurers. The Council was established in 1989 as a body corporate under section 82B of the *National Health Act 1953 (the NHA)* and continues in existence by force of section 264-1 of the *Private Health Insurance Act 2007 (the Act)*.
2. Under section 264-5 of the Act, the Council is required to take all reasonable steps to perform its functions and exercise its powers with a view to achieving an appropriate balance between:
  - fostering an efficient and competitive health insurance industry
  - protecting the interests of consumers
  - ensuring the prudential safety of private health insurers.
3. Under this legislative framework the Council has a range of information collection, compliance and enforcement powers and a range of public information and inter-agency co-operation functions as detailed in section 264-10 of the Act (see **Attachment A**). Additional information regarding the Council's roles and responsibilities can be found at: [www.phiac.gov.au](http://www.phiac.gov.au).

## Policy context

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4. As part of the Council's commitment to open and transparent regulatory action, and in accordance with best practice, the Council is publishing a series of policies and standard operating procedures (**SOPs**). The SOPs outline how the Council proposes to administer its responsibilities under the Act. These documents are being designed to give insurers a better understanding of the Council's options for monitoring and where necessary, intervening in the affairs of an insurer to ensure compliance with the requirements of the Act.
5. Provision of SOPs is best practice for regulators as it:
  - provides the regulated entities with useful information about how legislation will generally be exercised
  - promotes and encourages compliant conduct by establishing normative boundaries for behaviour.
6. The Council's enforcement actions are governed by the following principles:
  - **no surprises**: the Council prides itself on a close and positive working relationship with insurers. No surprises works both ways, with the Council expecting early and clear disclosure of potential compliance issues, and a commitment by the Council to giving insurers fair warning of proposed regulatory interventions
  - **transparency**: the Council's decision making takes place within rigorous corporate governance processes. This ensures that it acts predictably, proportionately and within the principles of natural justice. Its actions are able to be reviewed by a range of agencies, including the courts
  - **confidentiality**: in general, investigations are conducted confidentially and the Council does not comment on matters it may or may not be investigating

- **timeliness:** the investigative process and the resolution of enforcement matters will be conducted as efficiently as possible to avoid costly delays and insurer uncertainty
  - **fairness:** the Council aspires to strike a balance between voluntary compliance and enforcement. The Council will give insurers abundant opportunities to be heard and to rectify matters. If necessary, however, the Council will not hesitate to act, in particular to protect consumers of private health insurance
  - **responsibility:** all insurers are responsible for their compliance with the Act and to establish processes and protocols to ensure compliance.
7. The Council is reliant on timely and accurate information to support its continuous oversight of the industry, and to take appropriate action as and when required. Inaccuracies or delays around financial and operational information have the capacity to undermine the Council's ability to properly assess an insurer's prudential position, to respond to emerging compliance issues and to accurately advise stakeholders on the state of the industry.

## Definitions

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8. **Council supervised obligations (CSOs)** are defined in section 185-10 of the Act. They are enforceable obligations in the Act, the Rules made under the Act, a provision of a regulation, or a direction given to an insurer under the Act in relation to risk equalisation, the operations of health benefits funds as defined in Part 4-4 of the Act, or a prudential standard. A potential or actual breach of a CSO sets up the legislative framework for the Council to pursue a range of enforcement options. These include but are not limited to:
- giving a capital adequacy direction
  - giving a prudential standard directions
  - seeking an explanation
  - beginning an investigation (which may include requiring a person to give evidence on oath or affirmation)
  - accepting a written undertaking
  - giving a direction with respect to an insurer's day to day operations or rules
  - seeking remedies through the Federal Court.
9. **Disqualified Persons** are referred to in Division 166 of the Act. Insurers commit an offence if they allow a disqualified person to act as a director or a senior manager. The factors that automatically lead to disqualification are set out in section 166-15 of the Act and include:
- being convicted of an offence against or arising out of the Act or the *Corporations Act 2001*
  - being convicted of an offence concerning dishonest conduct
  - the person has applied for bankruptcy relief or become bankrupt
  - the Council has disqualified the person under section 166-20 of the Act.
10. **Prudential standards** are standards established under subsection 163-1 of the Act. The prudential standards are located in the *Private Health Insurance (Insurer Obligation) Rules 2009 (the Rules)* and currently include three standards: Appointed Actuary, Governance and Disclosure.

11. **Risk equalisation** is a system for sharing the hospital treatment costs of high-risk groups and high cost claims between insurers.
12. **Strict liability offence** is one with no fault element. This means the Council does not have to prove that an insurer or an individual intended to not comply with a request for information. The only defence is a mistake of fact. The prosecution of a breach may lead to a criminal conviction which leads to automatic disqualification of a person acting as a director or senior manager of an insurer in accordance with section 166-15 of the Act.

## What this document covers

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13. This SOP provides information in relation to the Council's information acquisition functions and powers and the reporting obligations of an insurer to the Council. The SOP considers both the Council's information acquisition functions that support the Council's day to day oversight of the private health insurance industry and the Council's information powers that support heightened supervisory oversight and potential regulatory intervention in the affairs of an insurer.
14. The Council collects information at two levels. The first relates to the routine collection of material to support its oversight function. The second deals with the acquisition of information in response to particular concerns which may precede additional regulatory activity.
15. The SOP addresses the Council's information acquisition functions and powers including:
  - section 264-10 of the Act: functions of the Council
  - section 264-20 of the Act: powers to perform functions
  - section 172-1 of the Act: insurers to comply with Council requirements
  - section 169-1 of the Act and rule 5 of the Rules: copies of reports to the Council
  - section 169-5 of the Act: information to be given annually
  - section 169-15 of the Act and rule 1(7) of Schedule 1 of the Rules: notification about the current Chief Executive Officer
  - section 160-30 of the Act and rule 2 of Schedule 2 of the Rules: the Appointed Actuaries Standard
  - Schedule 3 of the Rules: the Disclosure Standard.
16. The SOP also provides information about the power of the Council to require information in relation to heightened levels of concern which may underpin future regulatory activity by the Council including:
  - Division 191 of the Act: explanation of private health insurer's operations
  - Division 194 of the Act: investigation of private health insurer's operations
  - Division 214 of the Act: investigations into affairs of private health insurers.
17. For completeness, reference is also made to various other ancillary powers such as section 96-15 of the Act: giving additional information on request and section 126-15 of the Act: request for further information.
18. This document reinforces the need for insurers to be aware of their obligation to provide all requisite information in a timely and accurate manner. Insurers are reminded that repeated delays or provision of inaccurate data may lead to

heightened regulatory oversight of an insurer, including, for example, the appointment of an inspector or the giving of a Council direction. This information forms the basis of assessments by the Council of the insurer's prudential status and assists in the early detection of emerging risks.

19. Copies of each of the legislative provisions cited in this document are set out in **Attachment A**.

## Overview of PHIAC's information functions and powers

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20. At the core of the Council's information collection function is the function set out in section 264-10(2) of the Act which states:

*"The information collection function of the Council is to obtain from each private health insurer regular reports about the insurer's operations, including reports supported by actuarial certification."*

21. This function is supported by the power in section 264-20 of the Act which empowers the Council to *"do all things necessary or convenient to be done for, or in connection with the performance of the Council of its functions"*.
22. Combined these provisions enable the Council to obtain regular information from insurers to support Council's day to day oversight of the industry.
23. When the Council requires information using its formal powers it will very clearly do so in writing, with a clear reference to the power being used, the timeframe for a response and the penalties for non-compliance.

## Regular returns

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24. The Council requests insurers to provide quarterly reporting through four separate returns, known as the PHIAC 1-4 returns (collectively, the **Returns**).
25. Council requests insurers to provide all quarterly Returns no later than twenty-eight days after the end of the quarter to which the Return relates.
26. Each Return provides the Council with specific and relevant information regarding:
  - memberships, claims, benefits paid and risk equalisation data (PHIAC 1 Return)
  - financial and capital (PHIAC 2 Return)
  - prosthetic benefits (PHIAC 3 Return)
  - speciality block grouping information (PHIAC 4 Return).
27. The purpose of the PHIAC 1 Return is to allow the Council to calculate the payments due by or to each insurer to/from the Risk Equalisation Trust Fund for each state. This Return also forms the basis for several health insurance statistical summaries provided to a wider range of stakeholders than just the industry. There are significant implications for the industry if data is late or inaccurate as there may need to be recalculations and adjustments of amounts payable/receivable by each insurer.

28. The PHIAC 2 Return requires information relating to finances and capital. It operates to provide the Council with information on compliance with the capital adequacy and solvency standards.
29. If the content of the PHIAC 2 Return raises concerns about an insurer's compliance with a CSO, the insurer will be required to provide further information and/or clarification regarding the disclosures that have been made in the Return.
30. The PHIAC 3 Return covers information pertaining to prosthetic benefits by Clinical Advisory Groups such as cardiac pacemakers and prosthetic hips. This data is also used by the Department of Health and Ageing (**the Department**) to analyse "gap permitted" prostheses.
31. The PHIAC 4 Return deals with the Medicare Benefits Schedule specialty block grouping information. This term refers to groups taken from the Medicare Benefits Schedule that are paid for by insurers for hospital related medical services. These block groupings describe the medical services covered by the group heading, for example obstetrics, anaesthesia or ear, nose and surgical operations. This data is used by the Department to analyse the effect of gap cover schemes implemented by insurers.
32. The information in the PHIAC 4 Return is used to monitor and analyse changing cost pressures on insurers and is published to inform stakeholders such as the Department, researchers and consumers. Prosthetic benefits and medical benefits are also a component of the total benefits included in the risk equalisation calculation.
33. The information provided to the Council in the PHIAC 4 Return is provided back to insurers broken down to state and individual insurer level. The insurers have to provide the information under the section 310-10 of the Act to satisfy Risk Equalisation requirements. Accordingly, this data is also added to other hospital benefits in the risk equalisation.
34. Insurers need to conduct their own check and have appropriate systems in place to ensure that the returns are provided to the Council on time. The Council may question the insurer's management capabilities if any of the Returns are:
  - inconsistent with previous returns
  - late
  - knowingly false.
35. If the insurer does not maintain the levy information in the correct form, as per section 310-5 of the Act, or if they do not respond to a Council request for levy information, as per section 310-10 of the Act, the insurer may be held to commit a strict liability offence which carries 60 penalty units. If the false information was deliberately provided to the Council the more severe penalties in Division 137 of the *Criminal Code 1995* may apply.
36. The PHIAC 1 Return is collected under the Act through the *Private Health Insurance (Risk Equalisation Administration) Rules 2007*. The information sought in the PHIAC 2-4 Returns is not currently referenced under a particular power of the Act. If, however, there are delays or inaccurate material is provided, the Council may invoke the powers in the Act (including but not limited to

sections 172-1, 264-10(2) and 264-20 of the Act) to support the information collection functions.

