



Financial System Legislation Amendment (Financial Claims Scheme and Other Measures) Act 2008

No. 105, 2008

**An Act to amend the law relating to banking and
insurance, and for related purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

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No. 105, 2008

**An Act to amend the law relating to banking and
insurance, and for related purposes**

[Assented to 17 October 2008]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Financial System Legislation
Amendment (Financial Claims Scheme and Other Measures) Act
2008*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	17 October 2008
2. Schedule 1	Immediately after the provision(s) covered by table item 3.	
3. Schedules 2 to 5	The day after this Act receives the Royal Assent.	18 October 2008

Note: This table relates only to the provisions of this Act as originally passed by both Houses of the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Financial Claims Scheme

Part 1—Amendment of the Banking Act 1959

1 Subsection 5(1)

Insert:

account-holder means an entity (as defined in section 960-100 of the *Income Tax Assessment Act 1997*) that has (either alone or jointly with another entity) an account or covered financial product with an ADI.

Note: The following heading to subsection 5(1) is inserted “*Definitions*”.

2 Subsection 5(1)

Insert:

APRA Special Account has the same meaning as in the *Australian Prudential Regulation Authority Act 1998*.

3 Subsection 5(1)

Insert:

civil penalty provision: a subsection of this Act (or a section of this Act that is not divided into subsections) is a ***civil penalty provision*** if:

- (a) the words “civil penalty” and one or more amounts in penalty units are set out at the foot of the subsection (or section); or
- (b) another provision of this Act specifies that the subsection (or section) is a civil penalty provision.

Note: Schedule 2 deals with contraventions of civil penalty provisions, and treats people who are involved in various ways in such a contravention as if they had contravened the provision concerned.

4 Subsection 5(1)

Insert:

covered financial product has the meaning given by subsection (8).

5 Subsection 5(1)

Insert:

declaration time for an ADI means the time the ADI becomes a declared ADI.

6 Subsection 5(1)

Insert:

declared ADI means an ADI specified in a declaration under section 16AD as an ADI in relation to which Subdivision C of Division 2AA of Part II applies.

7 Subsection 5(1)

Insert:

Financial Claims Scheme Special Account has the same meaning as in the *Australian Prudential Regulation Authority Act 1998*.

8 Subsection 5(1)

Insert:

net credit balance:

- (a) the *net credit balance*, at a time, of an account means the excess of the balance of the account in credit in favour of the account-holder at that time over the amount (if any) of fees, charges and duties that are identified under the agreement under which the account is kept and are payable by the account-holder to the ADI at that time; and
- (b) the *net credit balance*, at a time, of a covered financial product that is not an account means the amount owed to the account-holder at that time under the terms of the agreement under which the covered financial product is kept.

9 Subsection 5(1)

Insert:

penalty unit has the meaning given by section 4AA of the *Crimes Act 1914*.

10 Subsection 5(1)

Insert:

personal information has the same meaning as in the *Privacy Act 1988*.

11 Subsection 5(1)

Insert:

protected account has the meaning given by subsections (4), (5), (6) and (7).

Note: The following heading to subsection 5(2) is inserted “*Subsidiary*”.

12 At the end of section 5

Add:

Protected account

- (4) Subject to subsections (5), (6) and (7), a *protected account* is an account or covered financial product that is kept by an account-holder (whether alone or jointly with one or more other account-holders) with an ADI and either:
- (a) is an account that is prescribed by the regulations for the purposes of this paragraph; or
 - (b) is an account, or covered financial product, that is kept under an agreement between the account-holder and the ADI requiring the ADI to pay the account-holder, on demand by the account-holder or at a time agreed by them, the net credit balance of the account or covered financial product at the time of the demand or the agreed time (as appropriate).
- Note: Paragraph (a)—the regulations may prescribe the account by reference to a class of accounts: see subsection 13(3) of the *Legislative Instruments Act 2003*.
- (5) An account is not a *protected account* on and after 12 October 2011 unless:
- (a) it is recorded in Australian currency; or
 - (b) it is kept with an ADI that is a declared ADI on 12 October 2011.
- (6) A covered financial product that is kept with an ADI and is not an account is not a *protected account* if APRA applies under section 14F on or after 12 October 2011 for an order that the ADI be wound up.

- (7) An account or covered financial product is not a ***protected account*** if the account or covered financial product is prescribed by the regulations for the purposes of this subsection.

Note: The regulations may prescribe the account or covered financial product by reference to a class of accounts or financial products: see subsection 13(3) of the *Legislative Instruments Act 2003*.

Covered financial product

- (8) The Minister may declare that a specified financial product is a ***covered financial product***.

Note: The declaration may specify the product by reference to a class of financial products: see subsection 13(3) of the *Legislative Instruments Act 2003*.

- (9) A declaration made under subsection (8), or an amendment of the declaration, is a legislative instrument, but neither section 42 (disallowance) nor Part 6 (sunsetting) of the *Legislative Instruments Act 2003* applies to the declaration or amendment.
- (10) The declaration or amendment takes effect from the time it is made, despite subsections 12(1) and (2) of the *Legislative Instruments Act 2003*.

Note: The following heading to subsection 5(3) is inserted “*Relevant group of bodies corporate*”.

13 Subsection 13A(3)

Repeal the subsection, substitute:

Priorities for application of assets of ADI in Australia

- (3) If an ADI becomes unable to meet its obligations or suspends payment, the assets of the ADI in Australia are to be available to meet the ADI’s liabilities in the following order:
- (a) first, the ADI’s liabilities (if any) to APRA because of the rights APRA has against the ADI because of section 16AI;
 - (b) second, the ADI’s debts (if any) to APRA under section 16AO;
 - (c) third, the ADI’s deposit liabilities in Australia (other than any such liabilities covered under paragraph (a));
 - (d) fourth, the ADI’s other liabilities (in the order of their priority apart from this subsection).

Note: Subsection (3) applies whatever other consequences flow from the ADI becoming unable to meet its liabilities or suspending payment (such as investigation of the ADI's affairs, or control of its business, under this Division, or winding up of the ADI).

Note: The following heading to subsection 13A(4) is inserted "*ADI's assets must at least equal its deposit liabilities*".

14 At the end of section 14F

Add:

Notifying Minister of application

- (3) If APRA makes an application under subsection (1), APRA must inform the Minister of the application as soon as possible.

Note: Once informed, the Minister may choose to apply Subdivision C of Division 2AA in relation to the ADI so some depositors can receive payments earlier than they would in the winding up of the ADI.

15 After Division 2 of Part II

Insert:

Division 2AA—Financial claims scheme for account-holders with insolvent ADIs

Subdivision A—Preliminary

16AB Purpose of this Division

The main purpose of this Division is to provide for a scheme that:

- (a) allows the Minister to make a declaration about an ADI that APRA has sought to have wound up for insolvency; and
- (b) entitles account-holders who have certain protected accounts with a declared ADI to be paid certain amounts to maintain the account-holders' liquidity before they would receive payment in a winding up of the ADI; and
- (c) substitutes APRA for those account-holders as a creditor of the declared ADI to the extent of the entitlements.

16AC APRA's functions relating to this Division

APRA's functions include:

- (a) meeting entitlements under Subdivision C; and

- (b) preparing, and assisting the Minister to prepare, for the application of that Subdivision in relation to ADIs; and
- (c) meeting APRA's other obligations under this Division and the regulations made for the purposes of this Division.

Subdivision B—Declaration of ADI

16AD Declaration that Subdivision C applies in relation to ADI

- (1) The Minister may declare that Subdivision C applies in relation to a specified ADI if APRA has applied under section 14F for the ADI to be wound up.

Note: The Minister cannot make a declaration relating to a foreign ADI because APRA cannot apply for a foreign ADI to be wound up: see section 11E.

Declaration to specify amount for meeting entitlements

- (2) The declaration must also specify the amount (if any) that is to be credited to the Financial Claims Scheme Special Account in connection with the application of Subdivision C in relation to the declared ADI. If APRA's application under section 14F was made on or after 12 October 2011, the amount must not be more than \$20,000,000,000.

Declaration to specify amount for administration

- (3) The declaration must also specify the amount (if any) that is to be credited to the APRA Special Account in connection with the administration of this Division in relation to the declared ADI. The amount must not be more than \$100,000,000.

Amendment of specification of amounts

- (4) The Minister may amend a declaration made under subsection (1), but only to change the specification of an amount under subsection (2) or (3), within the limit set in that subsection.

Declaration cannot be revoked

- (5) The Minister cannot revoke a declaration made under subsection (1).

Declaration or amendment not disallowable or subject to expiry

- (6) A declaration made under subsection (1), or an amendment of the declaration, is a legislative instrument, but neither section 42 (disallowance) nor Part 6 (sunsetting) of the *Legislative Instruments Act 2003* applies to the declaration or amendment.

Effect of declaration or amendment

- (7) The declaration or amendment:
- (a) takes effect from the time it is made, despite subsections 12(1) and (2) of the *Legislative Instruments Act 2003*; and
 - (b) has effect according to its terms.

Declaration not to specify ADI by reference to class

- (8) Subsection 13(3) of the *Legislative Instruments Act 2003* does not apply to a declaration under subsection (1) specifying an ADI.

Note: This ensures that a declaration must specify an ADI individually, and cannot specify it by reference to a class of ADIs.

16AE Advice and information for decision on making declaration

- (1) The Minister may give APRA, ASIC or the Reserve Bank a written request for advice or information about a matter relevant to making a decision about making a declaration under section 16AD (including a matter relating to the affairs of an ADI).
- (2) As soon as reasonably practicable after being given the request, APRA, ASIC or the Reserve Bank must give the Minister the advice or information about the matter.
- (3) In making the decision, the Minister must take into account the advice and information (if any) that he or she has been given before making the decision. This does not limit what the Minister may take into account in making the decision.

Subdivision C—Payment of account-holders with declared ADI

16AF Payment of account-holders with declared ADI

- (1) An account-holder who has a protected account with a net credit balance with a declared ADI at the declaration time is entitled to be paid by APRA an amount equal to the sum of:
 - (a) that balance; and
 - (b) the interest (if any) accrued by, but not credited to, the account-holder in connection with the protected account before the declaration time;increased or decreased in accordance with the regulations to take account of clearance, within the period prescribed by the regulations, of transactions connected with the protected account and entered into before the declaration time.

Joint protected accounts

- (2) If the account mentioned in subsection (1) is held jointly by 2 or more account-holders with the declared ADI, that subsection entitles each of the account-holders to an equal share of the amount to which one of those account-holders would be entitled if it alone had the account with the declared ADI.

16AG Limit on payments to account-holder with declared ADI

- (1) Despite section 16AF, an account-holder is not entitled under that section to be paid, in connection with the protected account or protected accounts the account-holder has with a particular declared ADI at a particular time, one or more amounts totalling more than the limit prescribed by, or worked out under, the regulations.
- (2) The regulations may prescribe, or provide for working out, different limits for the purposes of subsection (1) relating to account-holders in different classes.
- (3) Despite section 16AF, if:
 - (a) the account-holder has 2 or more protected accounts with the declared ADI at that time; and

(b) subsection (1) of this section reduces the total amount to which the account-holder would otherwise be entitled under section 16AF in connection with those protected accounts; APRA may determine in writing, for each of the protected accounts, the amount (if any) of the entitlement under that section connected with the protected account (so that the total of the entitlements equals the limit prescribed by, or worked out under, the regulations for the purposes of subsection (1) of this section).

Note: Amounts may be determined by reference to a class, or more than one class, of accounts: see subsection 46(3) of the *Acts Interpretation Act 1901*.

- (4) In making the determination, the desirability of the account-holder receiving its entitlements as early as possible is to be taken into account. This does not limit the matters that may be taken into account in making a determination.

16AH Payment

Various ways of meeting entitlement

- (1) An account-holder's entitlement under this Subdivision to be paid an amount may be met:
- (a) by paying the amount to the account-holder as a single amount or in instalments determined by APRA; or
 - (b) by applying the amount, as a single amount or in instalments determined by APRA, for the account-holder's benefit, by establishing an account with an ADI on behalf of the account-holder or in another way; or
 - (c) by paying part of the amount to the account-holder and applying the rest of the amount for the account-holder's benefit.
- (2) The regulations may make provision for or in relation to the ways in which account-holders' entitlements under this Subdivision to be paid amounts may be met.

Establishment of account by APRA for meeting entitlement

- (3) APRA may establish, on behalf of an account-holder who has an entitlement under this Subdivision, an account with an ADI (except

a declared ADI) for the purposes of wholly or partly meeting the entitlement.

- (4) Subsection (3) has effect:
- (a) whether or not the account-holder consents to the establishment of the account; and
 - (b) despite any other law of the Commonwealth relating to the establishment of such an account.
- (5) If an account-holder has an entitlement under this Subdivision connected with a protected account of a kind prescribed by the regulations for the purposes of this subsection, APRA must establish an account of the same kind on behalf of the account-holder for the purposes of wholly or partly meeting the entitlement.

Act to meet entitlement is not provision of designated service

- (6) An act done by any of the following persons for the purposes of meeting an account-holder's entitlement under this Subdivision is taken, for the purposes of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, not to be the provision of a designated service by the person:
- (a) APRA;
 - (b) the Reserve Bank.

Note: One effect of subsection (6) is that the person's act does not make the person a reporting entity for the purposes of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.

Exemption from section 32 of Anti-Money Laundering Act

- (7) Section 32 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* does not apply to a designated service described in item 1 of the table in subsection 6(2) of that Act provided by an ADI as a result of the exercise of APRA's power under subsection (3) of this section (whether or not subsection (5) required APRA to exercise that power).

16AI Substitution of APRA for account-holder as ADI's creditor

- (1) When an ADI becomes a declared ADI, then, by force of this subsection, the right of an account-holder who has a protected

account with the ADI to be paid an amount by the ADI in connection with the account:

- (a) is reduced to the extent of the account-holder's entitlement under this Subdivision connected with the account; and
 - (b) to the extent of the reduction, becomes a right of APRA.
- (2) APRA may exercise or assign a right it has under paragraph (1)(b).

Note: Under section 11 of the *Australian Prudential Regulation Authority Act 1998*, APRA's property is generally held on behalf of the Commonwealth.

Subdivision D—Administration

16AJ Requiring assistance

APRA may, by written notice given to any of the following persons, require the person to give APRA such reasonable assistance in the performance of its functions, and the exercise of its powers, under this Division as is specified:

- (a) an ADI (whether or not it is a declared ADI);
- (b) an administrator appointed under subsection 13A(1) to take control of an ADI's business;
- (c) a liquidator (including a provisional liquidator) appointed in connection with the winding up, or proposed winding up, of an ADI.

Note: APRA may amend or vary the requirement in writing: see subsection 33(3) of the *Acts Interpretation Act 1901*.

16AK Obtaining information relevant to determining and paying entitlements

- (1) APRA may, by written notice given to:
- (a) an ADI (whether or not it is a declared ADI); or
 - (b) an administrator appointed under subsection 13A(1) to take control of an ADI's business; or
 - (c) a liquidator (including a provisional liquidator) appointed in connection with the winding up, or proposed winding up, of an ADI;

require the ADI, administrator or liquidator to give a specified person specified information about an account-holder relevant to one or more of the actions described in subsection (4) in a specified

way within a reasonable specified time for the person to use in taking one or more of those actions.

Note: APRA may amend or vary the requirement in writing: see subsection 33(3) of the *Acts Interpretation Act 1901*.

