



Giving a Council Direction

Standard Operating Procedure

Legislative References from the *Private Health Insurance Act 2007*

Section 200-1 Direction to prevent or address a contravention of a Council supervised obligation

Section 163-15 Direction to comply with a prudential standard

Section 143-20 Direction to comply with the capital adequacy standard

Section 140-20 Direction to comply with the solvency standard

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Disclaimer

This publication is issued as a general guide as to how the Private Health Insurance Administration Council (the Council) may apply its powers to give a direction to a private health insurer. The Council reserves the right to take action other than as set out in this publication should the need arise. The guide 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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Author	Fiona Bowden, Legal Policy Officer, Industry Policy and Enforcement Section
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Contents

Giving a Council direction	1
About the Private Health Insurance Administration Council	4
Policy context	4
What this document covers	5
Elements common to Council directions	5
Section 200-1 directions to prevent or address a breach of a Council supervised obligation.....	6
Section 163-15 directions to comply with a prudential standard.....	8
Section 143-20 capital adequacy directions.....	9
Section 140-20 solvency directions	11
Attachment A: Extracts from the Private Health Insurance Act 2007	13
Attachment B: Summary of the Council’s key regulatory powers	25

About the Private Health Insurance Administration Council

1. The Private Health Insurance Administration Council (**the Council**) is an independent Statutory Authority that regulates the private health insurance industry. 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 individual private health insurers (**insurers**).
3. The Council has a range of general, information collection, compliance and enforcement powers to support its roles, and a range of public information and inter-agency co-operation functions as detailed in section 264-10 of the Act, and set out in the legislative provisions at **Attachment A**. Additional information regarding the Council's roles and responsibilities can be found at: www.phiac.gov.au.

Policy context

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**) outlining how the Council proposes to administer its responsibilities under the Act. These documents will give insurers a better understanding of the operation of elements of the Act, in particular, those parts of the Act which detail 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. The appropriate regulatory response will depend upon the nature and severity of the issue/s and the insurer's responsiveness to the Council's enquiries.
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 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. Council will give insurers subject to formal action opportunities to be heard and to rectify matters. Council will not hesitate to act when it should, 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.

What this document covers

7. This SOP discusses four directions powers which the Council may employ to protect the interests of consumers and to ensure the prudential safety of individual insurers:
 - direction to prevent or address a breach of a Council supervised obligation (section 200-1 of the Act refers)
 - direction to comply with a prudential standard (section 163-15 of the Act refers)
 - direction to comply with the capital adequacy standard (section 143-20 of the Act refers)
 - direction to comply with the solvency standard (section 140-20 of the Act refers).
8. The SOP briefly discusses a number of elements common to the four Council directions. It then addresses issues specific to each direction, to provide a better understanding to insurers of when such directions may be used and why. Underpinning the document is the need for insurers to be fully aware of all their obligations under the Act and the triggers which may give rise to a Council direction.
9. The order in which the directions are discussed moves from the more general power to prevent or address a breach of a Council supervised obligation through to the most specific, a section 140-20 direction to comply with the solvency standard.
10. Council supervised obligations are defined in section 185-10 of the Act. They are enforceable obligations in the Act, the Private Health Insurance Rules made under section 333-20 or 333-25 of the Act, a regulation, or a direction given to an insurer under the Act, that relate to risk equalisation, health benefits funds or prudential standards. A breach of any Council supervised obligation can be a trigger for Council intervention in the affairs of an insurer.

Elements common to Council directions

11. A Council direction is a legal instrument that imposes an enforceable obligation on an insurer, and, in some cases, an individual. All Council directions will be signed by a member of the Council and may be served on an insurer by serving a copy on the insurer's Chief Executive Officer.
12. The content of each Council direction will be tailored to address issues specific to the section of the Act from which the issue originates. For example, a solvency or capital adequacy direction may impose additional financial obligations on an insurer. A prudential standard direction may require a change to the composition of the board, whereas a section 200-1 direction to address a contravention of a council supervised obligation may overwrite an existing contract, modify rules or require changes to the day-to-day operations of an insurer.