### **Section 172-1 of the Act: Private health insurers to comply with Council's requirements**

37. Section 172-1 of the Act provides that *"a private health insurer must comply, within a reasonable time, with such requirements as the Council, in the performance of its functions, imposes on the insurer."*
38. This is a broad power that allows the Council to impose requirements on insurers with respect to the performance of Council's functions as set out in section 264-10 of the Act. This SOP, however, focuses on the use of section 172-1 of the Act to collect information.
39. For example, following a series of late or inaccurate Returns, the Council may impose additional information requests on an insurer, or undertake an urgent and targeted review of the insurer under section 172-1 of the Act.
40. When the Council imposes a requirement utilising the power in the power in section 172-1 of the Act, in accordance with good administrative practice, the insurer will be notified:
  - in writing, usually to the Chief Executive Officer at the insurer's head office
  - in language which is unambiguous as to the nature of the Council's concern
  - clearly stating which CSO/s the Council has concerns about
  - of the timeframe, within which the information must be provided.
41. It is the Council's view that a requirement may be imposed under section 172-1 of the Act that requests information and this may form a CSO if it relates to the operations of a health benefits fund, a prudential standard or risk equalisation. As such, it may be enforced using the Council's powers to address breaches of CSOs as discussed in the definition section. If the insurer fails to comply with the requirement, it may face actions in the Federal Court under Division 203 of the Act as follows:
  - a declaration of contravention (section 203-5 of the Act refers)
  - a pecuniary penalty order (section 203-10 of the Act refers)
  - any orders sought by the Council flowing on from the declaration of contravention, including costs (section 203-25 of the Act refers).

## **Reporting requirements**

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42. The next section covers a range of other reporting requirements including the obligations arising under sections 169-1, 169-5, 169-15, 160-10 of the Act and rule 1 of Schedule 1 of the Rules.

### **Section 169-1 of the Act: Copies of reports to policy holders**

43. Section 169-1 of the Act and rule 5 of the Rules provide that an insurer that makes any report to all or any policy holders must give a copy to the Council within one month of making the report, or within such further time as the Council allows. For example, if an insurer issues a special report to policy holders prior to an Extraordinary General Meeting, the insurer must provide a copy to the Council.

44. A failure to provide the report required under this section to the Council may be considered to be a breach of a CSO and may trigger enforcement action against the insurer.

#### **Section 169-5 of the Act: Information to be given to the Council annually**

45. Section 169-5 of the Act provides that within 3 months after the end of each financial year, or in such further time as the Council allows, an insurer must give to the Council:
- financial accounts and statements in respect of that year as the Council requires to be given, for the preparation of the annual report on the *“Operations of Private Health Insurers”* (refer section 264-15 of the Act)
  - such other statements in respect of that year as are required by the Rules.
46. The preparation of the Council’s annual report on the operations of private health insurers is a core activity for the Council. This report includes financial results for each insurer, membership, benefits paid, utilisation rates and major events that occurred during the financial year.
47. Rule 6 of the Rules provides that an insurer must give annually to the Council:
- a statement certifying that the capital adequacy margin is appropriate and endorsed by the board of the insurer
  - where appropriate, a statement certifying that a change in the loss ratio margin adopted by the insurer is appropriate, and endorsed by the board of the insurer.
48. Rule 7 of the Rules provides that any such accounts or statements given to the Council under section 169-5 of the Act must be certified by an authorised officer of the insurer to be true and correct.
49. A failure to comply with section 169-5 of the Act and the requirements in the Rules is a strict liability offence that carries a penalty of 30 penalty units. Importantly, it may also attract the enforcement options associated with a breach of a CSO.

#### **Section 169-15 of the Act: Notification of the current Chief Executive Officer**

50. It is important that the Council maintain an up to date contact point with each insurer. For this reason, section 169-15 of the Act provides that any changes to the contact details relating to the Chief Executive Officer for each insurer must be notified to the Council. The details must be set out in the approved form (available on the PHIAC website [www.phiac.gov.au](http://www.phiac.gov.au)) not more than 28 days after the change takes effect.
51. A failure to comply with this notification requirement is also a strict liability offence and carries a fine of 60 penalty units. Once more, it may also attract the enforcement options associated with a breach of a CSO.

#### **Rule 1 of Schedule 1 of the Rules: The Governance Standard**

52. Rule 1(6) of Schedule 1 of the Rules requires an insurer to tell the Council about a change in board membership or a change in the name, or the contact details of a director, within 28 days of the change. The details must be set out in the approved form located at: [www.phiac.gov.au](http://www.phiac.gov.au).

53. A failure to notify the Council of such a change is a breach of both the Disclosure Standard and a CSO. As a result, the insurer, or an individual, can be held under section 163-10 of the Act to commit an offence if they become aware of the breach and do not notify the Council as soon as practicable.
54. If an insurer fails to comply with a prudential standard direction under section 163-20 of the Act, it carries a penalty of 300 penalty units. If an individual fails to comply with a prudential standard direction, he or she is punishable on conviction by a fine not exceeding 60 penalty units.

### **Section 160-10 of the Act: Notification of appointment and cessation of Appointed Actuaries**

55. Section 160-10 of the Act requires insurers to give the Council written notice when an actuary is appointed and when they cease to be the appointed actuary. This reflects the importance the Council and the Parliament places on insurers engaging suitably qualified actuaries.
56. The Council views the role of the appointed actuary as a fundamental adjunct to its regulatory oversight of the industry. This is from the point of view of ensuring that insurers have access to the requisite skills and knowledge to support the operation of the business. Appointed actuaries also perform an important role, signing off on reports and providing information (as required by law) to the Council. For example appointed actuaries must sign off on the Financial Condition Reports which are required to be provided to Council pursuant to rule 2 of Schedule 2 of the Rules.
57. Once appointed, the actuary takes on statutory obligations as detailed in section 160-30 of the Act and the Appointed Actuary Standard in Schedule 2 of the Rules, to notify the Council in certain circumstances.
58. Appointed actuaries are required to advise the Council if:
  - they believe an insurer may have contravened the Act or any other law, particularly if such a contravention may significantly affect the interests of policy holders
  - the appointed actuary has drawn attention of the insurer to a matter that requires action to avoid a contravention of the Act, and the actuary considers that a reasonable time has elapsed and action has not been taken.

## **Disclosure requirements**

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### **Schedule 3 of the Rules: The Disclosure Standard**

59. The Disclosure Standard in Schedule 3 of the Rules sets out continuous disclosure requirements to be met by insurers, the timeframes and the format in which the information is to be provided. They include:
  - copies of five specified Australian Securities and Investment Commission (**ASIC**) forms to be provide to the Council at the same time as lodging them with ASIC (Rule 1 of Schedule 3 refers)
  - member meeting notices (Rule 2 of Schedule 3 refers)
  - resolutions to remove a director (Rule 3 of Schedule 3 refers)
  - details of policy terminations not related to cessation or the payment of premiums (Rule 4 of Schedule 3 refers)

- notice of investigations into the insurer or one of its officers within 14 days of becoming aware of the investigation (Rule 5 of Schedule 3 refers)
  - notification of unusual events or circumstances (Rule 6 of Schedule 3 refers).
60. There may be serious repercussions if an insurer or an individual breach the Disclosure Standard or any of the standards made under section 163-1 of the Act, as every notification requirement equates to a CSO.
61. For example, an insurer, or an individual, can be held under section 163-10 of the Act to commit an offence if they fail to notify the Council as soon as practicable of a breach of the Disclosure Standard.
62. Alternatively, the Council may issue a direction (see SOP *“Giving a Council Direction”* at [www.phiac.gov.au](http://www.phiac.gov.au)) under section 163-15 of the Act if it is satisfied that:
- an insurer has breached a prudential standard, or
  - the insurer is likely to breach the standard in a way that is likely to give rise to a prudential risk.
63. As discussed earlier, if an insurer fails to comply with a prudential standard direction the penalty is 300 penalty units (section 163-20(1) refers). If an individual fails to comply with a prudential standard direction, he or she is punishable, on conviction, by a fine not exceeding 60 penalty units (section 163-20(2) refers).
64. This is not a strict liability offence, however, it may result in a criminal conviction which would disqualify an individual from acting as a director or senior manager of an insurer pursuant to section 166-15 of the Act.
65. Insurers should also note that failure to comply with a Council direction given under section 163-15 of the Act may be a precursor to the appointment of an external manager under section 217-15 of the Act.

## Information required for the collection of levies

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66. Insurers directly bear the operational costs of the Council through levies in specific purpose legislation. Currently there are four private health insurance levies:
- the Council administration levy which meets the administrative costs of the Council
  - a complaints levy which finances the administrative costs of the Private Health Insurance Ombudsman (**PHIO**)
  - a risk equalisation levy which shares risk across the industry so that funds with a membership demographic that is older or less healthy are not disadvantaged.
  - a collapsed insurer levy to meet the liabilities of an insurer not able to meet its liabilities to policy holders.
67. An insurer must pay any levy imposed by the Council pursuant to section 307-10(2) of the Act and a failure to do so is a breach of a CSO.

### **Section 310-10 of the Act: the Council may request information from an insurer**

68. To assist the Council in the proper administration of the levies, section 310-10 of the Act allows the Council to request information if it believes, on reasonable grounds,

that an insurer is capable of giving information that is relevant to the levy amount that the insurer is liable to pay.

69. The information must be provided in the approved form for the PHIAC 1 Return (available via [www.phiac.gov.au](http://www.phiac.gov.au)) and be lodged with the Council within 28 days after the census day (as specified by the Act imposing the levy).
70. A request under section 310-10 of the Act:
  - must be served on the Chief Executive Officer of the insurer
  - may require verification by statutory declaration
  - must specify the manner in which the information is to be given
  - must include a statement that a failure to comply is an offence.
71. If the insurer fails to provide the Council with the required information within the specified timeframe, the insurer commits a strict liability offence under section 310-10(4) and may be subject to a fine of 60 penalty units.