- (2) The person specified in the requirement must be one of the following:
- (a) APRA;
 - (b) an APRA member whose duties relate to an action described in subsection (4);
 - (c) an APRA staff member whose duties relate to an action described in subsection (4);
 - (d) a person to whom APRA has delegated a power or function under this Division that relates to an action described in subsection (4);
 - (e) a person who is an officer or employee of a person described in paragraph (d) and whose duties relate to an action described in subsection (4).
- (3) The information specified in the requirement may be or include either or both of the following:
- (a) personal information about the account-holder (if he or she is an individual);
 - (b) the tax file number (as defined in section 202A of the *Income Tax Assessment Act 1936*) of the account-holder.
- This does not limit the information that may be specified in the requirement.
- (4) The actions are as follows:
- (a) identifying an account-holder who may have an entitlement under Subdivision C;
 - (b) determining whether an account-holder has an entitlement under Subdivision C;
 - (c) determining the amount of an entitlement under Subdivision C;
 - (d) meeting an entitlement under Subdivision C;
 - (e) establishing an account under section 16AH on behalf of an account-holder with an entitlement under Subdivision C;
 - (f) making a disclosure required by section 16AT in connection with the establishment of an account under section 16AH by

APRA on behalf of an account-holder with an entitlement under Subdivision C;

- (g) assessing whether and how information could be provided by an ADI (or a liquidator of the ADI, if one is appointed) to enable the actions described in paragraphs (a), (b), (c), (d), (e) and (f) to be taken if the ADI were to become a declared ADI.

(5) Subsection (1) does not apply in relation to a foreign ADI.

(6) This section does not limit section 16AJ.

16AL Enforcing requirement for assistance or information

Requirement made of ADI—civil penalty

- (1) An ADI must comply with a requirement made of it under section 16AJ or subsection 16AK(1).

Civil penalty: 10,000 penalty units.

Requirement made of ADI—offence

- (2) An ADI commits an offence if:
 - (a) it does, or fails to do, an act; and
 - (b) the doing of the act, or the failure to do the act, results in a contravention of a requirement made of the ADI under section 16AJ or subsection 16AK(1).

Penalty: 200 penalty units.

- (3) An offence against subsection (2) is an indictable offence.

Note: Section 4K (Continuing and multiple offences) of the *Crimes Act 1914* applies to an offence against subsection (2) relating to subsection 16AK(1), so an ADI commits an offence for each day it does not comply with a requirement under that subsection (to give information within a particular time).

Requirement made of ADI—offence by officer

- (4) An officer (as defined in section 9 of the *Corporations Act 2001*) of an ADI commits an offence if:

- (a) the officer fails to take reasonable steps to ensure that the ADI complies with a requirement made of it under section 16AJ or subsection 16AK(1); and
- (b) the officer's duties include ensuring that the ADI complies with the requirement.

Penalty: 50 penalty units.

- (5) Subsection (4) does not apply to an officer who is a liquidator (including a provisional liquidator) of the ADI.

Note: A defendant bears an evidential burden in relation to the matter in subsection (5): see subsection 13.3(3) of the *Criminal Code*.

- (6) If an officer of an ADI fails to take reasonable steps to ensure that the ADI complies with a requirement made of it under subsection 16AK(1) in circumstances that give rise to the officer committing an offence against subsection (4) of this section, the officer commits an offence against that subsection in respect of:
- (a) the first day on which the offence is committed; and
 - (b) each subsequent day (if any) on which the circumstances that gave rise to the officer committing the offence continue (including the day of conviction for any such offence or any later day).

Note: This subsection does not affect the application of section 4K of the *Crimes Act 1914* to other offences against this Act (including subsection (2)) or the regulations.

Liquidator to comply with requirement made of liquidator

- (7) A liquidator (including a provisional liquidator) must comply with a requirement made of the liquidator under section 16AJ or subsection 16AK(1).

Note: Action may be taken under the *Corporations Act 2001* against a liquidator who does not comply with such a requirement.

16AM Recovery of overpayments

The regulations may make provision for and in relation to the recovery by APRA of the excess of an amount paid to, or applied for the benefit of, an account-holder purportedly to meet an entitlement of the account-holder under Subdivision C over the account-holder's entitlement (if any) under that Subdivision.

16AN APRA may delegate functions and powers under this Division

- (1) APRA may, by writing under its seal, delegate any or all of APRA's functions and powers under this Division to a person.
- (2) In performing or exercising functions or powers delegated under subsection (1), the delegate must comply with any directions given by APRA.
- (3) This section does not limit section 15 of the *Australian Prudential Regulation Authority Act 1998*.

Note: Section 15 of the *Australian Prudential Regulation Authority Act 1998*:

- (a) makes the agreement of the Chair of ASIC a condition for a delegation to an ASIC member or an ASIC staff member; and
- (b) makes the agreement of the Governor of the Reserve Bank a condition for a delegation to the Governor or Deputy Governor of the Reserve Bank or to an officer of the Reserve Bank Service.

16AO APRA's costs of administration

- (1) The costs incurred by APRA in relation to the exercise of its powers and the performance of its functions under this Division (whether by APRA or by a delegate) relating to a declared ADI are a debt due by the declared ADI to APRA.
- (2) The debt is admissible to proof against the declared ADI in the winding up of the ADI.
- (3) Subsection (1) does not apply to the amounts of entitlements under Subdivision C.

Note: APRA may be able to recover those amounts through the rights it acquires under section 16AI from the account-holder.

Subdivision E—Account-holder's claims against ADI remaining after entitlement

16AP When this Subdivision applies

This Subdivision applies if:

- (a) a court orders the winding up of an ADI that becomes a declared ADI before, on or after the order is made; and

- (b) on making the order, the court appoints a liquidator of the ADI; and
- (c) an account-holder has an entitlement under Subdivision C connected with a protected account the account-holder has with the ADI; and
- (d) after the operation of section 16AI of this Act, section 553C of the *Corporations Act 2001* and, if relevant, section 554B of that Act, there is still a debt payable by the ADI to the account-holder, or a claim of the account-holder against the ADI, based on a right to be paid an amount by the ADI in connection with the protected account.

16AQ Liquidator may admit debt or claim without normal proof

- (1) The liquidator may admit the debt or claim even if it has not been proved by the account-holder in accordance with the *Corporations Act 2001* and regulations made under that Act.
- (2) However, the liquidator must act in accordance with the regulations (if any) made for the purposes of this subsection in deciding whether to admit or reject the debt or claim, and the extent to which to admit or reject the debt or claim.

Note: This section overrides any requirements imposed on the liquidator by the *Corporations Act 2001* and regulations under that Act in relation to proof of the debt or claim and a decision whether to admit or reject the debt or claim: see section 70B of this Act.

16AR How liquidator must pay distributions to account-holder

- (1) This section applies if, in the winding up of the ADI, a distribution attributable to the protected account is payable to the account-holder and the protected account was of a kind prescribed by the regulations for the purposes of this subsection.
- (2) The liquidator must pay the distribution (so far as it is attributable to the account) into an account of the same kind that is held by the account-holder with an ADI (except a declared ADI).
- (3) If the account-holder does not hold an account of that kind, the liquidator must establish, on behalf of the account-holder, an account of that kind with an ADI (except a declared ADI) for the payment of the distribution in accordance with subsection (2).

- (4) Subsection (3) empowers the liquidator to establish the account:
 - (a) whether or not the account-holder consents to the establishment of the account; and
 - (b) despite any other law of the Commonwealth relating to the establishment of such an account.

16AS APRA may disclose relevant personal information to liquidator

Information about account-holder's entitlement

- (1) APRA may disclose to the liquidator personal information about the fact that the account-holder has an entitlement under Subdivision C, and the amount of that entitlement, for the purpose of enabling the liquidator to decide whether to admit or reject the debt or claim in whole or in part.

Information relevant to section 16AR

- (2) APRA may disclose to the liquidator personal information about the account-holder for the purpose of enabling the liquidator to determine whether subsection 16AR(2) or (3) applies and, if it does, for complying with it.

Subdivision F—Disclosure of information relating to new accounts

16AT APRA or liquidator to disclose information to ADI

- (1) This section applies if, on behalf of an account-holder with an entitlement under Subdivision C:
 - (a) APRA establishes an account with an ADI under section 16AH; or
 - (b) a liquidator establishes an account with an ADI under section 16AR.
- (2) In the circumstances prescribed by the regulations, whichever of APRA and the liquidator established the account must disclose to the ADI the information (if any) that:
 - (a) is connected with the establishment of the account; and

- (b) is prescribed by the regulations for the purposes of this paragraph.
- (3) The regulations may prescribe different information in relation to different circumstances for disclosure.
- (4) The information prescribed by the regulations may be personal information about the account-holder (if he or she is an individual). This does not limit the information that may be prescribed by the regulations.

Subdivision G—Exceptions to Part IV of the Trade Practices Act 1974

16AU Exceptions to Part IV of the *Trade Practices Act 1974*

For the purposes of subsection 51(1) of the *Trade Practices Act 1974*, the following things are specified and specifically authorised:

- (a) anything done in the exercise of powers, or performance of functions, under this Division, or regulations made for the purposes of this Division, except Subdivision E;
- (b) anything done to enable or facilitate the exercise of those powers or performance of those functions;
- (c) anything incidental to the exercise of those powers or performance of those functions.

16 After section 65A

Insert:

65B Civil penalties

Schedule 2 (Civil penalties) has effect.

17 At the end of the Act

Add:

Schedule 2—Civil penalties

Note: See section 65B.

Part 1—Contravention of a civil penalty provision

1 Federal Court may order person to pay pecuniary penalty for contravening civil penalty provision

Application for order

- (1) Within 6 years of a person contravening a civil penalty provision, APRA may apply, on behalf of the Commonwealth, to the Federal Court of Australia for an order that the person pay the Commonwealth a pecuniary penalty.

Court may order person to pay pecuniary penalty

- (2) If the Court is satisfied that the person has contravened a civil penalty provision, the Court may order the person to pay to the Commonwealth for each contravention the pecuniary penalty that the Court determines is appropriate (but not more than the relevant amount specified for the provision).

Determining amount of pecuniary penalty

- (3) In determining the pecuniary penalty, the Court must have regard to all relevant matters, including:
 - (a) the nature and extent of the contravention; and
 - (b) the nature and extent of any loss or damage suffered as a result of the contravention; and
 - (c) the circumstances in which the contravention took place; and
 - (d) whether the person has previously been found by the Court in proceedings under this Act to have engaged in any similar conduct.

Conduct contravening more than one civil penalty provision

- (4) If conduct constitutes a contravention of 2 or more civil penalty provisions, proceedings may be instituted under this Act against a person in relation to the contravention of any one or more of those provisions. However, the person is not liable to more than one pecuniary penalty under this clause in respect of the same conduct.

2 Contravening a civil penalty provision is not an offence

A contravention of a civil penalty provision is not an offence.

3 Persons involved in contravening civil penalty provision

- (1) A person must not:
 - (a) aid, abet, counsel or procure a contravention of a civil penalty provision; or
 - (b) induce (by threats, promises or otherwise) a contravention of a civil penalty provision; or
 - (c) be in any way directly or indirectly knowingly concerned in, or party to, a contravention of a civil penalty provision; or
 - (d) conspire to contravene a civil penalty provision.
- (2) This Schedule applies to a person who contravenes subclause (1) in relation to a civil penalty provision as if the person had contravened the provision.
- (3) However, if an individual contravenes subclause (1) in relation to a civil penalty provision that can be contravened only by a body corporate, subclause 1(2) applies as if the reference in that subclause to the relevant amount specified for the provision were a reference to $\frac{1}{5}$ of the relevant amount specified for the provision.

4 Recovery of a pecuniary penalty

If the Federal Court of Australia orders a person to pay a pecuniary penalty:

- (a) the penalty is payable to the Commonwealth; and
- (b) the Commonwealth may enforce the order as if it were a judgment of the Court.

5 Civil evidence and procedure rules for pecuniary penalty orders

The Federal Court of Australia must apply the rules of evidence and procedure for civil matters when hearing proceedings for a pecuniary penalty order.

Part 2—Civil penalty proceedings and criminal proceedings

6 Civil proceedings after criminal proceedings

The Federal Court of Australia must not make a pecuniary penalty order against a person for a contravention of a civil penalty provision if the person has been convicted of an offence constituted by conduct that is substantially the same as the conduct constituting the contravention.

7 Criminal proceedings during civil proceedings

- (1) Proceedings for a pecuniary penalty order against a person for a contravention of a civil penalty provision are stayed if:
 - (a) criminal proceedings are started or have already been started against the person for an offence; and
 - (b) the offence is constituted by conduct that is substantially the same as the conduct alleged to constitute the contravention.
- (2) The proceedings for the order may be resumed if the person is not convicted of the offence. Otherwise, the proceedings for the order are dismissed.

8 Criminal proceedings after civil proceedings

Criminal proceedings may be started against a person for conduct that is substantially the same as conduct constituting a contravention of a civil penalty provision regardless of whether a pecuniary penalty order has been made against the person.

9 Evidence given in proceedings for penalty not admissible in criminal proceedings

Evidence of information given or evidence of production of documents by an individual is not admissible in criminal proceedings against the individual if:

- (a) the individual previously gave the evidence or produced the documents in proceedings for a pecuniary penalty order

against the individual for a contravention of a civil penalty provision (whether or not the order was made); and

- (b) the conduct alleged to constitute the offence is substantially the same as the conduct that was claimed to constitute the contravention.

However, this does not apply to a criminal proceeding in respect of the falsity of the evidence given by the individual in the proceedings for the pecuniary penalty order.

Part 2—Amendment of the Insurance Act 1973

18 At the end of subsection 2A(2)

Add:

- ; and (f) providing for policyholders, who have valid claims connected with certain policies issued by certain general insurers that are under judicial management and that APRA believes are insolvent, to be paid by APRA the amounts to which the policyholders are entitled before they would receive payment in winding up of the general insurers.

19 Subsection 3(1)

Insert:

APRA Special Account has the same meaning as in the *Australian Prudential Regulation Authority Act 1998*.

20 Subsection 3(1)

Insert:

civil penalty provision: a subsection of this Act (or a section of this Act that is not divided into subsections) is a *civil penalty provision* if:

- (a) the words “civil penalty” and one or more amounts in penalty units are set out at the foot of the subsection (or section); or
- (b) another provision of this Act specifies that the subsection (or section) is a civil penalty provision.

21 Subsection 3(1)

Insert:

declared general insurer means a general insurer specified in a declaration under section 62ZZC as a general insurer in relation to which Division 3 of Part VC applies.

22 Subsection 3(1)

Insert:

Financial Claims Scheme Special Account has the same meaning as in the *Australian Prudential Regulation Authority Act 1998*.

23 Subsection 3(1)

Insert:

penalty unit has the meaning given by section 4AA of the *Crimes Act 1914*.

24 Subsection 3(1)

Insert:

personal information has the same meaning as in the *Privacy Act 1988*.

25 Subsection 3(1)

Insert:

protected policy means a policy other than:

- (a) a policy prescribed by the regulations as not being a protected policy; and
- (b) a policy determined under section 62ZY not to be a protected policy.

26 After Part VB

Insert:

**Part VC—Financial claims scheme for
policyholders with insolvent general
insurers**

Division 1—Preliminary

62ZW Purpose of this Part

The main purpose of this Part is to provide for a scheme that:

- (a) allows the Minister to make a declaration about a general insurer that is under judicial management and that APRA believes is insolvent; and

- (b) entitles certain persons, who have valid claims connected with certain protected policies issued by a declared general insurer, to be paid certain amounts before they would receive payment in a winding up of the general insurer; and
- (c) substitutes APRA for those persons as a creditor of the declared general insurer to the extent of the entitlements.

62ZX APRA's functions relating to this Part

APRA's functions include:

- (a) meeting entitlements under Division 3; and
- (b) preparing, and assisting the Minister to prepare, for the application of that Division in relation to general insurers; and
- (c) meeting APRA's other obligations under this Part and the regulations made for the purposes of this Part.

62ZY Determination that policies are not protected policies

APRA may determine in writing that a policy is not a protected policy if it is reasonable to conclude, from the nature of the policy and/or the circumstances in which it was issued, that the policy was issued primarily to make the policyholder entitled to a payment under this Part.

62ZZ Determination that persons do not have entitlements

The Minister may, by legislative instrument, determine that persons in a specified class do not have entitlements under this Part.