13. An important feature of these powers is that the Act empowers the Council to become directly involved in the resolution of particular regulatory issues by providing it with a much stronger capacity to direct particular outcomes.
14. The Council has given the industry a commitment that it will exercise its powers under the Act in a transparent and open manner. Where appropriate, a Council direction will not be given without detailed communications with the insurer and consideration of the implications for the policy holders, the insurer and the industry as a whole. Where appropriate, before a Council direction is given to an insurer, the findings of any third party reports and the proposed content and timeframe of the direction will be discussed with the insurer to ensure compliance can be achieved.
15. The duration of a Council direction will depend on the severity of the issue and the insurer's ability to address the Council's requirements.
16. In considering whether to give a direction to an insurer, the Council will not consider ignorance as a possible defence against an insurer contravening a requirement of the Act.
17. When a direction is not complied with, the Council will seek a written explanation. If the insurer does not provide a timely and satisfactory response and seek to rectify non-compliance, the Council may apply to the Federal Court for any or all of the following orders:
 - 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 which flow from the declaration of contravention (section 203-25 of the Act refers).
18. The Council may also seek an order that the insurer pay all of the Council's legal and investigation costs incurred in taking the matter to Court. This accords with the judicial presumption that costs will follow the event.
19. Insurers also need to be aware that the time limit for the Council commencing Federal Court proceedings for a breach of a solvency direction, capital adequacy direction or a prudential standard direction is six years from the date of the contravention (section 203-30 of the Act refers).

Section 200-1 directions to prevent or address a breach of a Council supervised obligation

21. Division 200 is a very important addition to the Act as it empowers the Council to act decisively where it considers that to do so would assist in the prevention of a contravention of a Council supervised obligation.
22. Importantly, the circumstances in which a Council direction to address or prevent a contravention of a Council supervised obligation may be employed are described as being "at any time and for any reason".¹ This underscores the parliamentary intention that, where a situation emerges which, in the Council's view, warrants rapid and decisive action to protect consumers, the Council should have regulatory authority to do so.

¹ Section 200-1(2) of the Act refers

Notwithstanding this, where appropriate, before a section 200-1 Council direction is given to an insurer, the proposed content and timeframe of the direction will be discussed to ensure compliance can be achieved.

23. There are two triggers to a section 200-1 direction. The first is a preventative power whereby the Council can give a section 200-1 direction if the Council considers that the direction will assist in the prevention of contraventions of Council supervised obligations (section 200-1(1)(a) of the Act refers).
24. The second trigger for the Council giving a section 200-1 direction arises if the Council considers there may have been a contravention of a Council supervised obligation (section 200-1(2)(b) of the Act refers).
25. From these provisions it can be seen that the Council does not have to establish unequivocally a breach of the Act before issuing a section 200-1 direction. In appropriate circumstances there is authority to act on a *preventative basis*. Where Council has the information to support a finding that a direction will assist in the prevention of a contravention of a Council supervised obligation, the Council is able to proactively intervene. This preventative action is one of the cornerstones of the Council's new proactive powers under the Act.
26. Section 200-1 directions may include requirements that an insurer modify its day to day operations or its rules. Without being definitive, some of the matters that a section 200-1 Council direction may extend to include:
 - changing elements of an insurer's claims management system
 - the way a fund receives and deals with its customers
 - staffing and consulting arrangements
 - the fund's physical and financial capital arrangements
 - enhancing internal reporting and governance
 - improving data integrity
 - amending growth strategies
 - modifying product benefits
 - addressing liquidity issues
 - advertising and public relations
 - management of intellectual property and other incorporeal assets
 - improving fraud control
 - any other matters that the Council considers relevant.
27. Section 200-5 of the Act details the requirements for a section 200-1 direction. Specifically, a section 200-1 direction must be in writing, must be signed by the person giving the direction and may be served on the insurer, by serving a copy on the insurer's Chief Executive Officer.
28. For the purposes of this section of the Act, the insurer must keep the Council informed as to who is its current Chief Executive Officer. This does not preclude the Council from serving the direction on the Chairperson, or another member of the insurer's board.
29. If a section 200-1 direction is given by the Council, section 200-1(5) of the Act provides that the direction must be published on the PHIAC website no later than five working days after the direction is given. When the Council is satisfied that a direction has been complied with, a notice advising that the irregularities have been satisfactorily addressed or that the conditions referred to in the media release no longer apply will be published on the PHIAC website. This notice will be located adjacent to the original direction and

will allow consumers and others to obtain current information regarding and insurer's compliance with Council requirements.

30. If an insurer objects to the Council giving a section 200-1 direction, the insurer has the right of review under Part 6-9 of the Act.