### **Sections 313-1 and 313-5 of the Act: Authorised officer may enter premises**

72. Although not frequently used, the Council also has powers to apply for and execute search warrants and obtain documents that may not be available through the use of other information acquisition powers. Sections 313-1 and 313-5 of the Act allow an officer of the Council to enter premises and search for levy related documents. A “levy-related document” is defined in section 313-1(2) of the Act as  
*“a document (including a copy of a document) that contains information relevant to:*
  - (a) whether a private health insurer is liable to pay a \*private health insurance levy; or*
  - (b) the amount of the private health insurance levy that the insurer is liable to pay.”*
73. For this purpose, all members of Council staff are authorised officers (per section 313-1(1) of the Act) noting the requirement for the Council to issue an identity card under 313-20 of the Act.
74. Insurers should be aware that an officer seeking to enter premises will show photographic identification and request permission to enter the premises. Before the occupier consents, the authorised officer is required by sections 313-1(3) and (5) of the Act to inform the occupier they may refuse consent. If that occurs the search cannot proceed under section 313-1 of the Act and the authorised officer must leave the premises.
75. The authorised officer may then under section 313-5 of the Act apply to a magistrate for a search warrant if there is reason to believe that there are levy related documents on the premises.
76. The warrant will authorise one or more authorised officers to enter and search premises at any time or for nominated periods during the day or night.
77. Sections 313-15(3) and (4) of the Act provide that the occupier, or a person nominated by the occupier, has a right to observe the execution of the warrant so long as they do not impede its execution.

78. The occupier commits an offence if they fail to provide the authorised officer and any person assisting the authorised officer with all reasonable facilities and assistance for the effective exercise of their powers under the warrant. This is not a strict liability offence, however, if the offence is proved, the occupier faces a penalty of 60 penalty units.
79. The rationale for these two levy information collection powers is that if the levies are not paid, the Council cannot administer the Act or the Risk Equalisation Trust Fund.
80. To date, the Council has not needed to exercise either of these legislative powers. There have been concerns, however, about deficiencies in claims management systems causing incorrect data to be provided. The resultant recalculations add to the Council's administrative responsibilities and unfairly prejudice other insurers. If warranted, the Council may use these powers.
81. Whilst the Council can rely on the power in section 310-10 of the Act to require a resubmission of data under the *Private Health Insurance (Risk Equalisation Policy) Rules 2007* in cases of fraud or suspected wrongdoing, it may also consider invoking its other enforcement powers should an insurer regularly provide late or inaccurate information.

## Information acquisition powers for compliance and enforcement

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82. Whilst the Council relies on its information collection powers to support its day to day oversight of the industry, it may where it considers it to be necessary, employ specific information acquisition powers to obtain additional information including:
  - seek an explanation of an insurer's operations (section 191-1 of the Act refers)
  - investigate an insurer's operations (section 194-1 of the Act refers)
  - appoint an inspector to investigate an insurer's operations (section 214-1 of the Act refers).

### **Section 191-1: Seeking an explanation of an insurer's operations**

83. Section 191-1 of the Act allows the Council to write to an insurer seeking an explanation where the Council believes that, having regard to the information available, the insurer may have contravened a CSO.
84. The Council in exercising this power will write to the insurer:
  - explaining its concerns
  - requesting the insurer to explain its operations with respect to those concerns and
  - specify the timeframe within which the insurer must respond.
85. This section of the Act enables the insurer to explain its operations directly and formally having regard to the Council's specific concerns. It enables the Council, when the situation is urgent, to set a short timeframe for the insurer to respond. If the insurer is unable to respond within the time specified, or requires additional time, they may request an extension of time.
86. Ordinarily, there would be prior consultation with the insurer to determine a reasonable timeframe for a response. If the Council does not extend the period, the insurer would be provided with a statement of reasons in accordance with

section 191-1(3) of the Act. The insurer also has a right of review by the Administrative Appeals Tribunal pursuant to Part 6-9 of the Act.

87. When the Council receives the explanation from the insurer, section 191-5 of the Act provides that Council must inform the insurer in writing whether the Council is, or is not, satisfied with the explanation provided. If the Council is not satisfied with the explanation, the Council must also inform the insurer as to what steps the Council intends to take.
88. For example, the Council may be concerned about a fund pursuing a growth strategy that is likely to threaten its ability to comply with the capital adequacy requirements. In such an instance, the Council may write to the insurer seeking an explanation as to how the insurer will manage, monitor and report the risk associated with the fund's growth targets. If the insurer's explanation is unsatisfactory, the Council may seek further information including conducting an investigation (Division 194 of the Act) or appointing an inspector (Division 214 of the Act). If these enquiries reveal a breach of a CSO, the Council may pursue further regulatory action, such as issuing a direction and/or approaching the Federal Court in line with Division 203 of the Act.

### **Section 194-1: Investigating an insurer's operations**

89. The power to commence an investigation is an important element of the Council's information acquisition powers. It means that, in an appropriate case, the Council can begin an investigation of the affairs of an insurer to ascertain what has been happening within the insurer by direct reference to a person, source documents and relevant witnesses.
90. Section 194-1 of the Act allows the Council to commence an investigation into the operations of an insurer if **for any reason** it considers an insurer might have contravened a CSO or where the Council otherwise has concerns about an insurer's compliance with a CSO.
91. The Council would not commence an investigation without reasonable concerns about the operations of an insurer, although it is not necessary to have evidence that there has been an actual breach of a CSO before invoking the power in section 194-1 of the Act. A sufficient trigger is that the Council has concern about an insurer's compliance with a CSO. As such, this power may support the Council's preventative powers and proactive regulatory action as envisaged in the Act.
92. An investigation is more formal than a fund review and may form part of an escalated use of the regulatory powers. An insurer commits an offence under section 194-20 of the Act if it fails to comply with an investigation notice.
93. These requirements attach to a person including previous officers, employees or agents of the insurer. This enables the Council to target the source and the type of information sought.
94. Pursuant to section 194-5 of the Act, the Council may give a written notice to a person who is or has been an officer, employee or agent of the insurer requiring the person to give the Council, within a specified period, information about the area of the insurer's operations specified in the notice.
95. Pursuant to section 194-10 of the Act, the Council may give a written notice to a person who is or has been an officer, employee or agent of the insurer requiring the person to produce, at a time and place specified in the notice, records, books,

accounts and other documents of the insurer that are in the persons control and relate to the area of the insurer's operations specified in the notice.

96. Pursuant to section 194-15 of the Act, Council may give a written notice to a person who is or who has been an officer, employee or agent of the insurer requiring the person to attend, at a time and place specified in the notice, before the Council and give evidence relating to an area of the insurer's operations specified in the notice.
97. A person is not excused from giving information on the grounds that it may incriminate them or expose them to a penalty.
98. If an insurer does not provide the required information, or refuses to give evidence to the Council, they commit an offence under section 194-20 of the Act. A failure to comply is a strict liability offence which attracts up to 10 penalty units.
99. Once the gateway provisions in section 194-1 of the Act are satisfied, the Council may commence an investigation by one of several different types of notices:
  - to give information under section 194-5 of the Act
  - to produce documents under section 194-10 of the Act
  - to give evidence under section 194-15 of the Act
  - or it may authorise a person under section 194-25 of the Act to examine and report on the records, books, accounts and other documents of an insurer or an entity that was an insurer in the year before the authorisation was given.
100. As with the power to request an explanation (see section 191-1 of the Act above), the options available under Division 194 of the Act do not set a minimum time limit for a response. This provides for situations where urgent responses are required.
101. When the investigation is completed, section 194-35 of the Act provides that the Council must inform the insurer in writing of the result of the investigation. This correspondence must make clear whether the Council is satisfied with the performance of the insurer, and if not, what further action the Council intends to take.
102. An investigation under Division 194 of the Act is a powerful information acquisition tool that enables the Council to go directly to relevant parties and elicit information. The Council does not use this power lightly and if applied, insurers should be on notice that the Council holds significant concerns.

### **Section 214-1: Investigating the affairs of an insurer**

103. For completeness, this SOP references section 214-1 of the Act dealing with the appointment of an inspector to undertake an investigation of an insurer. The Council notes, however, given the importance and stand alone nature of this provision of the Act, it will be addressed in more detail in a future SOP.
104. By way of background, a key difference between a Division 214 investigation and a Division 194 investigation is that under a Division 214 investigation, the Council must have reason to suspect that either:
  - the affairs of the insurer are being carried on in a way that is not in the interests of policy holders of a health benefits fund conducted by the insurer, or

- the insurer has contravened a provision of Part 4.4 of the Act which deals with the operations of health benefit funds. In particular, their compliance with the capital adequacy and solvency standards.

105. One other distinction between investigations under Divisions 194 and 214 of the Act is the person carrying out the investigation. Under section 214-1 of the Act, the Council has a general practice of appointing a proxy as an inspector. In a Division 194 investigation, the authorised person may be a member of the staff of the Council, or an external appointee (section 194-25 of the Act refers).

### **Council directions**

106. The Council may in the use of its direction powers (as noted in the SOP “*Giving a Council Direction*”), direct an insurer to gather information by employing an independent third party to collect and provide that information to the Council at the insurer’s expense.

## **Ancillary reporting requirements**

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### **Section 96-15: Giving additional information on request**

107. The power in section 96-15(1)(b) of the Act is shared with the Department and the PHIO. It allows the Council to request information in relation to a complying health insurance product, or a complying health insurance policy.

108. A formal request from the Council for such information is not common. The Council’s preference is initially to request this information informally, however, if the information is not forthcoming, the Council may invoke section 96-15 of the Act.

109. This power involves the Council making a written request which clearly states what information is sought and when it is to be provided.

110. Pursuant to section 96-20 of the Act, a failure to provide the information to the Council when requested under section 96-15 of the Act is a strict liability offence which carries a penalty of 60 penalty units.

111. This power may be used to gather information relevant to the Council’s role in enforcing Division 84 of the Act.

### **Section 126-15 Requesting further information**

112. This power relates to the registration of insurers. To become a registered private health insurer, a body that is a company within the meaning of the *Corporations Act 2001* may apply to the Council for registration under section 126-10 of the Act.

113. Section 126-20 of the Act requires the Council to consider a range of matters in deciding the application. These include whether the applicant will be able to comply with the obligations imposed on insurers under the legislation, in particular relating to incentives, product construction, operations of the health benefits fund and prudential requirements of the Act.