62ZZA Allowing extra time for claims

- (1) Before, on or after the day prescribed by the regulations for the purposes of subparagraph 62ZZF(1)(b)(ii), APRA may specify in writing a later day as the day on which the period for making one or more claims that may give rise to an entitlement under this Part ends.
- (2) An instrument made under subsection (1) that specifies a day in relation to a single claim identified in the instrument is not a legislative instrument.

- (3) Otherwise, an instrument made under subsection (1) is a legislative instrument.
- (4) As soon as practicable after making an instrument described in subsection (2), APRA must take the steps it considers reasonable to inform a person whom it believes could make the claim concerned of the day specified in the instrument.

6ZZB Approval of forms

APRA may approve in writing forms for the purposes of subsections 6ZZJ(1) and (3).

Division 2—Declaration of general insurer

6ZZC Declaration that Division 3 applies in relation to general insurer

- (1) The Minister may declare that Division 3 applies in relation to a specified general insurer if:
 - (a) the general insurer is under judicial management under Division 1 of Part VB; and
 - (b) APRA has advised the Minister under this Division that APRA believes that:
 - (i) the general insurer is insolvent as defined in section 95A of the *Corporations Act 2001*; or
 - (ii) the general insurer is a foreign general insurer and is unable to pay, from its assets in Australia, all its debts that are liabilities in Australia other than pre-authorisation liabilities, as and when those debts become due and payable.

Note 1: Section 116A deals with assets and liabilities in Australia.

Note 2: The declaration does not end the judicial management of the general insurer.

Declaration to specify amount for meeting entitlements

- (2) The declaration must also specify the amount (if any) that is to be credited to the Financial Claims Scheme Special Account in connection with the application of Division 3 in relation to the

declared general insurer. The amount must not be more than \$20,000,000,000.

Declaration to specify amount for administration

- (3) The declaration must also specify the amount (if any) that is to be credited to the APRA Special Account in connection with the administration of this Part in relation to the declared general insurer. The amount must not be more than \$100,000,000.

Amendment of specification of amounts

- (4) The Minister may amend a declaration made under subsection (1), but only to change the specification of an amount under subsection (2) or (3), within the limit set in that subsection.

Declaration cannot be revoked

- (5) The Minister cannot revoke a declaration made under subsection (1).

Declaration or amendment not disallowable or subject to expiry

- (6) A declaration made under subsection (1), or an amendment of the declaration, is a legislative instrument, but neither section 42 (disallowance) nor Part 6 (sunsetting) of the *Legislative Instruments Act 2003* applies to the declaration or amendment.

Effect of declaration or amendment

- (7) The declaration or amendment:
- (a) takes effect from the time it is made, despite subsections 12(1) and (2) of the *Legislative Instruments Act 2003*; and
 - (b) has effect according to its terms.

Declaration not to specify general insurer by reference to class

- (8) Subsection 13(3) of the *Legislative Instruments Act 2003* does not apply to a declaration under subsection (1) specifying a general insurer.

Note: This ensures that a declaration must specify a general insurer individually, and cannot specify it by reference to a class of general insurers.

62ZZD Advice and information for decision on making declaration

- (1) The Minister may give APRA, ASIC or the Reserve Bank of Australia a written request for advice or information about a matter relevant to making a decision about making a declaration under section 62ZZC (including a matter relating to the affairs of a general insurer).
- (2) As soon as reasonably practicable after being given the request, APRA, ASIC or the Reserve Bank of Australia must give the Minister the advice or information about the matter.
- (3) In making the decision, the Minister must take into account the advice and information that he or she has been given before making the decision. This does not limit what the Minister may take into account in making the decision.

62ZZE APRA may advise Minister of its belief of insolvency

- (1) This section applies if APRA believes that a particular general insurer:
 - (a) is insolvent as defined in section 95A of the *Corporations Act 2001*; or
 - (b) is a foreign general insurer and is unable to pay, from its assets in Australia, all its debts that are liabilities in Australia other than pre-authorisation liabilities, as and when those debts become due and payable.

Note: Section 116A deals with assets and liabilities in Australia.

- (2) APRA may give the Minister written advice of APRA's belief.

Division 3—Early payment of claims

62ZZF Entitlement to payment of claimant under protected policy

Who this section covers

- (1) This section applies to a person if:
 - (a) the person is entitled to claim under insurance cover provided under a protected policy issued by a general insurer that later became a declared general insurer (whether the entitlement to claim arises because the cover is provided to the person

under the policy or because the person is otherwise entitled to claim under the cover); and

- (b) the person makes a claim under that cover within the period:
 - (i) starting on the day prescribed by the regulations for the purposes of this subparagraph; and
 - (ii) ending on a day prescribed by the regulations for the purposes of this subparagraph or, if APRA specifies a later day, that later day; and
- (c) APRA determines under section 62ZZI that the insurer is liable to the person in respect of the claim; and
- (d) the person is not covered by a determination under section 62ZZ.

Claims worth less than \$5,000

- (2) The person is entitled to be paid by APRA an amount equal to the insurer's liability to the person in respect of the claim if APRA determines that the amount of the liability is less than \$5,000.

Note: Section 62ZZI requires APRA to determine not only whether the insurer has a liability in respect of the claim but also the amount of the liability.

Claims worth \$5,000 or more

- (3) The person is entitled to be paid by APRA an amount equal to the insurer's liability to the person in respect of the claim if APRA determines that:
 - (a) the amount of the liability is \$5,000 or more; and
 - (b) the person meets the conditions prescribed by the regulations for the purposes of this paragraph.

Note 1: Section 62ZZI requires APRA to determine not only whether the insurer has a liability in respect of the claim but also the amount of the liability.

Note 2: Section 62ZZI requires APRA to determine whether the person meets the prescribed conditions, if the person applies for the determination.

Different claim periods for different claims

- (4) To avoid doubt, regulations for the purposes of subparagraph (1)(b)(i) or (ii) may prescribe different days for the purposes of that subparagraph applying in relation to different claims or claims under different cover.

62ZZG Entitlement to payment of third party

Who this section covers

- (1) This section applies to a person if:
 - (a) APRA determines under section 62ZZJ that APRA is satisfied that section 51 of the *Insurance Contracts Act 1984* permits the person to recover an amount (the **recoverable amount**) from a general insurer because of insurance cover the insurer provided under a protected policy the insurer issued before becoming a declared general insurer; and
 - (b) the person is not covered by a determination under section 62ZZ.

Recoverable amounts less than \$5,000

- (2) The person is entitled to be paid by APRA an amount equal to the recoverable amount if APRA determines that the recoverable amount is less than \$5,000.

Note: Section 62ZZJ requires APRA to determine not only whether it is satisfied the person could recover under section 51 of the *Insurance Contracts Act 1984* but also the amount the person could recover.

Recoverable amounts of \$5,000 or more

- (3) The person is entitled to be paid by APRA an amount equal to the recoverable amount if APRA determines that:
 - (a) the recoverable amount is \$5,000 or more; and
 - (b) the person meets the conditions prescribed by the regulations for the purposes of this paragraph.

Note 1: Section 62ZZJ requires APRA to determine not only whether it is satisfied the person could recover under section 51 of the *Insurance Contracts Act 1984* but also the amount the person could recover.

Note 2: Section 62ZZJ also requires APRA to determine whether the person meets the prescribed conditions, if the person applies for the determination.

62ZZH Entitlement on basis of notionally extended cover

- (1) If the period of insurance cover provided under a protected policy issued by a general insurer includes the time when the insurer becomes a declared general insurer, sections 62ZZF, 62ZZG,
-

62ZZI and 62ZZJ apply as if the period of the cover extended for 28 days after that time, even if:

- (a) the policy is cancelled within those 28 days; or
- (b) the period of the cover would otherwise have ended before the end of those 28 days.

Note: The effects of applying sections 62ZZF and 62ZZG as if the period of cover were extended include those sections applying as if:

- (a) the entitlement to claim under that cover were correspondingly extended; and
- (b) the liability of the insurer were also extended in respect of such claims.

- (2) However, if the policyholder cancelled the policy within those 28 days, those sections apply as if the period of the cover extended only until the cancellation of the policy.

62ZZI APRA must determine insurer's liability in respect of claim

- (1) If APRA becomes aware that a person has, in the period described in paragraph 62ZZF(1)(b), made a claim under insurance cover provided under a protected policy issued by a general insurer that became a declared general insurer after the issue, APRA must determine in accordance with the policy:
 - (a) whether the insurer is liable to the person in respect of the claim; and
 - (b) the amount of that liability (if any).
- (2) The determination must be made in writing as soon as reasonably practicable after APRA becomes aware that the claim has been made.

62ZZJ Determinations APRA must make on application

Determination that person meets conditions prescribed

- (1) Subsection (2) has effect if a person applies to APRA, in the form (if any) approved by APRA for the purposes of this subsection, for a determination that the person meets the conditions prescribed by the regulations for the purposes of paragraph 62ZZF(3)(b) or 62ZZG(3)(b).

- (2) APRA must determine in writing, as soon as reasonably practicable after the application is made, whether the person meets the conditions.

Determination that person may recover amount from insurer

- (3) Subsection (4) has effect if a person applies to APRA, in the form (if any) approved by APRA for the purposes of this subsection, for a determination that APRA is satisfied that section 51 of the *Insurance Contracts Act 1984* permits the person to recover an amount from a general insurer because of insurance cover the insurer provided under a protected policy the insurer issued before becoming a declared general insurer.
- (4) APRA must determine in writing, as soon as reasonably practicable after the application is made:
- (a) whether APRA is satisfied that section 51 of the *Insurance Contracts Act 1984* permits the person to recover an amount from the general insurer because of the insurance cover; and
 - (b) what that amount (if any) is.

Giving applicant notice of determination

- (5) As soon as reasonably practicable after making a determination under subsection (2) or (4), APRA must give the applicant a copy of the determination.

6ZZK Payment

- (1) A person's entitlement under this Division to be paid an amount may be met:
- (a) by paying the amount to the person as a single amount or in instalments determined by APRA; or
 - (b) by applying the amount, as a single amount or in instalments determined by APRA, for the person's benefit; or
 - (c) by paying part of the amount to the person and applying the rest of the amount for the person's benefit.
- (2) The regulations may make provision for or in relation to the ways in which persons' entitlements under this Division to be paid amounts may be met.

62ZZL Substitution of APRA as insurer's creditor

- (1) When a person's entitlement arises under this Division, the rights the person had against the general insurer in relation to the protected policy cease to be rights of the person and become rights of APRA, by force of this subsection.

Note 1: A person's entitlement arises under this Division when all of the relevant conditions in section 62ZZF or 62ZZG are met. This will generally happen at the last time APRA makes a relevant determination under section 62ZZI or 62ZZJ.

Note 2: APRA's right against the general insurer has the same priority in the winding up of the general insurer as it would have had if it had continued to be a right of the person.

- (2) APRA may exercise or assign a right it has under subsection (1).

Note: Under section 11 of the *Australian Prudential Regulation Authority Act 1998*, APRA's property is generally held on behalf of the Commonwealth.

62ZZM Meeting of entitlement taken to be payment by insurer

- (1) When an amount of a person's entitlement under this Division connected with a general insurer and a protected policy is met, the person is taken, for the purposes described in subsection (2), to have been paid the amount by the general insurer.

- (2) The purposes are:

- (a) the purposes of subrogation of the general insurer in connection with the protected policy; and
- (b) the purposes (if any) prescribed by the regulations for the purposes of this paragraph.

- (3) To avoid doubt, subsection (1) does not affect the rights APRA has under section 62ZZL against the general insurer.

Division 4—Administration

62ZZN APRA to try to ensure awareness of making of claims

APRA must take all reasonable steps to ensure that it is made aware, as soon as practicable, of:

- (a) the making of a claim described in section 62ZZI within the period described in paragraph 62ZZF(1)(b); and

(b) the time of the making of the claim.

Note: APRA might meet this requirement by requiring under section 62ZZP the general insurer concerned, or the liquidator of the general insurer, to inform APRA of the making of such a claim.

62ZZO Requiring assistance

APRA may, by written notice given to either of the following persons, require the person to give APRA such reasonable assistance in the performance of its functions, and the exercise of its powers, under this Part as is specified:

- (a) a general insurer (whether or not it is a declared general insurer);
- (b) a liquidator (including a provisional liquidator) appointed in connection with the winding up, or proposed winding up, of a general insurer.

Note: APRA may amend or vary the requirement in writing: see subsection 33(3) of the *Acts Interpretation Act 1901*.

62ZZP Obtaining information relevant to determining and paying entitlements

(1) APRA may, by written notice given to:

- (a) a general insurer (whether or not it is a declared general insurer); or
- (b) a liquidator (including a provisional liquidator) appointed in connection with the winding up, or proposed winding up, of a general insurer;

require the general insurer or liquidator to give a specified person specified information relevant to one or more of the actions described in subsection (4) in a specified way within a reasonable specified time for the person to use in taking one or more of those actions.

(2) The person specified in the requirement must be one of the following:

- (a) APRA;
- (b) an APRA member whose duties relate to an action described in subsection (4);
- (c) an APRA staff member whose duties relate to an action described in subsection (4);

- (d) a person to whom APRA has delegated a power or function under this Part that relates to an action described in subsection (4);
 - (e) a person who is an officer or employee of a person described in paragraph (d) and whose duties relate to an action described in subsection (4).
- (3) The information specified in the requirement may be or include personal information. This does not limit the information that may be specified in the requirement.
- (4) The actions are as follows:
- (a) identifying a person who may have an entitlement under Division 3;
 - (b) determining whether a person has an entitlement under Division 3 (including making a determination under one or both of sections 6ZZI and 6ZZJ);
 - (c) determining the amount of an entitlement under Division 3;
 - (d) meeting an entitlement under Division 3;
 - (e) assessing whether and how information could be provided by a general insurer (or a liquidator of the general insurer, if one is appointed) to enable the actions described in paragraphs (a), (b), (c) and (d) to be taken if the general insurer were to become a declared general insurer.

6ZZQ Enforcing requirement to give information

Requirement made of general insurer—civil penalty

- (1) A general insurer must comply with a requirement made of it under section 6ZZO or subsection 6ZZP(1).

Civil penalty: 10,000 penalty units.

Requirement made of general insurer—offence

- (2) A general insurer commits an offence if:
- (a) it does, or fails to do, an act; and
 - (b) the doing of the act, or the failure to do the act, results in a contravention of a requirement made of the general insurer under section 6ZZO or subsection 6ZZP(1).

Penalty: 200 penalty units.

- (3) An offence against subsection (2) is an indictable offence.

Note: Section 4K (Continuing and multiple offences) of the *Crimes Act 1914* applies to an offence against subsection (2), so a general insurer commits an offence for each day it does not comply with a requirement under subsection 6ZZP(1) (to give information within a particular time).

Requirement made of general insurer—offence by officer

- (4) An officer (as defined in section 9 of the *Corporations Act 2001*) of a general insurer commits an offence if:
- (a) the officer fails to take reasonable steps to ensure that the general insurer complies with a requirement made of it under section 6ZZO or subsection 6ZZP(1); and
 - (b) the officer's duties include ensuring that the general insurer complies with the requirement.

Penalty: 50 penalty units.

- (5) Subsection (4) does not apply to an officer who is a liquidator (including a provisional liquidator) of the general insurer.

Note: A defendant bears an evidential burden in relation to the matter in subsection (5): see subsection 13.3(3) of the *Criminal Code*.

- (6) If an officer of a general insurer fails to take reasonable steps to ensure that the general insurer complies with a requirement made of it under subsection 6ZZP(1) in circumstances that give rise to the officer committing an offence against subsection (4) of this section, the officer commits an offence against that subsection in respect of:
- (a) the first day on which the offence is committed; and
 - (b) each subsequent day (if any) on which the circumstances that gave rise to the officer committing the offence continue (including the day of conviction for any such offence or any later day).

Note: This subsection does not affect the application of section 4K of the *Crimes Act 1914* to other offences against this Act (including subsection (2)) or the regulations.

Liquidator to comply with requirement made of liquidator

- (7) A liquidator (including a provisional liquidator) must comply with a requirement made of the liquidator under section 62ZZO or subsection 62ZZP(1).