Section 163-15 directions to comply with a prudential standard

31. The Council may give a prudential direction under section 163-15 of the Act where the Council believes that an insurer has or is likely to breach a prudential standard.
32. A prudential standard is made pursuant to Division 163 of the Act and the existing standards are contained in the *Private Health Insurance (Insurer Obligations) Rules 2010*. These standards, not to be confused with the financial standards (capital adequacy and solvency) are designed to ensure that insurers conduct their affairs with integrity, prudence and professional skill. The prudential standards currently include governance, appointed actuary and disclosure requirements. The Council is committed to developing additional standards as issues arise within the industry.
33. The trigger for a section 163-15 Council direction can be preventative or reactive. That is, prior to issuing a section 163-15 direction, the Council needs to be satisfied that an insurer has either breached a prudential standard, or is likely to breach a prudential standard in a way that is likely to give rise to a prudential risk (section 163-1 of the Act refers).
34. A prudential risk is considered to be any issue that negatively impacts on a prudential matter. Prudential matters are defined in section 163-1(2) of the Act, to include the conduct by an insurer of any of its affairs in such a way as to keep them in a sound financial position; or not to cause or promote instability in the industry; or conduct any of their affairs with integrity, prudence and professional skill. Where appropriate, before a section 163-15 prudential standard direction is given to an insurer, the proposed content and timeframe of the direction will be discussed with the insurer to ensure compliance can be achieved.
35. Section 163-15(1)(b) of the Act, provides that an insurer who receives a section 163-15 direction must comply with all aspects of the direction within a specified time even if it is contrary to its constitution or any contract or arrangement to which it is a party. This does not mean that the Council will not first negotiate with the insurer and raise any concerns with respect to a prudential standard in a clear and transparent manner. The Council will take into consideration any implications on the insurer and will in most cases, be prepared to negotiate matters such as timing and consequences of the direction.
36. The Act does not specify a period of duration for a section 163-15 Council direction. It is more likely that a prudential direction will require a specific action which could be addressed more quickly than a capital adequacy or solvency direction. For example, a direction to remedy a breach of the governance standard may be remedied by the board of directors of the insurer through the modification of an existing policy or an Extraordinary General Meeting of the members.
37. The Council may revoke a section 163-15 direction that the Council considers is no longer necessary or appropriate by giving a written notice to the insurer in accordance with section 163-15(3) of the Act.

38. Unlike a section 200-1 direction, there is no requirement in the Act for the Council to publish a section 163-15 Council direction.
39. If the insurer objects to a section 163-15 direction being given, or if the Council refuses an insurer's request to revoke a section 163-15 direction, the insurer has the right of review under Part 6-9 of the Act.
40. Section 163-20(1) of the Act provides that an insurer who fails to comply with a direction given to it under section 163-15 of the Act commits an offence. Such an offence attracts a penalty of 300 penalty units.
41. Part 2.4 of the *Criminal Code* operates to extend criminal responsibility in certain circumstances. In the case of a breach of a prudential standard, section 163-20(2) of the Act extends the penalty to individuals and is punishable on conviction, by a fine of 60 penalty units. Whilst the financial impact of such a penalty is relatively small, such a conviction is likely to have serious ramifications for board members and senior managers of an insurer, as the conviction can lead to automatic disqualification under section 166-15 of the Act.
42. Insurers should also note that failure to comply with a section 163-15 Council direction can be a precondition to the Council appointing an external manager to a health benefits fund under section 217-15 of the Act.
43. A breach of a prudential standard has its own enforceable provision in section 163 of the Act as well as being enforceable in the Federal Court under section 203 of the Act.

Section 143-20 capital adequacy directions

44. In the regulatory arrangements described in the Act, many of the powers and functions which existed in the NHA were carried over into the new legislation. In particular, the Act retained the Council's capacity to give directions dealing with capital adequacy issues.
45. The capital adequacy standard, as set out in Schedule 3 to the *Private Health Insurance (Health Benefits Fund Administration) Rules 2007* establishes the minimum level of capital considered necessary to ensure that as far as practicable, there are sufficient assets in a fund conducted by the insurer to provide adequate capital for the conduct of the fund on the basis of an ongoing operation. In effect, Division 143 of the Act requires insurers to hold a certain amount of capital to ensure their long term viability.
46. Regulatory oversight of an insurer's capital adequacy position is a critical component of the Council's ability to ensure the prudential safety of individual insurers. As a consequence, the Council closely monitors the level of capital held by individual insurers and their compliance with the capital adequacy standard, through annual, quarterly, and in some instances, monthly reports. Unexplained variations in capital adequacy can trigger increased dialogue with the Council as the Council seeks to understand what is happening within the fund.
47. Importantly, however, the Act also sets considerable store on the Council interacting with the industry on a distinctly more proactive basis. Now, in addition to a full range of remedial measures where it has been shown that a health benefits fund conducted by an insurer has actually breached the capital adequacy standard, section 143-20 of the Act instructs the Council to engage with insurers in a more preventative way.