114. To facilitate determination by the Council, section 126-15 of the Act provides that the Council may, within 90 days after the application is made, give the applicant written

notice requiring the applicant to give further information relating to the application as is specified in the notice.

115. A failure to provide the information in a timely and accurate manner may delay or impact the decision to grant the application. By way of section 126-30 of the Act, the notice extends the time for the Council to consider the application by a further 90 days from the date the information is given to the Council. The decision to either refuse an application, or grant the application for registration subject to conditions, is subject to administrative review by the Administrative Appeals Tribunal under Part 6-9 of the Act and the insurer can expect a detailed statement of reasons.

## Prohibition on disclosure of information

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### **Section 323-1: Prohibition on disclosure of information**

116. The Council recognises that these powers must be used responsibly and there are safeguards in place to ensure these powers are not misused. Any concerns insurers may have about the confidentiality of protected information provided to the Council are addressed by the internal protections and the prohibition on disclosure of protected material contained in section 323-1 of the Act.
117. This section of the Act prohibits the disclosure of protected information unless the disclosure falls within the specified categories of exceptions. For example, the information may be disclosed during course of performing a duty or function or exercising a power as allowed by section 323-5 of the Act, or may be required to be produced or disclosed to a court in the course of litigation as authorised by section 323-20 of the Act.
118. The Council maintains an organisational culture that respects the confidentiality of information and has adopted active risk management practices to protect information acquired from the industry.

## Attachment A: Extracts from the *Private Health Insurance Act 2007*

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### **96-15 Giving additional information on request**

- (1) Any of the following:
  - (a) the Secretary of the Department;
  - (b) the Council;
  - (c) the Private Health Insurance Ombudsman;may request a private health insurer for specified information about, or in relation to, a \*complying health insurance product or products, or a \*complying health insurance policy, of the insurer.
- (2) The request must:
  - (a) be in writing; and
  - (b) specify the time by which the information requested is to be given.
- (3) The request may specify the manner and form in which the information requested is to be given.
- (4) A private health insurer must ensure that the request is complied with, by the time specified in the request or any longer time allowed by the person who made the request.

### **96-20 Failure to give information to Department, Council or Private Health Insurance Ombudsman**

- (1) A private health insurer commits an offence if:
  - (a) the insurer is required under section 96-1, 96-5, 96-10 or 96-15 to ensure that a particular thing is given to a particular person; and
  - (b) the thing is not given to the person.

Penalty: 60 penalty units.

- (2) Strict liability applies to subsection (1).

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

### **126-10 Applying for registration**

- (1) A body that is:
  - (a) a company within the meaning of the *Corporations Act 2001*; and
  - (b) a \*constitutional corporation;may apply to the Council for registration as a private health insurer.
- (2) The application:
  - (a) must be in the \*approved form; and
  - (b) must be accompanied by a copy of the \*rules according to which the applicant proposes to conduct the day-to-day operation of its \*health insurance business (including any \*health-related business that it proposes to conduct through any of its \*health benefits funds); and
  - (c) if the applicant is seeking to be \*registered as a for profit insurer—must state that fact; and
  - (d) if the applicant is seeking to be registered as a \*restricted access insurer—must state that fact.
- (3) The applicant must also give a copy of its \*rules to the Secretary of the Department.

## 126-15 Requesting further information

The Council may, within 90 days after the application is made, give the applicant written notice requiring the applicant to give the Council such further information relating to the application as is specified in the notice.

## 126-20 Deciding the application

- (1) The Council may:
  - (a) grant the application, subject to such terms and conditions as the Council thinks fit; or
  - (b) refuse the application.

Note: Refusals of applications, and granting of applications subject to terms and conditions, are reviewable under Part 6-9.

- (2) In deciding the application, the Council must consider:
  - (a) whether the applicant will be able to comply with the obligations imposed by or under this Act on private health insurers; and
  - (b) such other matters as the Private Health Insurance (Registration) Rules require the Council to consider.
- (3) In deciding the application, the Council may consider such other matters as it thinks fit, other than matters that the Private Health Insurance (Registration) Rules prohibit the Council from considering.
- (4) The Council must refuse the application if the \*rules of the applicant permit \*improper discrimination in relation to the applicant's \*complying health insurance policies. For the purposes of this subsection, the Council must consult the Secretary of the Department.
- (5) If the Council grants the application:
  - (a) the applicant is taken to have been \*registered as a private health insurer under this Part with effect from the date specified by the Council in granting the application (which may be a date that occurred before the application was made); and
  - (b) if the Council grants the application subject to terms and conditions—the registration is taken to be subject to those terms and conditions from the date on which the applicant is notified of the granting of the application; and
  - (c) if the applicant sought to be \*registered as a for profit insurer—the registration is taken to be registration of the applicant as a for profit insurer; and
  - (d) if the applicant sought to be registered as a \*restricted access insurer—subject to subsection (6), the registration is taken to be registration of the applicant as a restricted access insurer.
- (6) The registration cannot be taken to be registration as a \*restricted access insurer unless the insurer's constitution or \*rules:
  - (a) describes the \*restricted access group to whom the insurer's \*complying health insurance products are, or will be, available; and
  - (b) prohibits the insurer from issuing a complying health insurance product to a person who does not belong to the group; and
  - (c) prohibits the insurer from ceasing to insure a person for the reason that the person has ceased to belong to the group.
- (7) A **restricted access group** is a group of people who all belong to a particular group, based on whether they:
  - (a) are or were employed in a particular profession, trade, industry or calling; or

- (b) are or were employed by a particular employer or by an employer who belongs to a particular class of employers; or
- (c) are or were members of a particular profession, professional association or union; or
- (d) are or were members of the Defence Force or part of the Defence Force; or
- (e) are or were part of any group described in the Private Health Insurance (Registration) Rules.

The partners and \*dependent children of people who belong to such a group are also taken to belong to that group.

### **126-30 Council can be taken to refuse application**

The Council is taken, for the purposes of Part 6-9, to have refused the application if the Council does not notify the applicant of its decision on the application:

- (a) within 90 days after the application was made; or
- (b) within 90 days after a copy of the applicant's \*rules was given to the Secretary of the Department; or
- (c) if the Council had given the applicant a notice under section 126-15 requiring the applicant to give further information relating to the application—within 90 days after the applicant gives that information to the Council;

whichever is latest.

### **160-10 Notification of appointment etc.**

A private health insurer must give the Council written notice in accordance with the Private Health Insurance (Insurer Obligations) Rules if:

- (a) the insurer appoints a person under section 160-1; or
- (b) a person ceases to be the \*appointed actuary of the insurer.

### **160-25 Powers of appointed actuary**

- (1) The \*appointed actuary of a private health insurer is entitled to have access to any information or document in the possession, or under the control, of the insurer if the access is reasonably necessary for the proper performance of the actuary's functions and duties.
- (2) The \*appointed actuary of a private health insurer may require any \*officer or employee of the insurer to answer questions or produce documents for the purpose of enabling the actuary to have the access to information and documents provided for by subsection (1).
- (3) A private health insurer commits an offence if the insurer refuses or fails to allow access to information or a document under subsection (1).

Penalty: 30 penalty units.

- (4) An \*officer or employee of a private health insurer commits an offence if he or she refuses or fails to comply with a requirement under subsection (2).

Penalty: 30 penalty units.

- (5) The \*appointed actuary of a private health insurer is entitled to attend a meeting of the \*directors of the insurer and to speak on any matter being considered at the meeting:
  - (a) that relates to, or may affect:
    - (i) the solvency of a \*health benefits fund conducted by the insurer; or

- (ii) the adequacy of the capital of a health benefits fund conducted by the insurer;  
or
  - (b) that relates to advice given by the actuary to the directors; or
  - (c) that concerns a matter in relation to which the actuary will be required to give advice.
- (6) The \*appointed actuary of a private health insurer is entitled to attend:
- (a) any annual general meeting of members of the insurer; and
  - (b) any other meeting of members of the insurer at which:
    - (i) the insurer's annual accounts or financial statements are to be considered; or
    - (ii) any matter in connection with which the actuary is or has been subject to a duty under this Act is to be considered.

### **160-30 Actuary's obligations to report**

- (1) The \*appointed actuary of a private health insurer must draw to the attention of the insurer, or of the \*directors or an \*officer of the insurer, any matter that comes to the attention of the actuary and that the actuary thinks requires action to be taken by the company or its directors to avoid a contravention of this Act.
- (2) If the \*appointed actuary of a private health insurer thinks:
- (a) that there are reasonable grounds for believing that the insurer or a \*director of the insurer may have contravened this Act or any other law; and
  - (b) that the contravention is of such a nature that it may affect significantly the interests of \*policy holders of any \*health benefits funds conducted by the insurer;
- the actuary must inform the Council in writing of his or her opinion and of the information on which it is based.
- (3) If:
- (a) the \*appointed actuary of a private health insurer has drawn to the attention of the insurer, or of the \*directors or an \*officer of the insurer, a matter that the actuary thinks requires action to be taken by the insurer or its directors to avoid a contravention of this Act; and
  - (b) the actuary is satisfied that there has been reasonable time for the taking of the action but the action has not been taken;
- the actuary must inform the Council in writing of the matter.
- (4) If the \*appointed actuary of a private health insurer thinks that:
- (a) the \*directors of the insurer have failed to take such action as is reasonably necessary to enable the actuary to exercise his or her right under subsection 160-25(5) or (6); or
  - (b) an \*officer or employee of the insurer has engaged in conduct calculated to prevent the actuary exercising his or her right under subsection 160-25(5) or (6);
- the actuary may inform the Council of his or her opinion and of the information on which it is based.
- (5) If:
- (a) a person becomes subject to an obligation under subsection (2) or (3) to inform the Council of anything; and
  - (b) before the person informs the Council, the person ceases to be the \*appointed actuary of the private health insurer concerned;
- the person remains subject to the obligation as if he or she were still the appointed actuary of the insurer.