Note: Action may be taken under the *Corporations Act 2001* against a liquidator who does not comply with such a requirement.

62ZZR Obtaining further information from claimant or applicant

- (1) If section 62ZZI or 62ZZJ requires a determination to be made because of the making of a claim or application but there is insufficient information to make the determination:
- (a) APRA may request the claimant or applicant to give a specified person, in a specified way within a reasonable specified time, specified information relevant to the making of the determination, for the person to use in making the determination; and
 - (b) the determination need not be made until after the information is given as requested.
- (2) The person specified in the request must be one of the following:
- (a) APRA;
 - (b) an APRA member whose duties relate to the making of the determination;
 - (c) an APRA staff member whose duties relate to the making of the determination;
 - (d) a person to whom APRA has delegated the function of making the determination;
 - (e) a person who is an officer or employee of a person described in paragraph (d) and whose duties relate to the function of making the determination.
- (3) The information specified in the request may be or include personal information. This does not limit the information that may be specified in the request.

62ZZS Recovery of overpayments

The regulations may make provision for and in relation to the recovery by APRA of the excess of an amount paid to, or applied for the benefit of, a person purportedly to meet an entitlement of

the person under Division 3 over the person's entitlement (if any) under that Division.

6ZZT APRA may delegate functions and powers under this Part

- (1) APRA may, by writing under its seal, delegate any or all of APRA's functions and powers under this Part to a person.
- (2) In performing or exercising functions or powers delegated under subsection (1), the delegate must comply with any directions given by APRA.
- (3) This section does not limit section 15 of the *Australian Prudential Regulation Authority Act 1998*.

Note: Section 15 of the *Australian Prudential Regulation Authority Act 1998*:

- (a) makes the agreement of the Chair of ASIC a condition for a delegation to an ASIC member or an ASIC staff member; and
- (b) makes the agreement of the Governor of the Reserve Bank a condition for a delegation to the Governor or Deputy Governor of the Reserve Bank or to an officer of the Reserve Bank Service.

6ZZU APRA's costs of administration

- (1) The costs incurred by APRA in relation to the exercise of its powers and the performance of its functions under this Part (whether by APRA or by a delegate) relating to a declared general insurer are a debt due by the declared general insurer to APRA.
- (2) The debt is admissible to proof against the declared general insurer in the winding up of the general insurer.
- (3) The debt has the same priority in the winding up of the declared general insurer as a claim in respect of a policy issued by the insurer.
- (4) Subsection (1) does not apply to the amounts of entitlements under Division 3.

Note: APRA may be able to recover those amounts through the rights it acquires under section 6ZZL from the person.

Division 5—Exceptions to Part IV of the Trade Practices Act 1974

6ZZV Exceptions to Part IV of the *Trade Practices Act 1974*

For the purposes of subsection 51(1) of the *Trade Practices Act 1974*, the following things are specified and specifically authorised:

- (a) anything done in the exercise of powers, or performance of functions, under this Part, or regulations made for the purposes of this Part;
- (b) anything done to enable or facilitate the exercise of those powers or performance of those functions;
- (c) anything incidental to the exercise of those powers or performance of those functions.

27 Subsection 116A(1)

Omit “and 62M”, substitute “, 62M, 62ZZC and 62ZZE”.

28 At the end of subsection 116A(1)

Add:

Note 3: Sections 62ZZC and 62ZZE are concerned with APRA believing a foreign general insurer is unable to pay, from its assets in Australia, all its debts that are liabilities in Australia other than pre-authorisation liabilities, as and when those debts become due and payable.

29 Subsection 116A(2)

After “62M”, insert “, 62ZZC, 62ZZE”.

30 Subsection 116A(3)

Omit “and 62M”, substitute “, 62M, 62ZZC and 62ZZE”.

31 Subsection 116A(4)

After “62M”, insert “, 62ZZC, 62ZZE”.

32 Subsection 116A(5)

Omit “and 62M”, substitute “, 62M, 62ZZC and 62ZZE”.

33 After section 129D

Insert:

129E Civil penalties

Schedule 1 (Civil penalties) has effect.

34 At the end of the Act

Add:

Schedule 1—Civil penalties

Note: See section 129E.

Part 1—Contravention of a civil penalty provision

1 Federal Court may order person to pay pecuniary penalty for contravening civil penalty provision

Application for order

- (1) Within 6 years of a person contravening a civil penalty provision, APRA may apply, on behalf of the Commonwealth, to the Federal Court for an order that the person pay the Commonwealth a pecuniary penalty.

Court may order person to pay pecuniary penalty

- (2) If the Court is satisfied that the person has contravened a civil penalty provision, the Court may order the person to pay to the Commonwealth for each contravention the pecuniary penalty that the Court determines is appropriate (but not more than the relevant amount specified for the provision).

Determining amount of pecuniary penalty

- (3) In determining the pecuniary penalty, the Court must have regard to all relevant matters, including:
 - (a) the nature and extent of the contravention; and
 - (b) the nature and extent of any loss or damage suffered as a result of the contravention; and

- (c) the circumstances in which the contravention took place; and
- (d) whether the person has previously been found by the Court in proceedings under this Act to have engaged in any similar conduct.

Conduct contravening more than one civil penalty provision

- (4) If conduct constitutes a contravention of 2 or more civil penalty provisions, proceedings may be instituted under this Act against a person in relation to the contravention of any one or more of those provisions. However, the person is not liable to more than one pecuniary penalty under this clause in respect of the same conduct.

2 Contravening a civil penalty provision is not an offence

A contravention of a civil penalty provision is not an offence.

3 Persons involved in contravening civil penalty provision

- (1) A person must not:
 - (a) aid, abet, counsel or procure a contravention of a civil penalty provision; or
 - (b) induce (by threats, promises or otherwise) a contravention of a civil penalty provision; or
 - (c) be in any way directly or indirectly knowingly concerned in, or party to, a contravention of a civil penalty provision; or
 - (d) conspire to contravene a civil penalty provision.
- (2) This Schedule applies to a person who contravenes subclause (1) in relation to a civil penalty provision as if the person had contravened the provision.
- (3) However, if an individual contravenes subclause (1) in relation to a civil penalty provision that can be contravened only by a body corporate, subclause 1(2) applies as if the reference in that subclause to the relevant amount specified for the provision were a reference to $\frac{1}{5}$ of the relevant amount specified for the provision.

4 Recovery of a pecuniary penalty

If the Federal Court orders a person to pay a pecuniary penalty:

- (a) the penalty is payable to the Commonwealth; and
-

- (b) the Commonwealth may enforce the order as if it were a judgment of the Court.

5 Civil evidence and procedure rules for pecuniary penalty orders

The Federal Court must apply the rules of evidence and procedure for civil matters when hearing proceedings for a pecuniary penalty order.

Part 2—Civil penalty proceedings and criminal proceedings

6 Civil proceedings after criminal proceedings

The Federal Court must not make a pecuniary penalty order against a person for a contravention of a civil penalty provision if the person has been convicted of an offence constituted by conduct that is substantially the same as the conduct constituting the contravention.

7 Criminal proceedings during civil proceedings

- (1) Proceedings for a pecuniary penalty order against a person for a contravention of a civil penalty provision are stayed if:
 - (a) criminal proceedings are started or have already been started against the person for an offence; and
 - (b) the offence is constituted by conduct that is substantially the same as the conduct alleged to constitute the contravention.
- (2) The proceedings for the order may be resumed if the person is not convicted of the offence. Otherwise, the proceedings for the order are dismissed.

8 Criminal proceedings after civil proceedings

Criminal proceedings may be started against a person for conduct that is substantially the same as conduct constituting a contravention of a civil penalty provision regardless of whether a pecuniary penalty order has been made against the person.

9 Evidence given in proceedings for penalty not admissible in criminal proceedings

Evidence of information given or evidence of production of documents by an individual is not admissible in criminal proceedings against the individual if:

- (a) the individual previously gave the evidence or produced the documents in proceedings for a pecuniary penalty order against the individual for a contravention of a civil penalty provision (whether or not the order was made); and
- (b) the conduct alleged to constitute the offence is substantially the same as the conduct that was claimed to constitute the contravention.

However, this does not apply to a criminal proceeding in respect of the falsity of the evidence given by the individual in the proceedings for the pecuniary penalty order.

Part 3—Amendment of the Australian Prudential Regulation Authority Act 1998

35 Subsection 3(1) (definition of *Account*)

Repeal the definition.

36 Subsection 3(1)

Insert:

APRA Special Account means the Australian Prudential Regulation Authority Special Account established by section 52.

37 Subsection 3(1)

Insert:

Financial Claims Scheme Special Account means the Financial Claims Scheme Special Account established by section 54A.

38 Subsection 8(1)

Repeal the subsection, substitute:

- (1) APRA exists for the following purposes:
 - (a) regulating bodies in the financial sector in accordance with other laws of the Commonwealth that provide for prudential regulation or for retirement income standards;
 - (b) administering the financial claims schemes provided for in the *Banking Act 1959* and the *Insurance Act 1973*;
 - (c) developing the administrative practices and procedures to be applied in performing that regulatory role and administration.

39 Before section 50

Insert:

Division 1—APRA’s finances and the APRA Special Account

40 Section 50

Omit “the Account” (wherever occurring), substitute “the APRA Special Account”.

Note: The heading to subsection 50(2) is altered by omitting “*Account*” and substituting “*APRA Special Account*”.

41 Subsection 50(6) (at the end of the definition of *levy*)

Add “, the *Financial Claims Scheme (ADIs) Levy Act 2008* or the *Financial Claims Scheme (General Insurers) Levy Act 2008*”.

42 Section 53

Before “There”, insert “(1)”.

Note: The heading to section 53 is altered by omitting “**the Account**” and substituting “**the APRA Special Account**”.

43 Section 53

Omit “the Account” (wherever occurring), substitute “the APRA Special Account”.

44 At the end of paragraph 53(d)

Add “except Part 3A of the *Financial Institutions Supervisory Levies Collection Act 1998*”.

45 Section 53 (note)

Repeal the note.

46 At the end of section 53

Add:

; (e) an amount specified in a declaration under section 16AD of the *Banking Act 1959* or section 62ZZC of the *Insurance Act 1973* as an amount to be credited to the APRA Special Account.

Note: An Appropriation Act may contain a provision to the effect that, if any of the purposes of a Special Account is a purpose that is covered by an item in the Appropriation Act (whether or not the item expressly refers to the Special Account), then amounts may be debited against the appropriation for that item and credited to that Special Account.

(2) To avoid doubt, if:

(a) the amount specified in a declaration described in paragraph (1)(e) is credited to the APRA Special Account;
and

(b) the declaration is later amended so as to increase the amount; only the increase, and not the whole of the increased amount, is to be credited to the Account as a result of the amendment.

Note: Crediting the whole of the increased amount to the Account would lead to double-counting of the amount specified in the declaration before the amendment.

47 Subsections 54(1) and (2)

Omit “the Account”, substitute “the APRA Special Account”.

Note: The heading to section 54 is altered by omitting “**the Account**” and substituting “**the APRA Special Account**”.

48 At the end of section 54

Add:

(3) However, amounts standing to the credit of the APRA Special Account must not be debited for a purpose described in section 54C (Purposes of the Financial Claims Scheme Special Account).

Note: APRA’s administrative costs associated with its functions and powers under Subdivision C of Division 2AA of Part II of the *Banking Act 1959* or Division 3 of Part VC of the *Insurance Act 1973* can be paid from the APRA Special Account, but the entitlements under those provisions can be paid only from the Financial Claims Scheme Special Account.

(4) If a declaration under section 16AD of the *Banking Act 1959* or section 62ZZC of the *Insurance Act 1973* specifying an amount to be credited to the APRA Special Account is amended so as to reduce the amount, an amount equal to the reduction must be debited from the Account.

49 After section 54

Insert:

Division 2—Financial Claims Scheme Special Account and related borrowing

Subdivision A—Financial Claims Scheme Special Account

54A Financial Claims Scheme Special Account

- (1) The Financial Claims Scheme Special Account is established by this section.
- (2) The Account is a Special Account for the purposes of the *Financial Management and Accountability Act 1997*.

54B Credits to the Financial Claims Scheme Special Account

- (1) There must be credited to the Account amounts equal to the following:
 - (a) an amount specified in a declaration under section 16AD of the *Banking Act 1959* or section 62ZZC of the *Insurance Act 1973* as an amount to be credited to the Financial Claims Scheme Special Account;
 - (b) an amount borrowed under this Division.
- (2) To avoid doubt, if:
 - (a) the amount specified in a declaration described in paragraph (1)(a) is credited to the Financial Claims Scheme Special Account; and
 - (b) the declaration is later amended so as to increase the amount; only the increase, and not the whole of the increased amount, is to be credited to the Account as a result of the amendment.

Note: Crediting the whole of the increased amount to the Account would lead to double-counting of the amount specified in the declaration before the amendment.

54C Purposes of the Financial Claims Scheme Special Account

The purposes of the Financial Claims Scheme Special Account are as follows:

- (a) APRA:
 - (i) meeting account-holders' entitlements under Subdivision C (Payment of account-holders with

declared ADI) of Division 2AA of Part II of the *Banking Act 1959*; or

- (ii) paying APRA's agents or delegates amounts equal to the entitlements the agents or delegates meet on APRA's behalf or in the performance of APRA's delegated functions;
- (b) APRA:
- (i) meeting persons' entitlements under Division 3 (Early payment of claims) of Part VC of the *Insurance Act 1973*; or
 - (ii) paying APRA's agents or delegates amounts equal to the entitlements the agents or delegates meet on APRA's behalf or in the performance of APRA's delegated functions;
- (c) repayment of principal under a borrowing under this Division;
- (d) payment of interest and other costs connected with a borrowing under this Division.

Note: See section 21 of the *Financial Management and Accountability Act 1997* (debits from Special Accounts).

54D Debits to reflect reduced amounts specified in declarations

If a declaration under section 16AD of the *Banking Act 1959* or section 62ZZC of the *Insurance Act 1973* specifying an amount to be credited to the Financial Claims Scheme Special Account is amended so as to reduce the amount, an amount equal to the reduction must be debited from the Account.

Subdivision B—Borrowing for payments from the Financial Claims Scheme Special Account

54E Borrowing

- (1) With the Finance Minister's written approval, APRA may, on behalf of the Commonwealth, borrow money on terms and conditions specified in, or consistent with, the approval.
 - (2) However, the borrowing must not:
 - (a) be of an amount greater than the sum of the amounts specified in declarations under either section 16AD of the
-

Banking Act 1959 or section 62ZZC of the *Insurance Act 1973* as amounts that are to be credited to the Financial Claims Scheme Special Account; or

- (b) be for a period longer than 12 months.
- (3) If an amount is borrowed under this section in connection with a declaration described in paragraph (2)(a), the declaration has effect for future applications of this section as if the amount specified in the declaration were reduced by the amount previously borrowed in connection with the declaration.
- (4) APRA must not borrow money except under this section.
- (5) The Finance Minister may delegate, in writing, to an SES employee or acting SES employee in the Department that is administered by the Finance Minister, the Finance Minister's power of approval for the purposes of subsection (1).
- (6) In this section:

borrow includes raise money or obtain credit, whether by dealing in securities or otherwise, but does not include obtain credit in a transaction forming part of the day-to-day operations of APRA.

Finance Minister means the Minister who administers the *Financial Management and Accountability Act 1997*.

Division 3—Taxation of APRA

50 At the end of paragraph 59(2)(a)

Add:

- (iii) the operation of Division 2AA (Financial claims scheme for account-holders with insolvent ADIs) of Part II of the *Banking Act 1959*;

51 After paragraph 59(2)(a)

Insert:

- (aa) information on the operation of Part VC (Financial claims scheme for policyholders with insolvent general insurers) of the *Insurance Act 1973*;

52 Subsection 59(3)

Schedule 1 Financial Claims Scheme

Part 3 Amendment of the Australian Prudential Regulation Authority Act 1998

Omit “Paragraph (2)(a) does”, substitute “Subparagraphs (2)(a)(i) and (ii) do”.