48. While the Council, in giving a capital adequacy direction, must be satisfied that there are reasonable grounds to believe that the assets of the fund will not provide adequate capital for the conduct of the business of the fund, section 143-20(3) of the Act makes it very clear that it is not necessary for an insurer to be in breach of the capital adequacy standard before a capital adequacy direction is given by the Council. This is in direct contrast to section 73BCJ of the NHA, where the Council had to be satisfied that there was a breach of the capital adequacy standard before it could give a capital adequacy direction. This restriction was one factor which led to the ownership of three insurers being transferred between 2001 and 2004 after each breached the capital adequacy standard.
49. This means that the Council must undertake a more forward-looking regulatory stance and, when financial problems are beginning to emerge, intercede decisively, at an earlier time, to ensure that the areas of concern do not become an event necessitating a level of significant intervention.
50. The Council works with insurers to identify and prevent poor capital strategies or other systemic issues from escalating into a prudential crisis for the insurer, and in so doing, to minimise the risk for members of a fund and consumers generally. Such a stance is also beneficial for the industry as a whole since the general prudential environment and the reputation of the industry as a reliable and safe provider of health insurance products will be maintained.
51. Where appropriate before a section 143-20(1) capital adequacy direction is given to an insurer, the proposed content and timeframe of the direction will be discussed to ensure compliance can be achieved. In particular, an insurer can expect there to be discussions to determine:
- what is occurring within the insurer
 - whether the insurer has the necessary strategies or capacity to ensure the ongoing viability and compliance
 - what timeframe is appropriate to implement the terms of the direction
 - whether a direction is the best regulatory option by the Council to redress the declining capital position of the fund.
52. The grounds that Council may have regard to in determining whether or not to give a capital adequacy direction are too broad to provide a definitive list, particularly given the Act provides that the Council may take into account "*any other matters that the Council considers relevant*" (section 143-20(1)(c) of the Act refers). Notwithstanding this, a combination of any or all of the following may, if it results in the Council being satisfied that there are reasonable grounds to believe that the assets of the fund will not provide adequate capital for the conduct of the business of the fund, give rise to a capital adequacy direction:
- an insurer pursuing a rapid growth strategy based on very competitive pricing, coupled with an inability to predict and manage the claiming behaviour of new members
 - a marked decline in the insurer's capital position with continued forecast decline
 - evidence that suggests that the insurer has systemic mismanagement or governance issues
 - lack of a strategic plan
 - recurring errors or unexplained significant variances in the PHIAC returns
 - lack of internal capacity to generate accurate and reliable financial data and the information generated from that data
 - concerns regarding the competency and capacity of the board

- unwillingness to cooperate with Council requests
 - adverse findings in independent specialist reports on the operation of the fund
 - consumer protection issues.
53. Section 143-20(4) of the Act provides that an insurer must comply with a capital adequacy direction. If an insurer breaches a capital adequacy direction, the Council may rely on the breach as a precondition to appointing an external manager under section 217-15 of the Act. Alternatively, the Council may pursue remedies in the Federal Court. The remedies are set out in Division 203 of the Act. The types of orders sought may include:
- a declaration that an insurer has breached an undertaking
 - a declaration of contravention of a council supervised obligation by an insurer, and, where appropriate, an officer of an insurer
 - a pecuniary penalty order payable by an officer of an insurer who is found to have failed to take steps to prevent the contravention
 - a costs order in favour of the Council
 - any other order that the court considers appropriate to redress the contravention, this may include remedies to restore the position of policy holders.
54. The fact that the Council is now able to seek such orders is an important addition to its statutory powers. Prior to the Act, apart from matters related to implementation of schemes of administration, the Council was not able to directly approach the Federal Court for orders directed to insurers.
55. Section 143-20(5) the Act, provides that a capital adequacy direction will last no longer than three years from the date the direction is given. The Council also has the power to give a further direction in the same terms if the Council believes that there are insufficient assets in a fund conducted by the insurer to provide adequate capital for the conduct of the fund on the basis of an ongoing operation.
56. If the Council is satisfied that a particular capital adequacy direction is no longer necessary it will revoke or vary the direction by way of written notice.
57. If an insurer requests the Council to revoke or vary a capital adequacy direction under section 143-20(8) of the Act, the Council is required to provide a decision to the insurer within 28 days. If the request is refused, the Council will provide reasons for the decision and the relevant material it relied upon. The insurer has a right of review under Part 6-9 of the Act.

