Submission for Consultation regarding the Private Health Insurance (Prudential Supervision) Bill 2015

Provided by Stuart Rodger 30 January 2015

1. Background

These comments on the exposure draft Private Health Insurance (Prudential Supervision) Bill 2015 are provided by me in my private capacity. I am a Fellow of the Institute of Actuaries of Australia, and I have acted as the Appointed Actuary for several health insurers in Australia over the past decade.

I note that the industry will move from what was being governed by one Act of Parliament to now requiring at least three separate Acts to cover the same ground. While this does not seem to me to be a simplification, I recognise that this consultation is about the Bill itself, and not about the government decisions that give rise to it. I also note that APRA is a large, professional, and well respected prudential regulator; and while different from PHIAC, this change does not give me any concern in principle.

My comments are focussed on those parts of the Bill related to the Appointed Actuary's role duties and powers. These are set out in Division 2, sections 105 to 114 of the Bill.

2. Overview

It appears that sections 105 – 114 have been drafted very much with the existing life insurance Appointed Actuary legislation in mind. I agree this is a sensible base to use, and having been involved in consultations between the Actuaries Institute and those drafting the PHI Act 2007, I know that the existing PHI legislation also used the life insurance regime as a starting point. However in those consultations we then amended from that starting point, aiming to make the role more relevant and useful for health insurance.

My comments are therefore suggestions on how to improve the draft Bill. I do not oppose its general intent in these sections.

My comments cover:

- Termination
- Powers of the Appointed Actuary
- Strict liability duty to give information
- Some less significant items

I have labelled them according to whether I believe they are more or less significant.

3. Termination – S.106 (more significant)

The bill is worded so that when an insurer is well governed there are no problems, and when it is poorly governed the law allows problems to be created. This is the wrong way around – the law should prevent problems in situations of poor governance.

Specifically: The wording is *"A private health insurer MUST terminate the appointment …if …the insurer is SATISFIED that the person has failed to perform…PROPERLY the person's statutory functions and…"*

This requires two subjective judgements to be made ("satisfied" and "properly"), and applies a strict requirement ("MUST"). An Appointed Actuary who stands up to or argues with a chief executive or chairman might be considered by some types of CEO or Chairman – a troublesome minority - to have failed to act "properly"; and yet when there are governance problems in an insurer it may be seen by others as the duty of the Appointed Actuary to argue. Section 106 actually requires a renegade insurer to act, disregarding others' views on this – the law would require them to terminate the AA the moment they are "satisfied".

Suggested solution: *Drop this section from the primary legislation, which is very hard to change. If necessary, include an obligation on insurers in the prudential standards to terminate the appointment, but only after making proper enquiries. Subsections (1) and (3) would be dropped, and the entirety of section 106 would then be the defining of "statutory functions and duties" (which is still needed for other parts of the Bill – e.g. S.108(1))*

4. **Powers of the Appointed Actuary (more significant) (No exactly corresponding section, but S.108 is closest to the existing PHI Act)**

The PHI Act 2007 confers explicit powers on the Appointed Actuary in S. 160-25, and provides an enforcement mechanism for those powers both in S.160-25 (for production of information requested) and S.160-30(4) (for preventing attendance at relevant Meetings).

The corresponding section (s.108(2)) in the Bill is much weaker. It conveys a duty on the insurer to make arrangements necessary for the AA to perform his/her functions, but leaves interpretation of the word "necessary" up to the company rather than the AA. While in theory this can be covered by APRA stepping in if the insurer interprets this incompetently or maliciously, in practice APRA cannot do this continuously and so an insurer can adopt practices and cultures that systematically degrade the AA's ability to act.

Suggested solution: *State that it is the Appointed Actuary's opinion that determines whether something is "necessary". The wording would become:*

"108(2) The private health insurer must make any arrangements which the Appointed Actuary states are necessary to enable the Appointed Actuary to perform those functions and duties …"

Alternative suggested solution: *reinstate the Powers of Appointed Actuary section from the PHI Act*

5. **Duty of AA to give information – strict liability – S.111(3) (more significant)**

This section creates a strict liability offence if APRA under an earlier section directs the Appointed Actuary to produce "books, accounts or documents…". There is no allowance made for a situation where the Appointed Actuary is not in possession of those "books …" and has no ability to produce them.

This should not be a strict liability offence. It is not sufficient to say in response that APRA would never give such a notice, as that is a commitment about the future which no current officer of APRA has the legal power to unconditionally give.

If APRA regards this section as necessary then it should explain to the actuarial community how it believes they should respond if directed to produce "books" that they do not possess and have no power to produce. Under Section 111(2) there would be a reasonableness test brought to bear by the legal system, but the effect of 112(3) is to eliminate such a test.

Suggested solution:

Delete S111(3).

6. Other items (less significant)

S.109(2) : The wording here is subtly different from the PHI Act S.160-30(2), but I think the PHI Act is better. The Bill requires the AA to report the company to APRA the moment he/she "considers" it may have broken the law; the PHI Act requires that the AA have reasonable grounds for this. The requirement for "reasonable grounds" is an improvement made in the PHI Act to the then existing life insurance AA regime.

Suggested solution: Adopt the PHI Act wording

S.109 in relation to S.108(2): I cannot see a section corresponding to the PHI Act 160-30(4). If the insurer is not giving the AA the "arrangements" needed, then this should be reportable to APRA. (I have already commented above on the more significant issue of who says what's needed). S110 does not solve this problem, as it limits the information shared with APRA to that which "will assist APRA in performing its functions". While there is obviously some overlap, this is nevertheless different from that which "will assist the AA in performing his/her functions".

Suggested solution: After redrafting S.108(2), add a subsection into S.109 mandating a report to APRA if the insurer isn't complying with the requirements under the new 108(2)

Conclusion

Thank you for the opportunity to comment on the Bill. If you need to discuss these items with me please do not hesitate to contact me on the phone or email shown above.

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