Part 4—Consequential amendments

Administrative Decisions (Judicial Review) Act 1977

53 After paragraph (hb) of Schedule 1

Insert:

- (hc) decisions under Division 3 of Part VC of the *Insurance Act 1973*, except so far as they relate to either of the following matters:
 - (i) whether persons are covered by determinations under section 6ZZZ of that Act;
 - (ii) determinations under subsection 6ZZJ(2) of that Act;
- (hd) decisions under Subdivision C of Division 2AA of Part II of the *Banking Act 1959*, except so far as they relate to whether account-holders have protected accounts with ADIs;

Corporations Act 2001

54 Subsection 1292(2)

After “ASIC”, insert “or APRA”.

Financial Institutions Supervisory Levies Collection Act 1998

55 Part 2 (heading)

Repeal the heading, substitute:

Part 2—Supervisory levies

56 Part 3 (heading)

Repeal the heading, substitute:

Part 3—Superannuation (financial assistance funding) levy

57 After Part 3

Insert:

Part 3A—Financial claims scheme levies

26A Definitions

In this Part:

late payment penalty means penalty payable under section 26D.

levy means:

- (a) levy imposed by regulations under the *Financial Claims Scheme (ADIs) Levy Act 2008*; or
- (b) levy imposed by regulations under the *Financial Claims Scheme (General Insurers) Levy Act 2008*.

levy month means one of the 12 months of the calendar year.

26B Liability to levy

- (1) An ADI is liable to pay a levy imposed on the ADI's liabilities to its depositors.
- (2) A general insurer is liable to pay a levy imposed on the gross premiums received by the general insurer.

26C When levy due for payment

- (1) A levy payable by an ADI or a general insurer is due and payable on the date specified in the regulations imposing the levy.
- (2) The date specified must not be earlier than the 28th day after the day on which the regulation imposing the levy took effect.
- (3) However, APRA may, by written notice given to the ADI or general insurer before, on or after the day on which levy would be due and payable apart from this subsection, specify a later day as

the day on which the levy is due and payable. The notice has effect, and is taken always to have had effect, according to its terms.

Note: The notice may affect whether and when the ADI or general insurer is liable to pay late payment penalty.

26D Late payment penalty

- (1) If any levy payable by an ADI or general insurer remains unpaid at the start of a levy month after the levy became due for payment, the ADI or general insurer is liable to pay the Commonwealth, for that levy month, a penalty worked out using the formula:

$$\text{Amount of the levy remaining} \\ \text{unpaid at the start of the levy month} \times \frac{0.2}{12}$$

- (2) Late payment penalty for a levy month is due and payable at the end of the levy month.
- (3) However, APRA may, by written notice given to the ADI or general insurer before, on or after the day on which late payment penalty would be due and payable apart from this subsection, specify a later day as the day on which the late payment penalty is due and payable. The notice has effect, and is taken always to have had effect, according to its terms.

26E Payment of levy and late payment penalty

Levy and late payment penalty are payable to APRA on behalf of the Commonwealth.

26F Waiver of levy and late payment penalty

On behalf of the Commonwealth, APRA may waive the whole or a part of an amount of levy or late payment penalty.

26G Recovery of levy and late payment penalty

- (1) The following amounts may be recovered by the Commonwealth as debts due to the Commonwealth:
 - (a) levy that is due and payable;
 - (b) late payment penalty that is due and payable.

- (2) APRA may bring proceedings in the name of the Commonwealth (as its agent) for the recovery of a debt due to the Commonwealth as described in subsection (1).

26H Exempting laws ineffective

- (1) A law made before the commencement of this section does not exempt an ADI or general insurer from liability to pay levy.
- (2) A law made on or after the commencement of this section purporting to exempt an ADI or general insurer from liability to pay taxes under laws of the Commonwealth that would otherwise include levy does not exempt the ADI or general insurer from liability to pay levy unless the exemption expressly refers to levy under the Act under which the levy is imposed.

Income Tax Assessment Act 1936

58 At the end of section 202

Add:

- ; and (q) to facilitate the administration of Division 2AA of Part II of the *Banking Act 1959*.

Reserve Bank Act 1959

59 Subsection 79A(2)

After “2001”, insert “, section 62ZZD of the *Insurance Act 1973*”.

Taxation Administration Act 1953

60 Paragraphs 8WB(1A)(a) and (b)

Omit “or (o)”, substitute “, (o) or (q)”.

Part 5—Application and transitional provisions

61 Application—declaration of ADIs and general insurers

Subsection 16AD(1) of the *Banking Act 1959* permits the Minister to make a declaration on or after the commencement of the subsection if the condition in the subsection for making the declaration is met at any time before or on the making of the declaration (whether that time is before, on or after the commencement of the subsection).

62 Transitional—Product Disclosure Statements

Despite Chapter 7 of the *Corporations Act 2001*, a Product Disclosure Statement (as defined in that Chapter) given within 18 months after the commencement of this Schedule need not contain information relating to Division 2AA of Part II of the *Banking Act 1959* or Part VC of the *Insurance Act 1973*.

Schedule 2—Other measures: banking

Banking Act 1959

1 Subsection 5(1)

Insert:

external administrator means any of the following:

- (a) a liquidator or provisional liquidator;
- (b) a receiver, manager, managing controller, receiver and manager or other controller (other than an ADI statutory manager);
- (c) a voluntary administrator or administrator of a deed of a company arrangement or a scheme manager.

Expressions used in this definition have the same meanings as they have in the *Corporations Act 2001*.

2 Subsection 5(1)

Insert:

Finance Minister means the Minister who administers the *Financial Management and Accountability Act 1997*.

3 Subsection 5(1)

Insert:

Financial System Stability Special Account means the Financial System Stability Special Account established by section 70E.

4 Subsection 11CD(1)

Repeal the subsection, substitute:

- (1) This section applies if an ADI, authorised NOHC or subsidiary of an ADI or authorised NOHC is party to a contract, whether the proper law of the contract is Australian law (including the law of a State or Territory) or law of a foreign country (including the law of part of a foreign country).
 - (1A) The fact that the ADI or authorised NOHC is subject to a direction by APRA under Subdivision A or B does not allow the contract, or
-

a party to the contract, other than the ADI, NOHC or subsidiary, to do any of the following:

- (a) deny any obligations under that contract;
- (b) accelerate any debt under that contract;
- (c) close out any transaction relating to that contract.

This subsection has effect subject to subsections (2) and (3).

5 Subsection 11CD(2)

Omit “an ADI or an authorised NOHC, or a subsidiary of an ADI or of an authorised NOHC, is prevented from fulfilling its obligations under a”, substitute “the ADI, NOHC or subsidiary is prevented from fulfilling its obligations under the”.

6 Application

The amendments of section 11CD of the *Banking Act 1959* made by this Schedule apply to contracts made after the commencement of this Schedule.

7 Paragraph 13A(1)(b)

Repeal the paragraph, substitute:

- (b) APRA considers that, in the absence of external support:
 - (i) the ADI may become unable to meet its obligations; or
 - (ii) the ADI may suspend payment; or
 - (iii) it is likely that the ADI will be unable to carry on banking business in Australia consistently with the interests of its depositors and financial system stability in Australia; or

8 After subsection 13A(1)

Insert:

- (1A) The regulations may specify that a particular form of support for an ADI is not to be considered external support for the purposes of paragraph (1)(b).

9 After section 13B

Insert:

13BA Start of control of ADI's business by ADI statutory manager

- (1) After the decision that an ADI statutory manager will take control of an ADI's business is made, APRA must give the ADI written notice that the ADI statutory manager will take, or is taking, control of the business.

Note: Subsections 15A(4) and 16A(3) also require APRA to give notice of the taking of control.

- (2) An ADI statutory manager takes control of an ADI's business:
- (a) at the time specified in a notice under this section as the time when the ADI statutory manager takes control of the business (which must not be earlier than the notice is given); or
 - (b) if a notice under this section does not specify a time as the time when the ADI statutory manager takes control of the business—at the time the notice is given.
- (3) A notice under subsection (1) is not a legislative instrument.

10 Application

Section 13BA of the *Banking Act 1959* applies in relation to decisions made on or after the commencement of that section that an ADI statutory manager will take control of an ADI's business.

11 After subsection 14A(5)

Insert:

ADI statutory manager's powers to alter ADI's constitution etc.

- (5A) An ADI statutory manager may, if the ADI concerned is registered under the *Corporations Act 2001*, alter the ADI's constitution, rules or other arrangements for governance if the alteration:
- (a) is necessary or convenient for enabling or facilitating the performance of the ADI statutory manager's functions and duties, or the exercise of the ADI statutory manager's other powers, under this Division in relation to the ADI; and
 - (b) promotes:
 - (i) the protection of depositors of the ADI; and
 - (ii) financial system stability in Australia.
- (5B) An ADI statutory manager may do an act under subsection (5A) despite:
-

- (a) the *Corporations Act 2001*; and
- (b) the ADI's constitution; and
- (c) any contract or arrangement to which the ADI is party; and
- (d) any listing rules (as defined in section 761A of the *Corporations Act 2001*) of a financial market (as defined in that section) in whose official list the ADI is included.

12 After section 14A

Insert:

14AA ADI statutory manager's additional powers to facilitate recapitalisation

Powers

- (1) An ADI statutory manager of an ADI that is a company that has a share capital and is registered under the *Corporations Act 2001* may do one or more of the following acts on terms determined by the ADI statutory manager:
 - (a) issue shares, or rights to acquire shares, in the company;
 - (b) cancel shares, or rights to acquire shares, in the company;
 - (c) reduce the company's share capital by cancelling any paid-up share capital that is not represented by available assets;
 - (d) sell shares, or rights to acquire shares, in the company;
 - (e) vary or cancel rights or restrictions attached to shares in a class of shares in the company.

Note: Before doing such an act, the ADI statutory manager will usually need to get and consider a report on the fair value of each share or right concerned: see section 14AB.

Giving company members notice of exercise of powers

- (2) As soon as practicable after doing an act described in paragraph (1)(a), (b), (c) or (e) or subsection (3), the ADI statutory manager must give written notice to the persons who were members (under section 231 of the *Corporations Act 2001*) of the company just before the act, identifying the act and explaining its effect on their interests as members.

- (3) One of the acts to which subsection (2) relates is the offering of shares, or rights to acquire shares, in the company for sale under paragraph (1)(d).

Exercise of powers despite other laws etc.

- (4) An ADI statutory manager may do an act under subsection (1) despite:
- (a) the *Corporations Act 2001*; and
 - (b) the company's constitution; and
 - (c) any contract or arrangement to which the company is party; and
 - (d) any listing rules (as defined in section 761A of the *Corporations Act 2001*) of a financial market (as defined in that section) in whose official list the company is included.

14AB Considering report before acting under section 14AA

Getting and considering report on fair value of shares or rights

- (1) Before determining terms for an act under subsection 14AA(1), the ADI statutory manager must:
- (a) obtain a report meeting the requirements in subsection (2) of this section on the fair value of the shares or rights concerned from an expert who is not an associate of the ADI statutory manager, or of the company, under Division 2 of Part 1.2 of the *Corporations Act 2001*; and
 - (b) consider the report;
- unless APRA determines under subsection (8) that this subsection does not apply in relation to that act relating to those shares or rights.

Content of report

- (2) The report must set out:
- (a) the amount that is, in the expert's opinion, the fair value for each share or right concerned; and
 - (b) the reasons for forming the opinion; and
 - (c) any relationship between the expert and any of the following persons:
 - (i) the ADI statutory manager;

- (ii) a person who is an associate of the ADI statutory manager under Division 2 of Part 1.2 of the *Corporations Act 2001*;
- (iii) the ADI;
- (iv) a person who is an associate of the ADI under Division 2 of Part 1.2 of the *Corporations Act 2001*; including any circumstances in which the expert gives them advice, or acts on their behalf, in the proper performance of the functions attaching to the expert's professional capacity or business relationship with them; and
- (d) any financial or other interest of the expert that could reasonably be regarded as being capable of affecting the expert's ability to give an unbiased opinion in relation to the matter being reported on.

Determining fair value of shares

- (3) In determining for the purposes of paragraph (2)(a) the amount that is, in the expert's opinion, the fair value for each share concerned, the expert must:
 - (a) first, assess the value of the company as a whole, in accordance with the assumptions (if any) notified to the expert by the Minister for the valuation of the company; and
 - (b) then allocate that value among the classes of shares in the company that either have been issued or that the ADI statutory manager proposes to issue (taking into account the relative financial risk, and voting and distribution rights, of the classes); and
 - (c) then allocate the value of each class pro rata among the shares in that class that either have been issued or that the ADI statutory manager proposes to issue (without allowing a premium or applying a discount for particular shares in that class).

Assumptions for valuation of company

- (4) The Minister may give the expert written notice of assumptions for the valuation of the company. The Minister may, by further written notice given to the expert, revoke, but not vary, notice of the assumptions. A notice under this subsection is not a legislative instrument.

Determining fair value of rights

- (5) In determining for the purposes of paragraph (2)(a) the amount that is, in the expert's opinion, the fair value for each right concerned, the expert must act in accordance with the assumptions (if any) notified to the expert by the Minister for the valuation of the right.

Assumptions for valuation of rights

- (6) The Minister may give the expert written notice of assumptions for the valuation of the rights concerned. The Minister may, by further written notice given to the expert, revoke, but not vary, notice of the assumptions. A notice under this subsection is not a legislative instrument.

Contravention does not invalidate act

- (7) A contravention of subsection (1), (2), (3), (5) or (9) does not affect the validity of anything done under section 14AA.

Exemption from subsection (1)

- (8) APRA may determine in writing that subsection (1) does not apply in relation to an act relating to shares or rights if APRA is satisfied that delaying the act to enable compliance with that subsection in relation to the act would detrimentally affect:
- (a) depositors with the ADI concerned; and
 - (b) financial system stability in Australia.
- (9) APRA must:
- (a) publish a copy of a determination under subsection (8) in the *Gazette*; and
 - (b) give a copy of a determination under subsection (8) to the ADI statutory manager concerned (unless that manager is APRA).
- (10) A determination made under subsection (8) is not a legislative instrument.

14AC Act under section 14AA not ground for denying obligation

- (1) This section applies if an ADI is party to a contract, whether the proper law of the contract is Australian law (including the law of a
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State or Territory) or law of a foreign country (including the law of part of a foreign country).

- (2) The fact that an ADI statutory manager does an act under subsection 14AA(1) relating to the ADI does not allow the contract, or any other party to the contract, to do any of the following:
 - (a) deny any obligations under that contract;
 - (b) accelerate any debt under that contract;
 - (c) close out any transaction relating to that contract.

13 Application

- (1) Subsections 14(5A) and (5B), and section 14AA, of the *Banking Act 1959* apply to an ADI statutory manager that takes control of an ADI's business before, on or after the commencement of this Schedule.
- (2) Section 14AC of that Act applies to contracts made after the commencement of this Schedule.

14 After section 14D

Insert:

14DAA Administrator in control—additional duties where action may affect financial system stability in Australia

- (1) If an administrator of an ADI's business has reasonable cause to believe that an action that the administrator proposes to take is an action that is likely to have a detrimental effect on financial system stability in Australia, the administrator must:
 - (a) notify APRA as soon as practicable; and
 - (b) obtain APRA's written consent before taking the action.
- (2) The administrator is not required to comply with subsection (1) if the administrator is satisfied that it is not reasonably practicable to do so, having regard to urgency or other similar constraint.
- (3) The performance of a function or the exercise of a power by an administrator is not invalid merely because of a failure by the administrator to comply with this section.

15 Application

Section 14DAA of the *Banking Act 1959* applies to an administrator of an ADI's business appointed on or after the commencement of that section.

16 Subsection 15A(5)

Repeal the subsection.