### **163-1 Private Health Insurance (Insurer Obligations) Rules to establish prudential standards**

- (1) The Private Health Insurance (Insurer Obligations) Rules may establish prudential standards relating to \*prudential matters for private health insurers.
- (2) **Prudential matters** are matters relating to:
  - (a) the conduct by private health insurers of any of their affairs in such a way as:
    - (i) to keep themselves in a sound financial position; or
    - (ii) not to cause or promote instability in the Australian private health insurance system; or
  - (b) the conduct by private health insurers of any of their affairs with integrity, prudence and professional skill;but does not include matters relating to the solvency or capital adequacy of \*health benefits funds.
- (3) A \*prudential standard may impose different requirements to be complied with:
  - (a) by different classes of private health insurers; or
  - (b) in different situations; or
  - (c) in respect of different activities.
- (4) A \*prudential standard may provide for the Council to exercise powers and discretions under the standard, including but not limited to discretions to approve, impose, adjust or exclude specific prudential requirements in relation to a particular private health insurer or a particular class of private health insurers.
- (5) A \*prudential standard takes effect on the day on which it is established in the Private Health Insurance (Insurer Obligations) Rules, or on such later day as is specified in the Private Health Insurance (Insurer Obligations) Rules.

### **163-5 Compliance with prudential standards**

Every private health insurer must comply with the \*prudential standards as they apply in respect of that insurer.

### **163-10 Notice of breaches of prudential standards etc.**

- (1) A private health insurer commits an offence if:
  - (a) it becomes aware of:
    - (i) a breach by it of a \*prudential standard; or
    - (ii) any other matter or occurrence that materially affects its financial position;  
and
  - (b) it fails to notify the Council, as soon as practicable, in writing of the breach or of the other matter or occurrence.

Penalty: 200 penalty units.

- (2) If an individual:
  - (a) commits an offence against subsection (1) because of Part 2.4 of the *Criminal Code* (extensions of criminal responsibility); or
  - (b) commits an offence under Part 2.4 of the *Criminal Code* in relation to an offence against subsection (1);he or she is punishable, on conviction, by a fine not exceeding 40 penalty units.

- (3) A notification given to the Council of a matter referred to in paragraph (1)(a) must not include \*personal information relating to a person insured under a \*complying health insurance product that is \*referable to a \*health benefits fund conducted by the insurer, unless the information relates to \*prudential matters relating to the insurer.

### **163-15 Directions to comply with standards**

- (1) If the Council is satisfied that a private health insurer:
- (a) has breached a \*prudential standard; or
  - (b) is likely to breach a prudential standard in a way that is likely to give rise to a prudential risk;

the Council may (in writing) direct the insurer to comply with all or a part of the standard, or to take specified action, within a specified time.

Note: Decisions to give directions are reviewable under Part 6-9.

- (2) The insurer must comply with the direction despite anything in its constitution or in any contract or arrangement to which it is a party.
- (3) The Council may revoke a direction that the Council considers is no longer necessary or appropriate by giving written notice to the insurer.

Note: Refusals to revoke directions are reviewable under Part 6-9.

### **163-20 Failure to comply with directions**

- (1) A private health insurer commits an offence if the insurer contravenes a direction given to it under section 163-15.

Penalty: 300 penalty units.

- (2) If an individual:
- (a) commits an offence against subsection (1) because of Part 2.4 of the *Criminal Code* (extensions of criminal responsibility); or
  - (b) commits an offence under Part 2.4 of the *Criminal Code* in relation to an offence against subsection (1);

he or she is punishable, on conviction, by a fine not exceeding 60 penalty units.

### **166-5 Disqualified persons must not act for private health insurers**

A \*disqualified person commits an offence if he or she is, or acts as, a \*director or \*senior manager of a private health insurer.

Penalty: 120 penalty units or imprisonment for 2 years, or both.

### **166-15 Who is a *disqualified person*?**

- (1) A person is a *disqualified person* if, at any time:
- (a) the person has been convicted of an offence against or arising out of:
    - (i) this Act; or
    - (ii) the *Corporations Act 2001*, the Corporations Law that was previously in force, or any law of a foreign country that corresponds to that Act or to that Corporations Law; or
  - (b) the person has been convicted of an offence against or arising out of a law in force in Australia, or the law of a foreign country, if the offence concerns dishonest

conduct or conduct relating to a financial sector company (within the meaning of the *Financial Sector (Shareholdings) Act 1998*); or

- (c) the person has been or becomes bankrupt; or
- (d) the person has applied to take the benefit of a law for the relief of bankrupt or insolvent debtors; or
- (e) the person has compounded with his or her creditors; or
- (f) the Council has disqualified the person under section 166-20.

Note: The Council may determine that a person is not a disqualified person (see section 166-25).

- (2) A reference in subsection (1) to a person who has been convicted of an offence includes a reference to a person in respect of whom an order has been made relating to the offence under:
  - (a) section 19B of the *Crimes Act 1914*; or
  - (b) a corresponding provision of a law of a State, a Territory or a foreign country.
- (3) Nothing in this section affects the operation of Part VIIC of the *Crimes Act 1914* (which includes provisions that, in certain circumstances, relieve persons from the requirement to disclose spent convictions and require persons aware of such convictions to disregard them).

## **Division 169—Reporting and notification requirements**

### **169-1 Copies of reports to policy holders**

A private health insurer that makes any report to all or any of the \*policy holders of a \*health benefits fund conducted by the insurer must, if the Private Health Insurance (Insurer Obligations) Rules so require, give a copy of the report to the Council:

- (a) within one month after making the report; or
- (b) within such further time as the Council allows.

### **169-5 Information to be given to the Council annually**

- (1) A private health insurer must, within 3 months after the end of each financial year, or within such further time as the Council allows, give to the Council:
  - (a) such financial accounts and statements in respect of that year as the Council requires to be given for use in preparing the report referred to in section 264-15; and
  - (b) such other statements in respect of that year as are required by the Private Health Insurance (Insurer Obligations) Rules.
- (2) Any such accounts or statements must be certified on behalf of the insurer, in accordance with the Private Health Insurance (Insurer Obligations) Rules, to be true and correct.
- (3) A private health insurer commits an offence if the insurer fails to comply with this section.

Penalty: 30 penalty units.

- (4) Strict liability applies to subsection (3).

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

## **169-10 Private health insurers to notify any changes to rules**

- (1) A private health insurer that proposes to change its \*rules (other than a change to which section 66-10 applies) must notify the Secretary of the Department of the proposed change:
  - (a) in the \*approved form; and
  - (b) before the day on which the insurer proposes the change to take effect.

Note: See section 93-25 for a private health insurer's obligation to notify insured persons of changes to its rules.

- (2) The Minister may, in writing, direct the insurer not to make the change if the Minister is satisfied that the change might or would result in a breach of the Act.

Note: Directions are reviewable under Part 6-9.

- (3) The Minister must give the Secretary and the Council a copy of a direction under subsection (2).

## **169-15 Private health insurers to notify Department and Council about current chief executive officer**

- (1) An applicant for registration under Division 126 must, before starting to operate its \*health insurance business, notify the name and contact details of its \*chief executive officer to the Secretary of the Department, and to the Council, in the \*approved form.
- (2) A private health insurer must ensure that, if the name or contact details of its \*chief executive officer change, the change is notified, not more than 28 days after the change takes effect, to the Secretary of the Department, and to the Council, in the \*approved form.
- (3) A private health insurer commits an offence if:
  - (a) the insurer is required under subsection (2) to ensure that a particular thing happens; and
  - (b) the thing does not happen.

Penalty: 60 penalty units.

- (4) Strict liability applies to subsection (3).

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

## **Division 172—Miscellaneous**

### **172-1 Private health insurers to comply with Council's requirements**

A private health insurer must comply, within a reasonable time, with such requirements as the Council, in the performance of its functions, imposes on the insurer.

### **185-10 Meaning of *Council-supervised obligation***

All of the following \*enforceable obligations are *Council-supervised obligations*, to the extent to which they relate to risk equalisation, \*health benefits funds or Division 163 (\*prudential standards):

- (a) a provision of this Act;
- (b) a provision of any Private Health Insurance Rules made under section 333-20 or 333-25;
- (c) a provision of the regulations;

- (d) a direction given to a private health insurer under this Act.

### **191-1 Minister or Council may seek an explanation from a private health insurer**

- (1) If:
  - (a) the Minister believes that, having regard to information available to the Minister or to any performance indicators under the Private Health Insurance (Complying Product) Rules, a private health insurer may have contravened an \*enforceable obligation; or
  - (b) the Council believes that, having regard to information available to the Council, a private health insurer may have contravened a \*Council-supervised obligation;the Minister (if paragraph (a) applies) or the Council (if paragraph (b) applies) may write to the private health insurer:
  - (c) explaining the writer's concerns; and
  - (d) asking the insurer to explain its operations in relation to those concerns; and
  - (e) specifying the period within which the writer requires the insurer's response.
- (2) The private health insurer must respond within the specified period, or any longer period that the writer, in writing before the end of the specified period, allows.
- (3) If the writer refuses a request by the private health insurer for a longer period to respond, the writer must state the writer's reasons for refusing.

Note: Refusals of requests for longer periods to respond are reviewable under Part 6-9.

### **191-5 Writer must respond to insurer's explanation**

The writer under subsection 191-1(1) must, after receiving an explanation from a private health insurer in response, inform the insurer in writing:

- (a) whether the writer is or is not satisfied with the explanation; and
- (b) if the writer is not satisfied with the explanation—what steps the writer intends to take.

## **Division 194—Investigation of private health insurer’s operations**

### **194-1 Minister or Council may investigate a private health insurer**

- (1) The Minister may, at any time and for any reason, begin an investigation of the operations of a private health insurer by doing either or both of the following:
  - (a) giving a notice under any one or more sections of this Division;
  - (b) authorising a person under section 194-25.
- (2) The Council may, at any time, if for any reason it considers that a private health insurer might have contravened a \*Council-supervised obligation or it otherwise has concerns about the insurer’s compliance with a Council-supervised obligation, begin an investigation of the operations of a private health insurer by doing either or both of the following:
  - (a) giving a notice under any one or more sections of this Division;
  - (b) authorising a person under section 194-25.