Section 140-20 solvency directions

58. Section 140-5 of the Act gives the Council the authority to establish a solvency standard to provide for the financial security of the health benefits fund(s) conducted by an insurer.
59. Section 140-10 of the Act identifies the purpose of the solvency standard to ensure, as far as is practicable, that at any time, the financial position of a health benefits fund conducted by a private health insurer is able to meet all liabilities out of the fund's assets, that are referable to the fund as those liabilities become due. The solvency standard is considered to be core to prevention of financial loss by policy holders. It is designed to identify an amount of capital sufficient to enable the orderly run-off of a fund. As such, monitoring of an insurer's compliance with the solvency standard is a prime focus of the Council's ongoing regulatory supervision of all insurers, as the closer an insurer moves to breaching this standard, the less time there is for corrective action.

60. A solvency direction represents the most serious of all Council directions because it suggests that the Council has reason to believe that a health benefits fund conducted by an insurer may be approaching the *Corporations Act 2001* definition of insolvency and that the insurer does not have sufficiently robust strategies in place, or competency to restore the financial position of the fund.
61. Whilst a solvency direction may be used in conjunction with other powers to minimise risk to policy holders, it is unlikely that it would be the first regulatory action taken by the Council against an insurer facing financial difficulties. The Council is more likely to intervene earlier, relying on the broader regulatory powers of the Act to restore the capital position of a fund, before resorting to a solvency direction.
62. As with capital adequacy directions, an insurer does not have to have breached the solvency standard before the Council may give a solvency direction (section 140-20 of the Act refers). Key considerations for the Council in giving such a direction include policy holder protections, the ability of insurer to meet all liabilities referable to the business of the fund as they become due, and whether it would be in the policy holders interests to appoint an external manager to the fund.
63. From the insurer's perspective, a solvency direction is about being able to satisfy its liabilities given the quantum and nature of the assets of the health insurance business. The test goes beyond existing business, as it needs to take into account what might become of the insurer in the future. For this reason an insurer should expect, where appropriate, very detailed discussions with the Council before a solvency direction is given and that the proposed content and timeframe of the direction will be discussed to ensure compliance can be achieved.
64. Insurers should also note that breaches of the solvency standard or a solvency direction are preconditions for the appointment of an external manager to a health benefits fund under section 217-15 of the Act.
65. An example of the type of requirement which might be included in a solvency direction is the requirement that an insurer convert existing assets into a more liquid form.
66. Section 140-20(5) of the Act, provides that a solvency direction will last no longer than three years from the date the direction is given. It should also be noted that the Council also has the power to give a further direction in the same terms to take effect immediately after the expiration of a previous direction.
65. If the Council is satisfied that a particular solvency direction is no longer necessary it may revoke or vary the direction by writing to the insurer.
66. If an insurer requests that the Council revoke or vary a solvency direction under section 140-20(8) of the Act, the Council is required to provide a decision to the insurer within 28 days. If the insurer's request is refused, the Council will provide reasons for the decision and the relevant material it relied upon. The insurer has a right of review under Part 6-9 of the Act.

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

140-15 Compliance with solvency standard

Private health insurers to comply with solvency standard

- (1) Subject to subsection (2), every private health insurer must comply with the *solvency standard as it applies in respect of that insurer.

Declarations that solvency standard does not apply

- (2) The Council may declare, by notice in writing, that the *solvency standard does not apply to a particular private health insurer. The declaration may be expressed to be limited to particular specified circumstances, or to a particular specified period, or both.

Note: Refusals to make declarations are reviewable under Part 6-9.

Conditions applying to declarations

- (3) The Council may:
- (a) in a declaration under subsection (2); or
 - (b) by a separate notice in writing;
- impose conditions to be complied with by any private health insurer that is to get the benefit of the declaration.

Note: Decisions to impose conditions are reviewable under Part 6-9.

- (4) If a private health insurer fails to comply with a condition referred to in subsection (3), the declaration is taken to cease to apply to the insurer.

Revoking or varying declarations and conditions

- (5) If the Council is satisfied that a declaration under subsection (2), or a condition referred to in subsection (3), is no longer required or should be varied, the Council must, by notice in writing, revoke or vary the declaration or condition accordingly.

- (6) If a private health insurer requests the Council, in writing, to revoke or vary a declaration under subsection (2), or a condition referred to in subsection (3), the Council must, within 28 days after receiving the request:

- (a) if the Council is satisfied that the declaration or condition is no longer necessary or should be varied—revoke or vary the declaration or condition; or
- (b) in any other case—refuse to revoke or vary the declaration or condition.