17 After subsection 15B(1)

Insert:

- (1A) Subsection (1) does not apply to a proceeding in respect of an offence or a contravention of a provision of a law for which a pecuniary penalty (however described) may be imposed.

18 Section 15C

Repeal the section, substitute:

15C ADI statutory manager being in control not grounds for denial of obligations

- (1) This section applies if an ADI is party to a contract, whether the proper law of the contract is Australian law (including the law of a State or Territory) or law of a foreign country (including the law of part of a foreign country).
- (2) The fact that an ADI statutory manager is in control of the ADI's business does not allow the contract, or a party to the contract, to do any of the following:
- (a) deny any obligations under that contract;
 - (b) accelerate any debt under that contract;
 - (c) close out any transaction relating to that contract.

15D Continued application of other provisions

Neither the appointment of an administrator of an ADI's business under this Division nor the fact that an ADI statutory manager is in control of an ADI's business under this Division affects:

- (a) the continued operation of other provisions of this Act or the operation of the *Financial Sector (Collection of Data) Act 2001* in relation to the ADI; or

- (b) the obligation of the ADI to comply with those other provisions and that Act.

19 Application

Section 15C of the *Banking Act 1959* (as amended by this Schedule) applies to contracts made after the commencement of this Schedule.

20 At the end of Subdivision B of Division 2 of Part II

Add:

16AA Exceptions to Part IV of the *Trade Practices Act 1974*

For the purposes of subsection 51(1) of the *Trade Practices Act 1974*, the following things are specified and specifically authorised:

- (a) the acquisition of assets in a sale or disposal of the whole or part of the business of an ADI under this Division by an ADI statutory manager in control of the ADI's business (whether the assets are shares in another body corporate or other assets);
- (b) the acquisition of shares in an ADI as a direct result of:
 - (i) the issue or sale of the shares under this Division by an ADI statutory manager in control of the ADI's business; or
 - (ii) the exercise of a right to acquire shares that was issued or sold under this Division by an ADI statutory manager in control of the ADI's business.

21 Application

Section 16AA of the *Banking Act 1959* applies to acquisitions occurring on or after the commencement of that section.

22 After section 62A

Insert:

62B Involving APRA in applications to appoint external administrators of ADIs

- (1) Before a person other than APRA makes an application to a court under Chapter 5 of the *Corporations Act 2001* for the appointment

of an external administrator of an ADI, the person must give APRA written notice that the person proposes to make the application.

- (2) APRA is entitled to be heard on the application.
- (3) After receiving the notice, APRA may request the person to provide details of the proposed application.

Offence

- (4) A person (other than APRA) commits an offence if:
 - (a) the person makes an application to a court under Chapter 5 of the *Corporations Act 2001* for the appointment of an external administrator of an ADI; and
 - (b) before making the application, the person did not give APRA written notice indicating that the person proposed to make the application.

Penalty: 60 penalty units.

- (5) An offence against subsection (4) is an offence of strict liability.

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

62C Involving APRA in applications by liquidator

- (1) Before making an application to a court in relation to a matter arising under the winding-up of an ADI, a liquidator must give APRA written notice that the liquidator proposes to make the application.
- (2) The notice must include details of the proposed application.
- (3) APRA is entitled to be heard on the application.

23 After section 70B

Insert:

70C Authorising contracts etc. for protecting depositors' interests and financial system stability

Authorising the making of contracts and arrangements

- (1) With the Finance Minister's written approval, the Minister may authorise the making of contracts and arrangements by the Commonwealth for the purposes of:
 - (a) protecting the interests of depositors of ADIs in ways that are consistent with the continued development of a viable, competitive and innovative banking industry; or
 - (b) protecting financial system stability in Australia.

Specifying amounts to be credited to Special Account

- (2) The authorisation must specify the amount (if any) to be credited to the Financial System Stability Special Account, so that the total described in subsection (3) does not exceed by more than \$20,000,000,000 the total described in subsection (4).

Note: This ensures that the balance of the Special Account directly attributable to authorisations under this section cannot exceed \$20,000,000,000 at any time.

- (3) The total described in this subsection is the total of all the amounts specified under subsection (2) in authorisations made under this section (taking account of any amendments of those authorisations).
- (4) The total described in this subsection is the total of all the amounts taken under subsection 21(2) of the *Financial Management and Accountability Act 1997* to be debited from the Financial System Stability Special Account for expenditure for the purpose described in paragraph 70G(a) of this Act.

Note: That purpose is making a payment under a contract or arrangement whose making was authorised under this section.

Amending specification of amount to be credited

- (5) The Minister may amend an authorisation made under this section, but only to change the specification of an amount under subsection (2), within the limit set out in that subsection.

Authorisation cannot be revoked

- (6) The Minister cannot revoke an authorisation made under this section.

Authorisation or amendment not disallowable or subject to expiry

- (7) An authorisation or amendment made under this section is a legislative instrument, but neither section 42 (disallowance) nor Part 6 (sunsetting) of the *Legislative Instruments Act 2003* applies to the authorisation or amendment.

When authorisation or amendment takes effect

- (8) The authorisation or amendment takes effect from the time it is made, despite subsections 12(1) and (2) of the *Legislative Instruments Act 2003*.

70D Borrowing funds for payments under authorised contracts etc.

- (1) Subsection (2) applies if the Minister has determined under section 70C an amount to be credited to the Financial System Stability Special Account.
- (2) On behalf of the Commonwealth, the Minister may, with the Finance Minister's written approval, borrow money for not more than 24 months on terms and conditions specified in, or consistent with, the approval, so that the total unrepaid borrowing under this section is not more than \$20,000,000,000 at any time.
- (3) The Finance Minister may delegate, in writing, to an SES employee or acting SES employee in the Department that is administered by the Finance Minister, the Finance Minister's power of approval for the purposes of subsection (2).
- (4) In this section:

borrow includes raise money or obtain credit, whether by dealing in securities or otherwise, but does not include obtain credit in a transaction forming part of the day-to-day operations of the Commonwealth.

70E Financial System Stability Special Account

- (1) The Financial System Stability Special Account is established by this section.
- (2) The Account is a Special Account for the purposes of the *Financial Management and Accountability Act 1997*.

70F Credits to the Account

- (1) There must be credited to the Account amounts equal to the following:
 - (a) the amount specified in an authorisation under any of the following sections as an amount to be credited to the Account:
 - (i) section 70C;
 - (ii) section 131A of the *Insurance Act 1973*;
 - (iii) section 251A of the *Life Insurance Act 1995*;
 - (b) an amount borrowed under any of the following sections:
 - (i) section 70D;
 - (ii) section 131B of the *Insurance Act 1973*;
 - (iii) section 251B of the *Life Insurance Act 1995*.

Note: An Appropriation Act may contain a provision to the effect that, if any of the purposes of a Special Account is a purpose that is covered by an item in the Appropriation Act (whether or not the item expressly refers to the Special Account), then amounts may be debited against the appropriation for that item and credited to that Special Account.

- (2) To avoid doubt, if:
 - (a) the amount specified in an authorisation described in paragraph (1)(a) is credited to the Account; and
 - (b) the authorisation is later amended so as to increase the amount;only the increase, and not the whole of the increased amount, is to be credited to the Account as a result of the amendment.

Note: Crediting the whole of the increased amount to the Account would lead to double-counting of the amount specified in the authorisation before the amendment.

70G Purposes of the Account

The purposes of the Account are as follows:

- (a) making a payment under a contract or arrangement whose making was authorised under section 70C;
- (b) making a payment under a contract or arrangement whose making was authorised under section 131A of the *Insurance Act 1973*;
- (c) making a payment under a contract or arrangement whose making was authorised under section 251A of the *Life Insurance Act 1995*;
- (d) repaying a borrowing, and paying interest on a borrowing, made under any of the following sections:
 - (i) section 70D;
 - (ii) section 131B of the *Insurance Act 1973*;
 - (iii) section 251B of the *Life Insurance Act 1995*;
- (e) meeting the expenses of administering the Account.

Note: See section 21 of the *Financial Management and Accountability Act 1997* (debits from Special Accounts).

70H Debits to reflect reduced amounts specified in authorisations

If an authorisation under any of the following sections specifying an amount to be credited to the Account is amended so as to reduce the amount, an amount equal to the reduction must be debited from the Account:

- (a) section 70C;
- (b) section 131A of the *Insurance Act 1973*;
- (c) section 251A of the *Life Insurance Act 1995*.

Schedule 3—Other measures: general insurance

Part 1—Main amendments

Insurance Act 1973

1 At the end of subsection 2A(2)

Add:

- ; and (e) providing for judicial management of general insurers whose continuance may be threatened by unsatisfactory management or an unsatisfactory financial position, so as to protect the interests of policyholders and financial system stability in Australia.

2 Subsection 3(1)

Insert:

external administrator means any of the following:

- (a) a liquidator or provisional liquidator;
- (b) a receiver, manager, managing controller, receiver and manager or other controller (other than a judicial manager);
- (c) a voluntary administrator or administrator of a deed of a company arrangement or a scheme manager.

Expressions used in this definition have the same meanings as they have in the *Corporations Act 2001*.

3 Subsection 3(1)

Insert:

Finance Minister means the Minister who administers the *Financial Management and Accountability Act 1997*.

4 Subsection 3(1)

Insert:

Financial System Stability Special Account means the Financial System Stability Special Account established by section 70E of the *Banking Act 1959*.

5 Subsection 3(1)

Insert:

judicial manager means a judicial manager appointed by the Federal Court under section 62R.

6 Subsection 3(1)

Insert:

pre-authorisation liability means a liability, contingent or otherwise, that is assumed (whether in Australia or elsewhere) by a body corporate that, after assuming the liability, becomes authorised under section 12 to carry on insurance business in Australia.

7 After subsection 17F(1)

Insert:

- (1A) In deciding whether to confirm a scheme (with or without modifications), the Federal Court must have regard to:
- (a) the interests of the policyholders of a body corporate affected by the scheme; and
 - (b) if a report relevant to all or part of the scheme has been filed with the Court under section 62ZI—that report; and
 - (c) any other matter the Court considers relevant.

8 Application

The amendment of section 17F of the *Insurance Act 1973* made by this Part applies in relation to decisions relating to applications made on or after the commencement of this Part for confirmation of schemes.

9 Paragraph 28(a)

After “liabilities in Australia”, insert “other than pre-authorisation liabilities”.

10 Application

The amendment of section 28 of the *Insurance Act 1973* made by this Part applies in relation to a general insurer whether it became authorised to carry on insurance business in Australia before, on or after the commencement of this Part.

11 After Part VA

Insert:

Part VB—Judicial management, other external administration and winding up

Division 1—Judicial management of general insurers

62K Application for order for judicial management

- (1) APRA may apply to the Federal Court for an order that a general insurer be placed under judicial management.
- (2) Subject to subsection (3), a general insurer may apply to the Federal Court for an order that the general insurer be placed under judicial management.
- (3) A general insurer may only apply if it has given APRA at least one month's notice in writing of its intention to apply.
- (4) On an application by APRA, the general insurer is entitled to be heard.
- (5) On an application by the general insurer, APRA is entitled to be heard.

62L Order for judicial management after investigation

On an application under section 62K, the Federal Court may make an order that a general insurer be placed under judicial management if the Court is satisfied:

- (a) that the insurance business of the general insurer has been investigated under Part V; and
- (b) that, having regard to the results of the investigation, it is in the interests of policyholders of the general insurer that the order be made.

Note: This Division does not apply to management of insurance business carried on outside Australia by a foreign general insurer: see section 62ZO.

62M Order for judicial management on other grounds

On an application under section 62K, the Federal Court may make an order that a general insurer be placed under judicial management if the Federal Court is satisfied:

- (a) that:
 - (i) the general insurer is, or is likely to become, unable to meet its policy or other liabilities as they become due; or
 - (ii) the general insurer is a foreign general insurer and is, or is likely to become, unable to meet, from its assets in Australia, its liabilities in Australia other than pre-authorisation liabilities as they become due; or
 - (iii) the general insurer has failed to comply with a prudential standard; or
 - (iv) the general insurer has failed to comply with a direction under section 104; or
 - (v) there are reasonable grounds for believing that the financial position or management of the general insurer may be unsatisfactory; and
- (b) that the time needed to make or complete an investigation of the insurance business of the general insurer under Part V would be likely to be such as to prejudice the interests of policyholders of the general insurer.

Note 1: This Division does not apply to management of insurance business carried on outside Australia by a foreign general insurer: see section 62ZO.

Note 2: Section 116A deals with assets and liabilities in Australia.

62N Commencement of judicial management

The judicial management of a general insurer commences:

- (a) at the time specified in the order for judicial management as the time at which the judicial management is to commence; or
- (b) if no time is so specified, when the order is made.

62P Stay of proceedings during judicial management

- (1) While a general insurer is under judicial management, a proceeding in a court against the general insurer or in relation to any of its property cannot be commenced or proceeded with, except:
 - (a) with the judicial manager's written consent; or
 - (b) with the leave of the Federal Court and in accordance with such terms (if any) as the Federal Court imposes.
- (2) Subsection (1) does not apply to a proceeding in respect of an offence or a contravention of a provision of a law for which a pecuniary penalty (however described) may be imposed.
- (3) A judicial manager is not subject to any liability in respect of a refusal to give a consent for the purpose of subsection (1).

62Q No judicial management except in accordance with this Act

A general insurer is not to be judicially managed except in accordance with this Act.

62R Appointment of judicial manager

- (1) If the Federal Court orders the judicial management of a general insurer the Court must, by its order, appoint a judicial manager of the general insurer.
- (2) The Federal Court may at any time cancel the appointment of a judicial manager and appoint another person as judicial manager.

62S Remuneration of judicial manager

- (1) The Federal Court may give directions about:
 - (a) the remuneration and allowances that a judicial manager is to receive; and
 - (b) who is to pay the remuneration and allowances.
- (2) The Federal Court may charge the judicial manager's remuneration and allowances on the property of the general insurer under judicial management in such order of priority in relation to any existing charges on that property as the Court thinks fit.

62T Management vests in judicial manager

- (1) Subject to subsections (2) and (3), if the Federal Court has made an order placing a general insurer under judicial management, then, at the time the judicial management commences:
 - (a) any person vested with the management of the general insurer immediately before that time is divested of that management; and
 - (b) the management of the general insurer vests in the judicial manager appointed by the Court.
- (2) A general insurer may not issue policies without the leave of the Federal Court if the company is under judicial management.
- (3) To avoid doubt, if the general insurer is a foreign general insurer:
 - (a) paragraphs (1)(a) and (b) do not apply to the extent that the management of the foreign general insurer relates to insurance business carried on outside Australia by the foreign general insurer; and
 - (b) subsection (2) does not apply to the issue of policies in the course of insurance business carried on outside Australia by the foreign general insurer.

Note: Subsection (3) reflects the effect of section 62ZO.

62U Effect on external administrator of judicial manager managing general insurer

- (1) The appointment of an external administrator of a general insurer is terminated when the management of the general insurer vests in the judicial manager appointed by the Federal Court.
- (2) An external administrator of a general insurer must not be appointed while the management of the general insurer is vested in the judicial manager appointed by the Federal Court.
- (3) If:
 - (a) a person who ceased to be the external administrator of a general insurer under subsection (1); or
 - (b) a purported external administrator of a general insurer appointed in contravention of subsection (2);

purports to act in relation to the general insurer's business while the management of the general insurer is vested in a judicial manager, the purported act is invalid and of no effect.

- (4) As soon as possible after the Federal Court orders the judicial management of a general insurer and appoints a judicial manager, the judicial manager must inform the external administrator (if any) of the general insurer that the management of the general insurer vests in the judicial manager when the judicial management commences. However, failure to inform the external administrator does not affect the operation of this section.

62V Judicial manager being in control not ground for denying obligation

- (1) This section applies if the general insurer is party to a contract, whether the proper law of the contract is Australian law (including the law of a State or Territory) or law of a foreign country (including the law of part of a foreign country).
- (2) The vesting in the judicial manager of the management of the general insurer does not allow the contract, or any other party to the contract, to do any of the following:
 - (a) deny any obligations under that contract;
 - (b) accelerate any debt under that contract;
 - (c) close out any transaction relating to that contract.