### **194-5 Notice to give information**

- (1) The Minister, or, if subsection 194-1(2) applies, the Council, may give a written notice to a person who is or who has been an \*officer, employee or agent of:
  - (a) a private health insurer; or
  - (b) an entity that was a private health insurer at any time in the year ending on the day on which the notice is given;requiring the person to give the notice-giver or the person specified in the notice, within the period specified in the notice, information about the area of the insurer’s operations specified in the notice.
- (2) The notice-giver may require the person to give the information orally or in writing.
- (3) The notice-giver may require the person to give the information on oath or affirmation. For that purpose, the notice-giver or the person specified in the notice may administer an oath or affirmation.
- (4) The person is not excused from giving information on the ground that giving the information might tend to incriminate the person or make the person liable to a penalty. However, the information, or anything obtained as a direct or indirect consequence of the information, is not admissible in evidence against the person in any proceedings, other than proceedings for an offence against section 137.1 or 137.2 of the *Criminal Code*.

### **194-10 Notice to produce documents**

- (1) The Minister, or, if subsection 194-1(2) applies, the Council, may give a written notice to a person who is or who has been an \*officer, employee or agent of:
  - (a) a private health insurer; or
  - (b) an entity that was a private health insurer at any time in the year ending on the day on which the notice is given;requiring the person to produce, at the time and place specified in the notice, records, books, accounts and other documents of the insurer that are in the person’s custody or under the person’s control and that relate to the area of the insurer’s operations specified in the notice.
- (2) The person is not excused from producing a document on the ground that the production of the document might tend to incriminate the person or make the person liable to a

penalty. However, the production of the document, or anything obtained as a direct or indirect consequence of the production, is not admissible in evidence against the person in any proceedings, other than proceedings for an offence against section 137.1 or 137.2 of the *Criminal Code*.

### **194-15 Notice to give evidence**

- (1) The Minister, or, if subsection 194-1(2) applies, the Council, may give a written notice to a person who is or who has been an \*officer, employee or agent of:
  - (a) a private health insurer; or
  - (b) an entity that was a private health insurer at any time in the year ending on the day on which the notice is given;requiring the person to attend, at the time and place specified in the notice, before the notice-giver or the person specified in the notice and give evidence relating to an area of the insurer's operations specified in the notice.
- (2) The notice-giver may require the person to give the evidence orally or in writing.
- (3) The notice-giver may require the person to give the evidence on oath or affirmation. For that purpose, the notice-giver or the person specified in the notice may administer an oath or affirmation.
- (4) The person is not excused from answering a question on the ground that the answer to the question might tend to incriminate the person or make the person liable to a penalty. However, the answer, or anything obtained as a direct or indirect consequence of the answer, is not admissible in evidence against the person in any proceedings, other than proceedings for an offence against section 137.1 or 137.2 of the *Criminal Code*.

### **194-20 Offences in relation to investigation notices**

- (1) A person must not fail to comply with a requirement contained in a notice given to the person:
  - (a) under section 194-5 (notice to give information); or
  - (b) under section 194-10 (notice to produce documents); or
  - (c) under section 194-15 (notice to give evidence).

Penalty: 10 penalty units.

- (2) A person must not fail to be sworn or to make an affirmation when required to do so:
  - (a) under section 194-5 (notice to give information); or
  - (b) under section 194-15 (notice to give evidence).

Penalty: 10 penalty units.

- (3) An offence under subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

### **194-25 Authorisation to examine books and records etc.**

- (1) The Minister, or, if subsection 194-1(2) applies, the Council, may, in writing, authorise a person to examine and report on the records, books, accounts and other documents of:
  - (a) a private health insurer; or
  - (b) an entity that was a private health insurer at any time in the year ending on the day on which the authorisation is given.

- (2) A person authorised under subsection (1) must, at all reasonable times, have full and free access to any \*premises at which the records, books, accounts and other documents are kept and may take extracts from, or copies of, the records, books, accounts and other documents.

### **194-30 Minister may consult Council**

If, in the course of an investigation conducted by the Minister, the Minister believes that there are issues concerning a \*Council-supervised obligation, the Minister may:

- (a) consult the Council on that matter; and
- (b) if the Minister considers it appropriate—request the Council to take over any part of the investigation that relates to those issues.

### **194-35 Minister or Council must notify outcome of investigation**

After completing an investigation under this Division of a private health insurer or former private health insurer, the Minister or the Council (whichever was the investigator) must inform the insurer in writing:

- (a) whether the investigator is or is not satisfied with the performance of the insurer; and
- (b) if the investigator is not satisfied with the performance of the insurer—what steps the investigator intends to take.

### **203-5 Declarations of contravention**

- (1) If the Federal Court is satisfied that a private health insurer has contravened an \*enforceable obligation, it must make a declaration of contravention.
- (2) The declaration must specify:
  - (a) the \*enforceable obligation that was contravened; and
  - (b) the private health insurer that contravened the provision; and
  - (c) the conduct that constituted the contravention; and
  - (d) if the court is satisfied that an \*officer of the private health insurer failed to take reasonable steps to prevent the insurer contravening the enforceable obligation—the officer.
- (3) A \*declaration of contravention is conclusive evidence of the matters mentioned in subsection (2).

### **203-10 Pecuniary penalty order**

- (1) If the Federal Court has made a \*declaration of contravention (whether on application by the Minister or the Council) that specifies an \*officer of a private health insurer (see paragraph 203-5(2)(d)), the court may order the officer to pay the Commonwealth a pecuniary penalty of up to 1,000 penalty units.
- (2) The court must not make an order under subsection (1) if it is satisfied that a court has ordered the \*officer to pay damages in the nature of punitive damages in respect of:
  - (a) the contravention of the \*enforceable obligation; or
  - (b) the officer's failure to take reasonable steps to prevent the insurer contravening the enforceable obligation.
- (3) The penalty is a civil debt payable to the Commonwealth. The Commonwealth may enforce the order as if it were an order made in civil proceedings against the \*officer to

recover a debt due by the officer. The debt arising from the order is taken to be a judgment debt.

### **203-25 Other order**

- (1) If the Federal Court has made a \*declaration of contravention (whether on application by the Minister or the Council), the court may make any order that the applicant applies for.
- (2) The order may be enforced as if it were a judgment of the court.

### **214-1 Investigation of private health insurers by inspectors**

- (1) The Council may, in writing, appoint an \*inspector to investigate the affairs of a private health insurer if the Council has reason to suspect that:
  - (a) 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
  - (b) the insurer has contravened a provision of Part 4-4.
- (2) The instrument of appointment must specify:
  - (a) the matter referred to in paragraph (1)(a) or (b) that the Council suspects; and
  - (b) the ground on which the Council suspects the matter; and
  - (c) the matters into which the investigation is to be made, being the whole or some part of the affairs of the insurer.
- (3) An \*inspector so appointed may be a person engaged or appointed under the *Public Service Act 1999* or by an authority of the Commonwealth.

### **264-5 Objectives of the Council**

In performing its functions and exercising its powers, the Council must take all reasonable steps to achieve an appropriate balance between the following objectives:

- (a) fostering an efficient and competitive health insurance industry;
- (b) protecting the interests of consumers;
- (c) ensuring the prudential safety of individual private health insurers.

### **264-1 Continuation of the Council**

- (1) The Private Health Insurance Administration Council established under section 82B of the *National Health Act 1953* continues in existence by force of this section, under and subject to the provisions of this Act.

### **264-10 Functions of the Council**

#### *General*

- (1) The functions of the Council are:
  - (a) to administer the \*Risk Equalisation Trust Fund; and
  - (b) to administer the registration of private health insurers under Part 4-3; and
  - (c) the information collection function under subsection (2); and
  - (d) the compliance functions under subsection (3); and
  - (e) the enforcement functions under subsection (4); and
  - (f) the public information functions under subsection (5); and
  - (g) the agency cooperation functions under subsection (6); and

- (h) to advise the Minister about the financial operations and affairs of private health insurers; and
- (i) functions incidental to any other functions of the Council; and
- (j) any other functions conferred on the Council by this, or any other, Act.

*Information collection function*

- (2) The information collection function of the Council is to obtain from each private health insurer regular reports about the insurer's operations, including reports supported by actuarial certification.

*Compliance functions*

- (3) The compliance functions of the Council are:
  - (a) to establish a \*solvency standard and a \*capital adequacy standard to be complied with by private health insurers, and to give \*solvency directions and \*capital adequacy directions to private health insurers; and
 

Note: The solvency standard and the capital adequacy standard are established by the Private Health Insurance (Health Benefits Administration) Rules.
  - (b) to exercise powers and discretions under the \*prudential standards, and to give directions to private health insurers relating to compliance with the prudential standards; and
 

Note: The prudential standards are established by the Private Health Insurance (Insurer Obligations) Rules.
  - (c) to consider, in accordance with Division 160, whether persons should, or should not, be \*appointed actuaries; and
  - (d) to consider, in accordance with Division 166, whether persons should, or should not, be \*disqualified persons; and
  - (e) to examine, from time to time, the financial affairs of private health insurers, by the inspection and analysis of the records, books and accounts of the insurers and any other relevant information; and
  - (f) to review, by carrying out independent actuarial assessment, the value of the assets and liabilities of each \*health benefits fund; and
  - (g) if it is necessary, for the purpose of making a proper examination of the financial affairs of a private health insurer, for the Council to incur unusually high costs—to impose an appropriate fee on the private health insurer concerned.

*Enforcement functions*

- (4) The enforcement functions of the Council are:
  - (a) to take action under Part 5-2 to monitor compliance with, and to encourage or compel compliance with, \*Council-supervised obligations; and
  - (b) to appoint, under section 214-1, \*inspectors for the purpose of investigating the affairs of private health insurers under Division 214, and to exercise other related powers and functions of the Council under that Division; and
  - (c) to appoint, under Subdivision 217-B, persons as \*external managers of \*health benefits funds, and to exercise other related powers and functions of the Council under Division 217 and 220.

*Public information functions*

- (5) The public information functions of the Council are:

- (a) to make statistics, and other financial information, relating to a private health insurer or private health insurers, publicly available in accordance with the Private Health Insurance (Council) Rules; and
- (b) to collect and disseminate information about private health insurance, for the purpose of enabling people to make informed choices about private health insurance.

*Agency cooperation functions*

- (6) The agency cooperation functions of the Council are:
  - (a) to cooperate with other regulatory agencies on matters affecting private health insurers and the private health insurance industry generally; and
  - (b) to provide the Private Health Insurance Ombudsman, from time to time, with information in the Council's possession that the Council considers likely to be of use in production of the State of the Health Funds Reports referred to in paragraph 238-5(c).

**264-15 Report on private health insurers**

- (1) The Council must, as soon as practicable after 30 September in each year, give the Minister a report, for presentation to the Parliament, on the operations of private health insurers during the financial year ending on 30 June in that year.