Note: Refusals to revoke or vary declarations or conditions are reviewable under Part 6-9.

- (7) If the Council does not, within the 28 days referred to in subsection (6), either revoke or vary or refuse to revoke or vary the declaration or condition concerned, the Council is to be taken, for the purposes of this Act, to have refused to revoke or vary the declaration or condition at the end of that period.

Note: Decisions that the Council is taken under this subsection to have made are reviewable under Part 6-9.

- (8) The Council must give to the private health insurer written notice of a decision made under subsection (6) and, if the Council refuses to revoke or vary the declaration or condition concerned, provide a statement of reasons for so refusing.

Declarations etc. are not legislative instruments

- (9) A notice under subsection (2), (3), (5) or (8) is not a legislative instrument.

References to declarations etc.

- (10) A reference in this section to a declaration or condition includes a reference to a declaration or condition as varied.

140-20 Solvency directions

Council may give solvency directions

- (1) The Council may give written directions (*solvency directions*) to a private health insurer if, having regard to:
- (a) the nature and value of the *assets of a *health benefits fund conducted by the insurer; or
 - (b) the nature and extent of the liabilities that are referable to the business of the fund; or
 - (c) any other matters that the Council considers relevant;
- the Council is satisfied that there are reasonable grounds for believing that the insurer might not be able to meet, out of the assets of the fund, all liabilities referable to the business of the fund as they become due.
- (2) *Solvency directions are directions that, in the Council's opinion, are reasonably necessary to ensure, as far as practicable, that a private health insurer will be able to meet the liabilities of a *health benefits fund conducted by the insurer out of the *assets of the fund as they become due.
- (3) The Council may give a *solvency direction to a private health insurer even if, when the direction is given:
- (a) the insurer meets the requirements of the *solvency standard applicable to that insurer in respect of the fund; and
 - (b) there are reasonable grounds to believe that the insurer will meet that standard at all times while the direction is in force.

Compliance with solvency directions

- (4) A private health insurer must comply with a *solvency direction given to it under subsection (1).

Duration of solvency directions

- (5) Subject to subsections (7) and (8), a *solvency direction remains in force for a period specified in the direction, not exceeding 3 years, commencing on the day when the direction is given.
- (6) Subsection (5) does not prevent the Council from giving a further *solvency direction in the same terms to take effect immediately after the expiry of a previous direction.

Revoking or varying solvency directions

- (7) If the Council is satisfied that a particular *solvency direction is no longer required or should be varied, the Council must, by written notice given to the private health insurer, revoke or vary the direction accordingly.

(8) If a private health insurer to which a *solvency direction has been given requests the Council, in writing, to revoke or vary the direction, the Council must, within 28 days after receiving the request:

- (a) if the Council is satisfied that the direction is no longer necessary or should be varied—revoke or vary the direction; or
- (b) in any other case—refuse to revoke or vary the direction.

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

(9) If the Council does not, within the 28 days referred to in subsection (8), either revoke or vary or refuse to revoke or vary the *solvency direction concerned, the Council is to be taken, for the purposes of this Act, to have refused to revoke or vary the direction at the end of that period.

Note: Decisions that the Council is taken under this subsection to have made are reviewable under Part 6-9.

(10) The Council must give to the private health insurer written notice of a decision made under subsection (8) and, if the Council refuses to revoke or vary the *solvency direction concerned, provide a statement of reasons for refusing.

143-15 Compliance with capital adequacy standard

Private health insurers to comply with capital adequacy standard

(1) . Subject to subsection (2), every private health insurer must comply with the *capital adequacy standard as it applies in respect of that insurer.

Declarations that capital adequacy standard does not apply

(2) The Council may declare, by notice in writing, that the *capital adequacy standard does not apply to a particular private health insurer. The declaration may be expressed to be limited to particular specified circumstances, or to a particular specified period, or both.

Note: Refusals to make declarations are reviewable under Part 6-9.

Conditions applying to declarations

(3) The Council may:
(a) in a declaration under subsection (2); or
(b) by a separate notice in writing;
impose conditions to be complied with by any private health insurer that is to get the benefit of the declaration.

Note: Decisions to impose conditions are reviewable under Part 6-9.

(4) If a private health insurer fails to comply with a condition referred to in subsection (3), the declaration is taken to cease to apply to the insurer.