62W Continued application of other Parts of Act

The appointment of a judicial manager under this Part does not affect the continued operation of other Parts of this Act or the operation of the *Financial Sector (Collection of Data) Act 2001* in relation to a general insurer or the obligation of a general insurer to comply with provisions of other Parts of this Act or the provisions of the *Financial Sector (Collection of Data) Act 2001*.

62X Federal Court's control of judicial manager

- (1) A judicial manager is subject to the control of the Federal Court.
- (2) In addition to duties imposed by this Part, a judicial manager has such duties as the Federal Court directs.

- (3) A judicial manager may apply to the Federal Court at any time for instructions:
 - (a) as to the way in which the judicial management should be conducted; or
 - (b) in relation to any matter arising during the judicial management.
- (4) Before applying to the Federal Court for instructions, the judicial manager must:
 - (a) inform APRA that he or she intends to make the application; and
 - (b) give APRA written details of the application.
- (5) APRA is entitled to be heard on the application.

62Y Powers of judicial manager

- (1) The judicial manager of a general insurer has the following powers:
 - (a) to bring or defend any legal proceedings in the name and on behalf of the general insurer;
 - (b) to appoint a legal practitioner to help him or her in the performance of his or her duties;
 - (c) to appoint an actuary (other than the actuary appointed for the purposes of section 39) to help him or her in the performance of his or her duties;
 - (d) to sell or otherwise dispose of all or any of the property of the general insurer;
 - (e) to do all acts and execute in the name and on behalf of the general insurer all deeds, receipts and other documents;
 - (f) for the purpose of paragraph (d), to use the general insurer's common or official seal;
 - (g) subject to the *Bankruptcy Act 1966*, to prove in the bankruptcy of any debtor of the general insurer or under any deed executed under that Act;
 - (h) to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the general insurer;
 - (i) to obtain credit, whether on the security of the general insurer or otherwise;

- (j) to take out letters of administration of the estate of a deceased debtor, and to do anything necessary for obtaining payment of any money due from a debtor, or his or her estate, that cannot conveniently be done in the name of the general insurer;
 - (k) to appoint an agent to do anything that it is not practicable for the judicial manager to do personally or that it is unreasonable to expect him or her to do personally;
 - (l) such other powers as the Federal Court directs.
- (2) The powers conferred by this section are in addition to powers conferred on a judicial manager by any other provision of this Part.

62Z Judicial manager's additional powers to facilitate recapitalisation

Powers

- (1) A judicial manager of a general insurer that is a company that has a share capital and is registered under the *Corporations Act 2001* may do one or more of the following acts on terms determined by the judicial manager:
- (a) issue shares, or rights to acquire shares, in the company;
 - (b) cancel shares, or rights to acquire shares, in the company;
 - (c) reduce the company's share capital by cancelling any paid-up share capital that is not represented by available assets;
 - (d) sell shares, or rights to acquire shares, in the company;
 - (e) vary or cancel rights or restrictions attached to shares in a class of shares in the company.

Note: Before doing such an act, the judicial manager will usually need to get and consider a report on the fair value of each share or right concerned (see section 62ZA), and will need to report to the Federal Court and obtain the court's order for the act (see sections 62ZI and 62ZJ).

Giving company members notice of exercise of powers

- (2) As soon as practicable after doing an act described in paragraph (1)(a), (b), (c) or (e) or subsection (3), the judicial manager must give written notice to the persons who were members (under section 231 of the *Corporations Act 2001*) of the company just before the act, identifying the act and explaining its effect on their interests as members.

- (3) One of the acts to which subsection (2) relates is the offering of shares, or rights to acquire shares, in the company for sale under paragraph (1)(d).

Exercise of powers despite other laws etc.

- (4) A judicial manager may do an act under subsection (1) despite:
- (a) the *Corporations Act 2001*; and
 - (b) the company's constitution; and
 - (c) any contract or arrangement to which the company is party; and
 - (d) any listing rules (as defined in section 761A of the *Corporations Act 2001*) of a financial market (as defined in that section) in whose official list the company is included.

62ZA Considering report before acting under section 62Z

Getting and considering report on fair value of shares or rights

- (1) Before determining terms for an act under subsection 62Z(1), the judicial manager must:
- (a) obtain a report meeting the requirements in subsection (2) of this section on the fair value of the shares or rights concerned from an expert who is not an associate of the judicial manager, or of the company, under Division 2 of Part 1.2 of the *Corporations Act 2001*; and
 - (b) consider the report;
- unless APRA determines under subsection (8) that this subsection does not apply in relation to that act relating to those shares or rights.

Content of report

- (2) The report must set out:
- (a) the amount that is, in the expert's opinion, the fair value for each share or right concerned; and
 - (b) the reasons for forming the opinion; and
 - (c) any relationship between the expert and any of the following persons:
 - (i) the judicial manager;

- (ii) a person who is an associate of the judicial manager under Division 2 of Part 1.2 of the *Corporations Act 2001*;
- (iii) the company;
- (iv) a person who is an associate of the company under Division 2 of Part 1.2 of the *Corporations Act 2001*; including any circumstances in which the expert gives them advice, or acts on their behalf, in the proper performance of the functions attaching to the expert's professional capacity or business relationship with them; and
- (d) any financial or other interest of the expert that could reasonably be regarded as being capable of affecting the expert's ability to give an unbiased opinion in relation to the matter being reported on.

Determining fair value of shares

- (3) In determining for the purposes of paragraph (2)(a) the amount that is, in the expert's opinion, the fair value for each share concerned, the expert must:
 - (a) first, assess the value of the company as a whole, in accordance with the assumptions (if any) notified to the expert by the Minister for the valuation of the company; and
 - (b) then allocate that value among the classes of shares in the company that either have been issued or that the judicial manager proposes to issue (taking into account the relative financial risk, and voting and distribution rights, of the classes); and
 - (c) then allocate the value of each class pro rata among the shares in that class that either have been issued or that the judicial manager proposes to issue (without allowing a premium or applying a discount for particular shares in that class).

Assumptions for valuation of company

- (4) The Minister may give the expert written notice of assumptions for the valuation of the company. The Minister may, by further written notice given to the expert, revoke, but not vary, notice of the assumptions. A notice under this subsection is not a legislative instrument.

Determining fair value of rights

- (5) In determining for the purposes of paragraph (2)(a) the amount that is, in the expert's opinion, the fair value for each right concerned, the expert must act in accordance with the assumptions (if any) notified to the expert by the Minister for the valuation of the right.

Assumptions for valuation of rights

- (6) The Minister may give the expert written notice of assumptions for the valuation of the rights concerned. The Minister may, by further written notice given to the expert, revoke, but not vary, notice of the assumptions. A notice under this subsection is not a legislative instrument.

Contravention does not invalidate act

- (7) A contravention of subsection (1), (2), (3), (5) or (9) does not affect the validity of anything done under section 62Z.

Exemption from subsection (1)

- (8) APRA may determine in writing that subsection (1) does not apply in relation to an act relating to shares or rights if APRA is satisfied that delaying the act to enable compliance with that subsection in relation to the act would detrimentally affect:
- (a) policyholders of the general insurer concerned; and
 - (b) financial system stability in Australia.
- (9) APRA must:
- (a) publish a copy of a determination under subsection (8) in the *Gazette*; and
 - (b) give a copy of a determination under subsection (8) to the judicial manager concerned.
- (10) A determination made under subsection (8) is not a legislative instrument.

62ZB Act under section 62Z not ground for denying obligation

- (1) This section applies if a general insurer is party to a contract, whether the proper law of the contract is Australian law (including
-

the law of a State or Territory) or law of a foreign country (including the law of part of a foreign country).

- (2) The fact that a judicial manager does an act under subsection 62Z(1) relating to the general insurer does not allow the contract, or a party to the contract, to do any of the following:
 - (a) deny any obligations under that contract;
 - (b) accelerate any debt under that contract;
 - (c) close out any transaction relating to that contract.

62ZC Application by APRA for instructions to judicial manager

- (1) APRA may apply to the Federal Court for an order that the Court give instructions to the judicial manager relating to the conduct of the judicial management of a general insurer.
- (2) The judicial manager is entitled to be heard on the application.

62ZD Request by APRA for information

- (1) APRA may ask a judicial manager to give APRA information about one or more of the following in a reasonable time specified in the request:
 - (a) the conduct of the judicial management;
 - (b) the financial position of the general insurer under judicial management.
- (2) The judicial manager must comply with APRA's request.

62ZE Duration of judicial management

If the Federal Court orders that a general insurer be placed under judicial management, the general insurer remains under judicial management until:

- (a) the judicial management is cancelled; or
- (b) the Court orders that the general insurer be wound up.

62ZF Cancellation of judicial management

- (1) A judicial manager appointed to manage a general insurer may apply to the Federal Court for an order cancelling the judicial management.

- (2) Any other interested person may apply to the Federal Court for an order cancelling the judicial management of a general insurer.
- (3) On an application under subsection (1) or (2), the Federal Court may cancel the order for the judicial management of the general insurer if it appears to the Court:
 - (a) that the purpose of the order has been fulfilled; or
 - (b) that for any reason it is undesirable that the order remain in force.
- (4) Before applying to the Federal Court under subsection (1) or (2), the judicial manager or interested person must:
 - (a) inform APRA that he or she intends to make the application; and
 - (b) give APRA written details of the application.
- (5) At the time when an order cancelling the judicial management of the general insurer comes into force:
 - (a) the judicial manager is divested of the management of the general insurer; and
 - (b) the management of the general insurer vests in the board of directors or other governing body of the general insurer.
- (6) APRA is entitled to be heard on any application made under subsection (1) or (2).

62ZG How judicial manager is to manage

The judicial manager of a general insurer must conduct the judicial management as efficiently and economically as possible.

62ZH Disclaimer of onerous property

Division 7A (Disclaimer of onerous property) of Part 5.6 of the *Corporations Act 2001* applies in relation to the disclaimer of property of a general insurer by a judicial manager of the general insurer as if:

- (a) the general insurer were a company for the purposes of that Division; and
 - (b) the judicial manager were the liquidator of the company; and
 - (c) a reference in that Division to the Court were a reference to the Federal Court; and
-

- (d) subsection 568(10) of the *Corporations Act 2001* were omitted; and
- (e) the policyholders of the general insurer were the company's creditors for the purposes of subsections 568B(3) and 568E(5) of the *Corporations Act 2001*.

Note: One effect of this is that the judicial manager of a general insurer has essentially the same powers and duties relating to the disclaimer of property as a liquidator of a company.

62ZI Report by judicial manager

- (1) As soon as possible after starting to manage a general insurer, a judicial manager must file with the Federal Court a report that:
 - (a) recommends the course of action listed in subsection (2) that is, in his or her opinion, most advantageous to the general interest of the policyholders of the general insurer while promoting financial system stability in Australia; and
 - (b) sets out the reasons for that recommendation.
- (2) The following are the possible courses of action:
 - (a) to transfer the business of the general insurer to another general insurer under Division 3A of Part III (whether the policies issued by the general insurer continue for the original sums insured, with the addition of bonuses that attach to the policies, or for reduced amounts);
 - (b) to allow the general insurer to carry on its business after a period of judicial management (whether the policies issued by the general insurer continue for the original sums insured, with the addition of bonuses that attach to the policies, or for reduced amounts);
 - (c) to do one or more of the acts described in subsection 62Z(1) (which is about various measures to recapitalise the general insurer), if that subsection applies to the general insurer;
 - (d) to wind up the general insurer;
 - (e) to take such other course of action as the judicial manager considers desirable, which may, for example, be a course of action that includes either or both of the following:
 - (i) altering the constitution, rules or other arrangements for governance of the general insurer, if it is registered under the *Corporations Act 2001*, to enable or facilitate the performance of the judicial manager's functions and

- duties, the exercise of the judicial manager's powers or a course of action described in paragraph (a), (b), (c) or (d);
- (ii) one or more of the courses of action described in paragraphs (a), (b), (c) and (d).
- (3) A report may recommend different courses of action in respect of different parts of a general insurer's business.
- (4) If the Federal Court makes an order under section 62ZJ giving effect to a course or courses referred to in paragraph (2)(a), (b), (c) or (e) of this section, the judicial manager may file with the Court a further report or further reports dealing with matters to which a report under subsection (1) of this section may relate.
- (5) A report under subsection (4) must set out the reasons for any recommendation made in the report.
- (6) As soon as possible after filing a report under this section, the judicial manager must:
- (a) give a copy of it to APRA; and
 - (b) apply to the Federal Court for an order to give effect to the course or courses of action stated in the report.
- (7) A report, or a copy of a report, under this section must be available for inspection by any person:
- (a) at the Registry of the Federal Court in which the report is filed during the business hours of that Registry; and
 - (b) at such other place (if any) as APRA determines.

62ZJ Order of Federal Court on report of judicial manager

- (1) On an application for an order to give effect to a course or courses of action recommended in a report under section 62ZI:
- (a) APRA and any other person interested is entitled to be heard; and
 - (b) the Federal Court may make an order giving effect to such course or courses of action as it considers in the circumstances to be most advantageous to the general interest of the policyholders of the general insurer concerned, while promoting financial system stability in Australia.

- (2) The course or courses of action to which an order may give effect may be one or more of the following:
 - (a) one or more of the courses of action set out in subsection 62ZI(2);
 - (b) one or more other courses of action.
- (3) An order under this section:
 - (a) is binding on all persons; and
 - (b) takes effect despite anything in any of the following:
 - (i) the *Corporations Act 2001*;
 - (ii) the constitution or other rules of the general insurer;
 - (iii) any contract or arrangement to which the general insurer is party;
 - (iv) any listing rules (as defined in section 761A of the *Corporations Act 2001*) of a financial market (as defined in that section) in whose official list the general insurer is included.

62ZK Transfer of business to another general insurer

- (1) If the Federal Court orders the transfer of the business of a general insurer to another general insurer, the judicial manager must prepare a scheme for the transfer in accordance with Division 3A of Part III.
- (2) Until the Federal Court confirms the scheme under that Part, the management of the general insurer continues to be vested in the judicial manager.

62ZL Resignation

A judicial manager appointed under this Division may resign the appointment as judicial manager by filing with the Federal Court a signed notice of resignation.

62ZM Immunity

A judicial manager is not subject to any liability to any person in respect of anything done, or omitted to be done, in good faith in the exercise or performance of powers, functions or duties conferred or imposed on the judicial manager by this Act.

62ZN Exceptions to Part IV of the *Trade Practices Act 1974*

For the purposes of subsection 51(1) of the *Trade Practices Act 1974*, the following things are specified and specifically authorised:

- (a) the acquisition of assets in:
 - (i) a sale or disposal of property of a general insurer under this Division by a judicial manager of the general insurer; or
 - (ii) a transfer of insurance business of a general insurer under a scheme prepared by a judicial manager of the general insurer and confirmed (with or without modifications) by the Federal Court under Division 3A of Part III;
(whether the assets are shares in another body corporate or other assets);
- (b) an agreement or deed for carrying out a transfer described in subparagraph (a)(ii);
- (c) arrangements necessary to give effect to a scheme described in subparagraph (a)(ii);
- (d) the acquisition of shares in a general insurer as a direct result of:
 - (i) the issue or sale of the shares under this Division by a judicial manager of the general insurer; or
 - (ii) the exercise of a right to acquire shares that was issued or sold under this Division by a judicial manager of the general insurer.

62ZO Limited application of Division to foreign general insurers

This Division does not apply in relation to:

- (a) insurance business carried on outside Australia by a foreign general insurer; or
- (b) the management of a foreign general insurer so far as the management relates to such business; or
- (c) policyholders of a foreign general insurer so far as the policies held from the insurer relate to such business.

Division 2—Extra provisions relating to external administration of general insurers

62ZP Relationship of this Division with Chapter 5 of the Corporations Act 2001

This Division applies in relation to a general insurer in addition to Chapter 5 of the *Corporations Act 2001*.