Note: See also section 34C of the *Acts Interpretation Act 1901*, which contains extra rules about annual reports.

- (2) The report must include, in respect of each \*health benefits fund conducted by a private health insurer during the year to which the report relates, the following information:
  - (a) premiums payable to the fund;
  - (b) other amounts payable to the fund;
  - (c) fund benefits payable out of the fund;
  - (d) management expenses;
  - (e) other amounts payable out of the fund;
  - (f) the balance of the fund as at the end of that year;
  - (g) details of how the reserves of the fund have been invested;
  - (h) such other information as the Minister requires to be included.

Note: An annual report on the Council's operations must also be prepared under section 9 of the *Commonwealth Authorities and Companies Act 1997*.

**264-20 Powers**

The Council has power to do all things necessary or convenient to be done for, or in connection with the performance of its functions.

**310-10 Council may request information from insurer**

- (1) The Council may, if it believes on reasonable grounds that a private health insurer is capable of giving information that is relevant to:
  - (a) whether the insurer is liable to pay a \*private health insurance levy (other than \*complaints levy); or
  - (b) the amount of the private health insurance levy (other than complaints levy) that the insurer is liable to pay;
 request the insurer to give the Council the information or records that are specified in the request, before the end of the period specified in the request.

- (2) The Secretary of the Department may, if he or she believes on reasonable grounds that a private health insurer is capable of giving information that is relevant to:
  - (a) whether the insurer is liable to pay \*complaints levy; or
  - (b) the amount of complaints levy that the insurer is liable to pay;
 request the insurer to give him or her the information or records that are specified in the request, before the end of the period specified in the request.
- (3) A request under subsection (1) or (2):
  - (a) must be served on the \*chief executive officer of the insurer; and
  - (b) may require the information to be verified by statutory declaration; and
  - (c) must specify the manner in which the information must be given; and
  - (d) must contain a statement to the effect that a failure to comply with the request is an offence.
- (4) A private health insurer commits an offence if the insurer fails to comply with a request under subsection (1) or (2).

Penalty: 60 penalty units.

- (5) Strict liability applies to subsection (4).

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

### **313-1 Authorised officer may enter premises with consent**

- (1) A person who is a member of staff of the Council or authorised in writing by the Minister for this purpose (both of these kinds of persons are *authorised officers*) may enter any \*premises for the purpose of exercising \*search powers in relation to \*levy-related documents if:
  - (c) the \*occupier of the premises consents to the entry; and
  - (d) the officer shows the occupier his or her identity card.
- (2) A *levy-related document* is a document (including a copy of a document) that contains information relevant to:
  - (a) whether a private health insurer is liable to pay a \*private health insurance levy; or
  - (b) the amount of the private health insurance levy that the insurer is liable to pay.
- (3) Before obtaining the consent of the \*occupier, the \*authorised officer must inform the occupier that he or she may refuse consent.
- (4) An entry by an \*authorised officer with the consent of the \*occupier is not lawful if the consent of the occupier is not voluntary.
- (5) The \*authorised officer must leave the \*premises if the \*occupier asks the officer to do so.

### **313-5 Authorised officer may enter premises under warrant**

- (1) If an \*authorised officer has reason to believe that there are \*levy-related documents on particular \*premises, the officer may apply to a magistrate for a warrant authorising the officer to enter the premises for the purpose of exercising \*search powers in relation to the documents.
- (2) If the magistrate is satisfied by information on oath or affirmation that there are reasonable grounds for believing that there are \*levy-related documents on the \*premises, the magistrate may issue a warrant.
- (3) The warrant must:

- (a) authorise one or more \*authorised officers to enter the \*premises for the purpose of exercising \*search powers in relation to \*levy-related documents; and
  - (b) state whether the entry is authorised at any time of the day or night or during specified hours of the day or night; and
  - (c) authorise the officers to use such assistance and force as is necessary and reasonable to enter the premises for the purpose of exercising search powers in relation to levy-related documents.
- (4) The \*authorised officers do not have to be named in the warrant.

### **313-15 Executing a warrant to enter premises**

#### *Circumstances in which this section applies*

- (1) This section applies if:
- (a) a warrant under section 313-5 is being executed by an \*authorised officer in respect of \*premises; and
  - (b) the \*occupier of the premises is present.

#### *Obligations of authorised officer executing a warrant*

- (2) The \*authorised officer must:
- (a) make a copy of the warrant available to the \*occupier; and
  - (b) show the occupier the officer's identity card; and
  - (c) inform the occupier of the occupier's rights and responsibilities under subsections (3) to (6).

#### *Persons entitled to observe execution of warrant*

- (3) The \*occupier, or a person nominated by the occupier who is readily available, is entitled to observe the execution of the warrant.
- (4) The right to observe the execution of the warrant ceases if the \*occupier or the nominated person impedes that execution.
- (5) Subsection (3) does not prevent the execution of the warrant in 2 or more areas of the \*premises at the same time.

#### *Occupier to provide reasonable facilities and assistance*

- (6) An \*occupier commits an offence if the occupier fails to provide the \*authorised officer and any person assisting that officer with all reasonable facilities and assistance for the effective exercise of their powers under the warrant.

Penalty: 60 penalty units.

### **313-20 Identity cards**

- (1) For the purposes of this Division, the Council must issue an identity card to an \*authorised officer in the \*approved form. It must contain a recent photograph of the authorised officer.
- (2) A person commits an offence if:
- (a) the person has been issued with an identity card; and
  - (b) the person ceases to be an \*authorised officer; and

- (c) the person does not, as soon as it is practicable after so ceasing, return the identity card to the Council.

Penalty: 1 penalty unit.

- (3) Strict liability applies to subsection (2).

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (4) An \*authorised officer must carry the identity card at all times when exercising powers or performing functions under this Division as an authorised officer.

### **323-1 Prohibition on disclosure of information**

- (1) A person commits an offence if:
  - (a) the person has, or has at any time had, a duty, function or power under this Act; and
  - (b) the person discloses information to another person; and
  - (c) the information is \*protected information; and
  - (d) the disclosure is not an \*authorised disclosure.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

- (2) Information is *protected information* if the information:
  - (a) either:
    - (i) is obtained by a person in the course of performing duties or functions, or exercising powers, under this Act; or
    - (ii) was information to which subparagraph (i) applied and is obtained by a person by way of an \*authorised disclosure under section 323-10, 323-15 or 323-20; and
  - (b) relates to a person other than the person who obtained it.
- (3) A disclosure of information is an *authorised disclosure* if the disclosure is one that the person may make under section 323-5, 323-10, 323-15, 323-20, 323-25, 323-30 or 323-35.

### **323-5 Authorised disclosure: official duties**

For the purposes of subsection 323-1(3), a person may disclose information if the disclosure is made:

- (a) in the course of performing a duty or function, or exercising a power, under this Act; or
- (b) for the purpose of enabling a person to perform functions under the *Medicare Australia Act 1973*.

### **323-20 Authorised disclosure: public interest**

- (1) For the purposes of subsection 323-1(3), a person may disclose information to another person if:
  - (a) the information does not relate to any of the following:
    - (i) a private health insurer;
    - (ii) an applicant to become a private health insurer;
    - (iii) a person carrying on \*health insurance business;
    - (iv) a \*director or \*officer of a person mentioned in subparagraph (i), (ii) or (iii); and

- (b) the information is not information of a kind specified in the Private Health Insurance (Information Disclosure) Rules as information that must not be disclosed under this section; and
  - (c) the disclosure is made in accordance with any requirements in the Private Health Insurance (Information Disclosure) Rules; and
  - (d) the disclosure is, or is a kind of disclosure, certified by the Minister by written instrument to be in the public interest; and
  - (e) if there are any conditions specified in the certificate—the conditions are met.
- (2) The Minister may specify conditions in a certificate under paragraph (1)(d) relating to the application of the certificate.
- (3) A certificate under paragraph (1)(d) is not a legislative instrument.

## Rule 5 Copies of reports to Council

For section 169-1 of the Act, a private health insurer that makes a report to all or any of the policy holders of a health benefits fund conducted by the private health insurer, must, if requested by the Council, give a copy of the report to the Council.

*Note* Section 169-1 of the Act provides that a report be given to the Council within 1 month after making the report, or within such further time as the Council allows.

## Rule 6 Information to be given annually to the Council

- (1) For paragraph 169-5 (1) (b) of the Act, the private health insurer must give to the Council:
  - (a) a statement by the directors of the insurer certifying that the capital adequacy margin adopted by the insurer for the financial year to which the statement relates:
    - (i) is considered appropriate; and
    - (ii) has been endorsed by a resolution of the board; and
  - (b) if the board believes the sum of the claims ratio and the expense ratio, determined for the application of the capital adequacy standard, may no longer be a best estimate of the prospective loss ratio for calculating the unexpired risk liability in accordance with the capital adequacy standard — a statement certifying that the alternative loss ratio adopted by the insurer and included in a financial statement provided to the Council:
    - (i) is considered appropriate; and
    - (ii) has been endorsed by a resolution of the board.

*Note* Subsection 169-5 (1) of the Act provides that the information be given to the Council within 3 months after the end of each financial year, or within such further time as the Council allows.

- (2) In this rule, *capital adequacy margin*, *claims ratio*, *expense ratio*, *loss ratio* and *unexpired risk liability* have the meanings given by the capital adequacy standard.

## Rule 7 Certification requirements

- (1) For subsection 169-5 (2) of the Act, any accounts and statements given to the Council under subsection 169-5 (1) of the Act and the statements mentioned in rule 6 must be certified by 2 officers of the private health insurer to be true and correct.

## Schedule 1 Governance Standard

(rule 10)

### 1 Board composition

- (6) A private health insurer must tell the Council about a change in board membership or a change in the name or contact details of a director:
  - (a) within 28 days after the change; and
  - (b) in a form approved by the Council.

## Schedule 2 Appointed Actuaries Standard

(rule 11)

### 2 Insurers to prepare financial condition report

A private health insurer must, as soon as practicable after the end of each financial year:

- (a) request its appointed actuary to prepare a financial condition report; and
- (b) provide a copy of the report to the Council within 3 months after the end of the financial year.