Revoking or varying declarations and conditions

(5) If the Council is satisfied that a declaration under subsection (2), or a condition referred to in subsection (3), is no longer required or should be varied, the Council must, by notice in writing, revoke or vary the declaration or condition accordingly.

(6) If a private health insurer requests the Council, in writing, to revoke or vary a declaration under subsection (2), or a condition referred to in subsection (3), the Council must, within 28 days after receiving the request:

- (a) if the Council is satisfied that the declaration or condition is no longer necessary or should be varied—revoke or vary the declaration or condition; or
- (b) in any other case—refuse to revoke or vary the declaration or condition.

Note: Refusals to revoke or vary declarations or conditions are reviewable under Part 6-9.

- (7) If the Council does not, within the 28 days referred to in subsection (6), either revoke or vary or refuse to revoke or vary the declaration or condition concerned, the Council is to be taken, for the purposes of this Act, to have refused to revoke or vary the declaration or condition at the end of that period.

Note: Decisions that the Council is taken under this subsection to have made are reviewable under Part 6-9.

- (8) The Council must give to the private health insurer written notice of a decision made under subsection (6) and, if the Council refuses to revoke or vary the declaration or condition concerned, provide a statement of reasons for so refusing.

Declarations etc. are not legislative instruments

- (9) A notice under subsection (2), (3), (5) or (8) is not a legislative instrument.

References to declarations etc.

- (10) A reference in this section to a declaration or condition includes a reference to a declaration or condition as varied.

143-20 Capital adequacy directions

Council may give capital adequacy directions

- (1) The Council may give written directions (*capital adequacy directions*) to a private health insurer if, having regard to:
- (a) the nature and value of the *assets of a *health benefits fund conducted by the insurer; or
 - (b) the nature and extent of the liabilities that are referable to the business of the fund; or
 - (c) any other matters that the Council considers relevant;
- the Council is satisfied that there are reasonable grounds for believing that the assets of the fund will not provide adequate capital for the conduct of the business of the fund in accordance with this Act and in the interests of the *policy holders of the fund.
- (2) *Capital adequacy directions are directions that, in the Council’s opinion, are reasonably necessary to ensure, as far as practicable, that *assets of a *health benefits fund conducted by a private health insurer will provide adequate capital for the purposes described in subsection (1).
- (3) The Council may give a *capital adequacy direction to a private health insurer even if, when the direction is given:
- (a) the insurer meets the requirements of the *capital adequacy standard applicable to that insurer in respect of the fund; and
 - (b) there are reasonable grounds to believe that the insurer will meet that standard at all times while the direction is in force.

Compliance with capital adequacy directions

- (4) A private health insurer must comply with a *capital adequacy direction given to it under subsection (1).

Duration of capital adequacy directions

- (5) Subject to subsections (7) and (8), a *capital adequacy direction remains in force for a period specified in the direction, not exceeding 3 years, commencing on the day when the direction is given.
- (6) Subsection (5) does not prevent the Council from giving a further *capital adequacy direction in the same terms to take effect immediately after the expiry of a previous direction.

Revoking or varying capital adequacy directions

- (7) If the Council is satisfied that a particular *capital adequacy direction is no longer required or should be varied, the Council must, by written notice given to the private health insurer, revoke or vary the direction accordingly.
- (8) If a private health insurer to which a *capital adequacy direction has been given requests the Council, in writing, to revoke or vary the direction, the Council must, within 28 days after receiving the request:
- (a) if the Council is satisfied that the direction is no longer necessary or should be varied—revoke or vary the direction; or
 - (b) in any other case—refuse to revoke or vary the direction.

Note: Refusals to revoke or vary capital adequacy directions are reviewable under Part 6-9.

- (9) If the Council does not, within the 28 days referred to in subsection (8), either revoke or vary or refuse to revoke or vary the *capital adequacy direction concerned, the Council is to be taken, for the purposes of this Act, to have refused to revoke or vary the direction at the end of that period.

Note: Decisions that the Council is taken under this subsection to have made are reviewable under Part 6-9.

- (10) The Council must give to the private health insurer written notice of a decision made under subsection (8) and, if the Council refuses to revoke or vary the *capital adequacy direction concerned, provide a statement of reasons for so refusing.

Division 163—Prudential standards

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.

166-15 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).

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.

Division 200—Ministerial and Council directions

200-1 Minister or Council may give directions

- (1) If, at any time and for any reason:
 - (a) the Minister considers that it will assist in the prevention of *improper discrimination to do so; or
 - (b) the Council considers that it will assist in the prevention of contraventions of *Council-supervised obligations to do so;the Minister (if paragraph (a) applies) or Council (if paragraph (b) applies) may give a direction to a private health insurer requiring it:
 - (c) to modify its day-to-day operations in a particular respect; or
 - (d) to modify its *rules in a particular respect; or
 - (e) if the insurer is a *restricted access insurer and the Minister gives the direction—to modify the provisions included in its constitution or *rules in order to comply with subsection 126-20(6) in a particular respect.

Note: A decision to give a direction is reviewable under Part 6-9.

- (2) If, at any time and for any reason:
 - (a) the Minister considers that there appears to be a contravention of an *enforceable obligation involving *improper discrimination by a private health insurer; or
 - (b) the Council considers that there appears to be a contravention of a *Council-supervised obligation;the Minister (if paragraph (a) applies) or Council (if paragraph (b) applies) may give a direction to the insurer:
 - (c) requiring it to modify its day-to-day operations; or
 - (d) requiring it to modify its *rules; or
 - (e) if the insurer is a *restricted access insurer and the Minister gives the direction—requiring it to modify the provisions included in its constitution or *rules in order to comply with subsection 126-20(6);so as to address that contravention.

Note: A decision to give a direction is reviewable under Part 6-9.

- (3) A direction mentioned in subsection (1) or (2) may, if the person who gives the direction considers it proper to do so, include requirements with respect to the reconsideration by the private health insurer of an application or claim made to the insurer and dealt with by it before the direction takes effect.
- (4) A private health insurer must, in reconsidering an application or claim in accordance with subsection (3), deal with the application or claim as if the direction had been in force at the time when the application or claim was first considered.

- (5) A direction given under this section must be published:
- (a) if given by the Minister—on the Department’s website; and
 - (b) if given by the Council—on the Council’s website;
- not later than 5 working days after the direction is given.

200-5 Direction requirements

A direction given under this Division to a private health insurer:

- (a) must be in writing; and
- (b) must be signed by the person giving the direction; and
- (c) may be served on the insurer by serving a copy on the insurer’s *chief executive officer.

Note: Private health insurers must keep the Department and Council informed about who the current chief executive officer is (see section 169-15).

Division 203—Remedies in the Federal Court

203-1 Minister or Council may apply to the Federal Court

- (1) If the Minister is satisfied that a private health insurer has contravened an *enforceable obligation, the Minister may apply to the Federal Court for:
- (a) a *declaration of contravention; and
 - (b) any one or more of the following orders:
 - (i) a pecuniary penalty order under section 203-10;
 - (ii) a compensation order under section 203-15;
 - (iii) an adverse publicity order under section 203-20;
 - (iv) any other order that the Minister considers to be appropriate to redress the contravention.
- (2) If the Council is satisfied that a private health insurer has contravened a *Council-supervised obligation, the Council may apply to the Federal Court for:
- (a) a *declaration of contravention; and
 - (b) either or both of the following orders:
 - (i) a pecuniary penalty order under section 203-10;
 - (ii) any order that the Council considers to be appropriate to redress the contravention, other than an order under section 203-15 or 203-20.

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.

203-30 Time limit for declarations and orders

Proceedings under this Division may be started no later than 6 years after the contravention.

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.

264-10 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).

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*.

Attachment B: Summary of the Council's key regulatory powers

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

COUNCIL'S KEY POWERS	SECTION OF THE ACT
Require an explanation of operations if the Council suspects a breach of a CSO.	s191-1
Notice to give information 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
Notice to produce documents. 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
Notice to give evidence. 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
Authorise a person to examine documents if the Council considers an insurer might have contravened a CSO.	s194-25
Council to advise after investigation. After an investigation, the Council to notify the insurer whether it is satisfied, and, if not, what steps it intends to take.	s194-35
Accept undertakings by insurer. The Council may request an undertaking by an insurer to improve the insurer's operations in relation to a CSO.	s197-1
Direction to modify operations or rules if the Council considers this will assist in the prevention of a contravention of CSO.	s200-1
Give a solvency or capital adequacy direction to an insurer.	s140-20 and 143-20
Give a prudential direction to an insurer.	s163-15.
Appoint an inspector 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
Appoint an external manager 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
Approving termination of a fund which must be all the funds of an insurer if it has more than one fund.	s149-10
Applying for winding up of the insurer Council or terminating manager, may apply to the Federal Court if the terminating manager recommends this.	s149-60

COUNCIL'S KEY POWERS	SECTION OF THE ACT
<i>Injunction in relation to non complying policies</i> 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

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