## Schedule 3 Disclosure Standard

(rule 12)

### 1 Insurers must give copies of certain forms lodged with ASIC to Council

- (1) If a private health insurer lodges with ASIC any of the following forms, the insurer must, at the same time, give a copy of the lodged form to the Council:
  - (a) Form 205 — Notification of resolution;
  - (b) Form 315 — Notification of resignation, removal or cessation of auditor;
  - (c) Form 388 — Copy of financial statements and reports;
  - (d) Form 484 — Change to company details;
  - (e) Form 2501 — Application for extension of time to hold Annual General Meeting.
- (2) A reference in subsection (1) to a lodged form includes a reference to any other material required by the Corporations legislation to be lodged with the form.
- (3) In this section, a reference to a form followed by a number is a reference to:
  - (a) if a form of that number is prescribed in the *Corporations Regulations 2001* for a provision of the *Corporations Act 2001* or a provision of those Regulations — the form so numbered in those Regulations; and
  - (b) if a form of that number is not prescribed in those Regulations — the form of that number that is approved by ASIC.

*Note* Forms approved by ASIC under paragraph 350 (1) (b) of the *Corporations Act 2001* are available on the ASIC website at <http://www.asic.gov.au>.

### 2 Insurers to give copies of notice of meetings of members to Council

- (1) A private health insurer must give to the Council:
  - (a) written notice of a meeting of the members of the insurer in the same way that a member of the insurer is entitled to receive notice of a meeting under section 249J of the *Corporations Act 2001*; and
  - (b) any other communications relating to the meeting that a member of the insurer is entitled to receive under that Act.
- (2) The private health insurer must give to the Council the information mentioned in subsection (1) in accordance with:
  - (a) if the insurer is a listed company — the notice requirements mentioned in section 249HA of the *Corporations Act 2001*; and

- (b) if the insurer is not a listed company — the longer of:
  - (i) the notice requirements mentioned in section 249H of the *Corporations Act 2001*; and
  - (ii) the period for giving notice specified in the insurer's constitution.

### **3 Insurers to notify Council of resolution to remove director**

- (1) A private health insurer must notify the Council, in writing, if:
  - (a) the insurer by resolution removes a director from office; or
  - (b) for an insurer that is not a public company — the directors of the insurer by resolution remove a director from office.
- (2) The insurer must notify the Council within 14 days after the day the resolution is passed.

### **4 Insurers to notify Council of termination of person's complying health insurance policy**

- (1) A private health insurer must notify the Council, in writing, if:
  - (a) a decision is made to terminate a person's complying health insurance policy with the insurer; and
  - (b) the termination:
    - (i) does not relate to the person's payment of premiums under the policy; and
    - (ii) is not a result of a request by the person to cancel the policy.
- (2) The notification must:
  - (a) be made within 14 days after the end of the month in which the termination occurred; and
  - (b) include only the following information:
    - (i) the number of terminations in the month;
    - (ii) the reason for each termination.

### **5 Insurers to notify Council of investigation of insurer or officer of insurer**

- (1) A private health insurer must notify the Council, in writing, if:
  - (a) the insurer, or an officer of the insurer, is under investigation or subject to criminal or civil proceedings in relation to an alleged or suspected contravention of:
    - (i) the Act; or
    - (ii) the Corporations legislation, or any law of a foreign country that corresponds to the Corporations legislation; or
    - (iii) the *Trade Practices Act 1974*; or
    - (iv) a law in force in Australia, or the law of a foreign country, if the offence concerns dishonest conduct or conduct relating to a financial sector company (within the meaning of the *Financial Sector (Shareholdings) Act 1998*); or

- (b) the insurer, or an officer of the insurer, is under investigation or subject to disciplinary action, by a regulatory authority or other body established by or under a law of the Commonwealth or of a State or Territory, for conduct that is reasonably likely to affect the operations of the insurer; or
  - (c) the insurer gives a written undertaking to the Australian Competition and Consumer Commission for section 87B of the *Trade Practices Act 1974*.
- (2) The insurer must give to the Council details of a matter mentioned in subsection (1) within 14 days after the insurer becomes aware of the matter.
  - (3) The insurer must report the outcome of the matter to the Council within 14 days after the day the insurer is notified of the outcome of the matter.
  - (4) This section does not apply to:
    - (a) a preliminary inquiry for the purpose of deciding:
      - (i) how to deal with a complaint relating to a private health insurer or an officer of a private health insurer; or
      - (ii) whether to conduct an investigation in relation to a private health insurer or an officer of a private health insurer; or
    - (b) a request under section 96-15 of the Act by the Secretary of the Department or the Private Health Insurance Ombudsman for a private health insurer to give specified information about a complying health insurance product or products, or a complying health insurance policy, of the insurer; or
    - (c) a request under subsection 191-1 (1) of the Act by the Minister for a private health insurer to explain its operations; or
    - (d) an investigation by the Minister of the operations of a private health insurer under Division 194 of the Act; or
    - (e) the exercise of search powers by an authorised officer in accordance with Division 313 of the Act; or
    - (f) an investigation by the Private Health Insurance Ombudsman.

*Note* The Council must comply with the Information Privacy Principles — see section 16 of the *Privacy Act 1988*. For the limits on disclosure of personal information, see Principle 11 in section 14 of that Act.

## **6 Insurer must notify Council of unusual incidents or circumstances**

- (1) A private health insurer must notify the Council, in writing or by telephone, as soon as practicable after an unusual incident or circumstance occurs that affects prudential matters relating to the insurer.

*Note* For the meaning of *prudential matters*, see section 163-1 of the Act.

- (2) For subsection (1), an *unusual incident or circumstance* includes, but is not limited to, any of the following:
  - (a) fire, flood or other damage to infrastructure resulting in a substantial loss of operational capacity of the insurer for more than 24 hours;
  - (b) total or partial loss of information and communications technology infrastructure for more than 72 hours;
  - (c) an accident that:
    - (i) causes the death of, or serious personal injury to, a substantial proportion of the officers of the insurer; or

- (ii) causes a substantial proportion of the officers of the insurer to be incapacitated from performing work;
- (d) biohazard, bomb threat, lockdown or other event that results in a substantial loss of operational capacity of the insurer for more than 24 hours.

## Attachment C: Summary of the Council's key regulatory powers

COUNCIL'S KEY POWERS	SECTION OF THE ACT
<b>General powers</b>	
<b>Register</b> a company as an insurer.	s126-20
<b>Cancel registration</b> if an insurer has ceased health insurance business for 12 months or its fund is terminated.	s126-45
<b>Impose requirements</b> on insurers.	s172-1
<b>Collect information</b> from insurers, including with actuarial certification, about their operations.	s 264-10
<b>Impose a fee</b> on an insurer if the costs for making a proper examination of the financial affairs are unusually high.	s264-10(3)(g)
<b>Direct insurer to divest health-related business</b> if health insurance is not the dominant business of the fund.	s134-10
<b>Approve change to for-profit status</b> if no demutualisation and equal treatment of policy holders.	s126-42
<b>Approve a restructure</b> of an insurer's health benefits funds (so that they may have more than one fund).	s146-1
<b>Approve a merger or acquisition</b> of an insurer's fund/s with others.	s146-5
<b>Approve a capital payment</b> if an insurer wishes to transfer assets from one of its funds to another.	s137-5(3)(b)
<b>Approve a person as an approved actuary</b> if the person does not meet the specified eligibility requirements.	s160-1(4)
<b>Regulatory powers</b>	
<b>Declare an appointed actuary is not eligible</b> against the criteria in the Insurer Obligation Rules.	s160-5(2)
<b>Disqualify a person as a director/senior manager</b> if satisfied the person is not a fit and proper person to act in that position. The Act also sets out circumstances for automatic disqualification.	s166-20
<b>Notice to remedy a breach of Part 4-4</b> which deals with assets, standards, restructures or mergers.	s152-5
<b>Suing in insurer's name.</b> The Council may bring an action in the insurer's name to recover an amount the insurer may recover under Division 152.	s152-15
<b>Require an explanation of operations</b> if the Council suspects a breach of a CSO.	s191-1

<b>Notice to give information</b> Notice to a person to give information if the Council considers an insurer might have contravened a CSO, or has concerns about compliance.	s194-5
<b>Notice to produce documents.</b> Notice to a person to produce documents if the Council considers an insurer might have contravened a CSO, or has concerns about compliance.	s194-10
<b>Notice to give evidence.</b> Notice to a person to give evidence if the Council considers an insurer might have contravened a CSO, or has concerns about compliance.	s194-15
<b>Authorise a person to examine documents</b> if the Council considers an insurer might have contravened a CSO.	s194-25
<b>Council to advise after investigation.</b> After an investigation, the Council to notify the insurer whether it is satisfied, and, if not, what steps it intends to take.	s194-35
<b>Accept undertakings by insurer.</b> The Council may request an undertaking by an insurer to improve the insurer's operations in relation to a CSO.	s197-1
<b>Direction to modify operations or rules</b> if the Council considers this will assist in the prevention of a contravention of CSO.	s200-1
<b>Give a solvency or capital adequacy direction</b> to an insurer.	s140-20 and 143-20
<b>Give a prudential direction</b> to an insurer.	s163-15.
<b>Appoint an inspector</b> if the Council suspects the affairs are not being carried on in the interests of policy holders, or a contravention of Part 4-4 (assets, standards, restructures, mergers and termination of funds).	s 214
<b>Appoint an external manager</b> to a fund (not to the insurer) if in the interests of the policy holders and non-compliance with the solvency standard or a direction.	s 217-10 and 217-15
<b>Approving termination of a fund</b> which must be all the funds of an insurer if it has more than one fund.	s149-10
<b>Applying for winding up of the insurer Council</b> or terminating manager, may apply to the Federal Court if the terminating manager recommends this.	s149-60
<b>Injunction in relation to non complying policies</b> Council may apply for an injunction if a private health insurer has engaged in, or is proposing to engage in conduct that contravenes sections 63-1 or 84-1 of the Act.	s 84-10(3)

## Remedies in the Federal Court

<b>Enforcement powers</b>	<b>Application and relevant provision</b>
<b><i>Enforcement of undertaking</i></b>	Seek order if satisfied of breach of undertaking (s197-5).
<b><i>Declaration of contravention</i></b>	Seek order if satisfied contravention of a CSO (s203-1).
<b><i>Pecuniary penalty order</i></b>	Seek a pecuniary penalty order if court declares a contravention (s203-1).
<b><i>Compensation order</i></b>	Seek a compensation order if court declares a contravention (s203-1).