62ZQ Involving APRA in applications to appoint external administrators of general insurers

- (1) Before a person (other than APRA) makes an application to a court under Chapter 5 of the *Corporations Act 2001* for the appointment of an external administrator of a general insurer, the person must give APRA written notice that the person proposes to make the application.
- (2) APRA is entitled to be heard on the application.
- (3) After receiving the notice, APRA may request the person to provide details of the proposed application.

Offence

- (4) A person (other than APRA) commits an offence if:
 - (a) the person makes an application to a court under Chapter 5 of the *Corporations Act 2001* for the appointment of an external administrator of a general insurer; and
 - (b) before making the application, the person did not give APRA written notice indicating that the person proposed to make the application.

Penalty: 60 penalty units.

- (5) An offence against subsection (4) is an offence of strict liability.

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

62ZR Involving APRA in applications by liquidator

- (1) Before making an application to a court in relation to a matter arising under the winding-up of a general insurer, a liquidator must

give APRA written notice that the liquidator proposes to make the application.

- (2) The notice must include details of the proposed application.
- (3) APRA is entitled to be heard on the application.

62ZS Application by APRA for directions

- (1) APRA may apply to the Federal Court for directions regarding any matter arising under the winding-up of a general insurer (whether the winding-up occurs as a result of an application made under the *Corporations Act 2001* or by APRA under Division 3 of this Part).
- (2) APRA must give the liquidator written notice that APRA proposes to make the application.
- (3) The notice must include details of the proposed application.
- (4) The liquidator is entitled to be heard on the application.

62ZT APRA may request information from liquidator

- (1) APRA may request a liquidator of a general insurer in writing to give APRA, within a reasonable time specified in the request, information in writing about the winding-up of the general insurer (whether the winding-up occurs as a result of an application made under the *Corporations Act 2001* or by APRA under Division 3 of this Part).
- (2) The liquidator must comply with the request.

Note: Action may be taken under the *Corporations Act 2001* against a liquidator who does not comply with such a request.

Division 3—Extra provisions for winding up general insurers

62ZU Order to wind up general insurer on APRA’s application

- (1) After an investigation of a general insurer has been made under Part V, APRA may apply to the Federal Court for an order that the general insurer be wound up.

- (2) The Federal Court may make the order if satisfied that it is in the interests of the general insurer's policyholders.

62ZV Relationship with the *Corporations Act 2001*

- (1) Section 62ZU applies in relation to a general insurer in addition to Chapter 5 of the *Corporations Act 2001*.
- (2) The winding-up of a general insurer under an order made under section 62ZU is to be conducted in accordance with the *Corporations Act 2001*.

12 Application

Sections 62V and 62ZB of the *Insurance Act 1973* apply to contracts made after the commencement of those sections.

13 Subsection 105(1)

Repeal the subsection, substitute:

- (1) This section applies if a general insurer, authorised NOHC or subsidiary of a general insurer or authorised NOHC is party to a contract, whether the proper law of the contract is Australian law (including the law of a State or Territory) or law of a foreign country (including the law of part of a foreign country).
- (1A) The fact that the general insurer or authorised NOHC is subject to a direction by APRA under section 104 does not allow the contract, or a party to the contract, other than the general insurer, NOHC or subsidiary, to do any of the following:
- (a) deny any obligations under that contract;
 - (b) accelerate any debt under that contract;
 - (c) close out any transaction relating to that contract.
- This subsection has effect subject to subsections (2) and (3).

14 Subsection 105(2)

Omit "a general insurer or an authorised NOHC, or a subsidiary of a general insurer or authorised NOHC, is prevented from fulfilling its obligations under a", substitute "the general insurer, NOHC or subsidiary is prevented from fulfilling its obligations under the".

15 Application

The amendments of section 105 of the *Insurance Act 1973* made by this Part apply to contracts made after the commencement of this Part.

16 After subsection 116(3)

Insert:

- (3A) For the purposes of subsection (3), a pre-authorisation liability of a general insurer is taken not to be a liability in Australia of the general insurer.

17 Application

Subsection 116(3A) of the *Insurance Act 1973* applies in relation to a general insurer whether it became authorised to carry on insurance business in Australia before, on or after the commencement of this Part.

18 Subsection 116A(1)

Omit “section 28 (General insurer must hold sufficient assets)”, substitute “sections 28 and 62M”.

19 At the end of subsection 116A(1)

Add:

- Note 1: Section 28 requires general insurers to hold sufficient assets.
Note 2: Section 62M provides for the appointment of a judicial manager for a foreign general insurer if its assets in Australia are, or are likely to become, insufficient to enable it to meet its liabilities in Australia other than pre-authorisation liabilities as they become due.

20 Subsection 116A(2)

Omit “section 116 (General insurer not to carry on insurance business after start of winding up) and section 28”, substitute “sections 28, 62M and 116”.

21 At the end of subsection 116A(2)

Add:

- Note: Subsection 116(3) gives priority to discharge of liabilities in Australia when a general insurer is being wound up.

22 Subsection 116A(3)

Omit “section 28”, substitute “sections 28 and 62M”.

23 Subsection 116A(4)

Omit “section 116 and section 28”, substitute “sections 28, 62M and 116”.

24 Subsection 116A(5)

Omit “are, for the purposes of section 28”, substitute “is, for the purposes of sections 28 and 62M”.

25 After section 127

Insert:

127A Compensation for acquisition of property

- (1) If the operation of this Act would result in an acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person.
- (2) If the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in the Federal Court for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.
- (3) In this section:

acquisition of property has the same meaning as in paragraph 51(xxxi) of the Constitution.

just terms has the same meaning as in paragraph 51(xxxi) of the Constitution.

26 After section 131

Insert:

131A Authorising contracts etc. for protecting policyholders’ interests and financial system stability

Authorising the making of contracts and arrangements

- (1) With the Finance Minister’s written approval, the Minister may authorise the making of contracts and arrangements by the Commonwealth for the purposes of:

- (a) protecting the interests of policyholders and prospective policyholders under insurance policies (issued by general insurers and Lloyd's underwriters) in ways that are consistent with the continued development of a viable, competitive and innovative insurance industry; or
- (b) protecting financial system stability in Australia.

Specifying amounts to be credited to Special Account

- (2) The authorisation must specify the amount (if any) to be credited to the Financial System Stability Special Account, so that the total described in subsection (3) does not exceed by more than \$10,000,000,000 the total described in subsection (4).

Note: This ensures that the balance of the Special Account directly attributable to authorisations under this section cannot exceed \$10,000,000,000 at any time.

- (3) The total described in this subsection is the total of all the amounts specified under subsection (2) in authorisations made under this section (taking account of any amendments of those authorisations).
- (4) The total described in this subsection is the total of all the amounts taken under subsection 21(2) of the *Financial Management and Accountability Act 1997* to be debited from the Financial System Stability Special Account for expenditure for the purpose described in paragraph 70G(b) of the *Banking Act 1959*.

Note: That purpose is making a payment under a contract or arrangement whose making was authorised under this section.

Amending specification of amount to be credited

- (5) The Minister may amend an authorisation made under this section, but only to change the specification of an amount under subsection (2), within the limit set out in that subsection.

Authorisation cannot be revoked

- (6) The Minister cannot revoke an authorisation made under this section.

Authorisation or amendment not disallowable or subject to expiry

- (7) An authorisation or amendment made under this section is a legislative instrument, but neither section 42 (disallowance) nor Part 6 (sunsetting) of the *Legislative Instruments Act 2003* applies to the authorisation or amendment.

When authorisation or amendment takes effect

- (8) The authorisation or amendment takes effect from the time it is made, despite subsections 12(1) and (2) of the *Legislative Instruments Act 2003*.

131B Borrowing funds for payments under authorised contracts etc.

- (1) Subsection (2) applies if the Minister has determined under section 131A an amount to be credited to the Financial System Stability Special Account.
- (2) On behalf of the Commonwealth, the Minister may, with the Finance Minister's written approval, borrow money for not more than 24 months on terms and conditions specified in, or consistent with, the approval, so that the total unrepaid borrowing under this section is not more than \$10,000,000,000 at any time.
- (3) The Finance Minister may delegate, in writing, to an SES employee or acting SES employee in the Department that is administered by the Finance Minister, the Finance Minister's power of approval for the purposes of subsection (2).
- (4) In this section:

borrow includes raise money or obtain credit, whether by dealing in securities or otherwise, but does not include obtain credit in a transaction forming part of the day-to-day operations of the Commonwealth.

Part 2—Related amendments

Corporations Act 2001

27 At the end of subsection 435C(3)

Add:

; or (h) management of the general insurer vests in a judicial manager of the company appointed by the Federal Court under Part VB of the *Insurance Act 1973* or Part 8 of the *Life Insurance Act 1995*.

28 At the end of subparagraph 461(1)(h)(ii)

Add “or”.

29 Paragraph 461(1)(j)

Repeal the paragraph.

30 Subsection 462(3)

Repeal the subsection.

31 Saving

The amendments of sections 461 and 462 of the *Corporations Act 2001* made by this Part do not apply in relation to applications made before the commencement of the amendments for orders that companies be wound up.

Schedule 4—Other measures: life insurance

Life Insurance Act 1995

1 Paragraph 3(2)(d)

Repeal the paragraph, substitute:

- (d) providing for judicial management of life companies whose continuance may be threatened by unsatisfactory management or an unsatisfactory financial position, so as to protect the interests of policyholders and financial system stability in Australia;

2 Part 8 (heading)

Repeal the heading, substitute:

Part 8—Judicial management, other external administration and winding up

3 Paragraph 160(a)

Omit “on the day specified in the order for judicial management as the day on”, substitute “at the time specified in the order for judicial management as the time at”.

4 Paragraph 160(b)

Omit “day”, substitute “time”.

5 Application

The amendments of section 160 of the *Life Insurance Act 1995* made by this Schedule apply in relation to orders for judicial management made on or after the commencement of this Schedule.

6 At the end of subsection 161(2)

Add “or a contravention of a provision of a law for which a pecuniary penalty (however described) may be imposed”.

7 Application

The amendment of section 161 of the *Life Insurance Act 1995* made by this Schedule applies in relation to judicial management commencing after the commencement of this Schedule.

8 Subsection 163(3)

Repeal the subsection.

9 Subsection 165(1)

Omit “when”, substitute “at the time”.

10 Paragraph 165(1)(c)

Omit “date”, substitute “time”.

11 After section 165

Insert:

165A Effect on external administrator of judicial manager managing company

- (1) The appointment of an external administrator of a company is terminated when the management of the company vests in the judicial manager appointed by the Court.
- (2) An external administrator of a company must not be appointed while the management of the company is vested in the judicial manager appointed by the Court.
- (3) If:
 - (a) a person who ceased to be the external administrator of a company under subsection (1); or
 - (b) a purported external administrator of a company appointed in contravention of subsection (2);purports to act in relation to the company’s business while the management of the company is vested in a judicial manager, the purported act is invalid and of no effect.
- (4) As soon as possible after the Court orders the judicial management of a company and appoints a judicial manager, the judicial manager must inform the external administrator (if any) of the company that the management of the company vests in the judicial manager when the judicial management commences. However,

failure to inform the external administrator does not affect the operation of this section.

165B Judicial manager being in control not ground for denying obligation

- (1) This section applies if a life company is party to a contract, whether the proper law of the contract is Australian law (including the law of a State or Territory) or law of a foreign country (including the law of part of a foreign country).
- (2) The vesting in the judicial manager of the management of the company, or of part of the business of the company, does not allow the contract, or any other party to the contract, to do any of the following:
 - (a) deny any obligations under that contract;
 - (b) accelerate any debt under that contract;
 - (c) close out any transaction relating to that contract.

12 Application

- (1) Section 165A of the *Life Insurance Act 1995* applies in relation to judicial management commencing after the commencement of that section.
- (2) Section 165B of that Act applies to contracts made after the commencement of that section.

13 After section 168

Insert:

168A Judicial manager's additional powers to facilitate recapitalisation

Powers

- (1) A judicial manager of a life company that has a share capital and is registered under the *Corporations Act 2001* may do one or more of the following acts on terms determined by the judicial manager:
 - (a) issue shares, or rights to acquire shares, in the company;
 - (b) cancel shares, or rights to acquire shares, in the company;

- (c) reduce the company's share capital by cancelling any paid-up share capital that is not represented by available assets;
- (d) sell shares, or rights to acquire shares, in the company;
- (e) vary or cancel rights or restrictions attached to shares in a class of shares in the company.

Note: Before doing such an act, the judicial manager will usually need to get and consider a report on the fair value of each share or right concerned (see section 168B), and will need to report to the Court and obtain the Court's order for the act (see sections 175 and 176).

Giving company members notice of exercise of powers

- (2) As soon as practicable after doing an act described in paragraph (1)(a), (b), (c) or (e) or subsection (3), the judicial manager must give written notice to the persons who were members (under section 231 of the *Corporations Act 2001*) of the company just before the act, identifying the act and explaining its effect on their interests as members.
- (3) One of the acts to which subsection (2) relates is the offering of shares, or rights to acquire shares, in the company for sale under paragraph (1)(d).

Exercise of powers despite other laws etc.

- (4) A judicial manager may do an act under subsection (1) despite:
 - (a) the *Corporations Act 2001*; and
 - (b) the company's constitution; and
 - (c) any contract or arrangement to which the company is party; and
 - (d) any listing rules (as defined in section 761A of the *Corporations Act 2001*) of a financial market (as defined in that section) in whose official list the company is included.

168B Considering report before acting under section 168A

Getting and considering report on fair value of shares or rights

- (1) Before determining terms for an act under subsection 168A(1), the judicial manager must:
 - (a) obtain a report meeting the requirements in subsection (2) of this section on the fair value of the shares or rights concerned

from an expert who is not an associate of the judicial manager, or of the company, under Division 2 of Part 1.2 of the *Corporations Act 2001*; and

(b) consider the report;

unless APRA determines under subsection (8) that this subsection does not apply in relation to that act relating to those shares or rights.

Content of report

(2) The report must set out:

- (a) the amount that is, in the expert's opinion, the fair value for each share or right concerned; and
- (b) the reasons for forming the opinion; and
- (c) any relationship between the expert and any of the following persons:
 - (i) the judicial manager;
 - (ii) a person who is an associate of the judicial manager under Division 2 of Part 1.2 of the *Corporations Act 2001*;
 - (iii) the company;
 - (iv) a person who is an associate of the company under Division 2 of Part 1.2 of the *Corporations Act 2001*;including any circumstances in which the expert gives them advice, or acts on their behalf, in the proper performance of the functions attaching to the expert's professional capacity or business relationship with them; and
- (d) any financial or other interest of the expert that could reasonably be regarded as being capable of affecting the expert's ability to give an unbiased opinion in relation to the matter being reported on.

Determining fair value of shares

- (3) In determining for the purposes of paragraph (2)(a) the amount that is, in the expert's opinion, the fair value for each share concerned, the expert must:
- (a) first, assess the value of the company as a whole, in accordance with the assumptions (if any) notified to the expert by the Minister for the valuation of the company; and

- (b) then allocate that value among the classes of shares in the company that either have been issued or that the judicial manager proposes to issue (taking into account the relative financial risk, and voting and distribution rights, of the classes); and
- (c) then allocate the value of each class pro rata among the shares in that class that either have been issued or that the judicial manager proposes to issue (without allowing a premium or applying a discount for particular shares in that class).

Assumptions for valuation of company

- (4) The Minister may give the expert written notice of assumptions for the valuation of the company. The Minister may, by further written notice given to the expert, revoke, but not vary, notice of the assumptions. A notice under this subsection is not a legislative instrument.

Determining fair value of rights

- (5) In determining for the purposes of paragraph (2)(a) the amount that is, in the expert's opinion, the fair value for each right concerned, the expert must act in accordance with the assumptions (if any) notified to the expert by the Minister for the valuation of the right.

Assumptions for valuation of rights

- (6) The Minister may give the expert written notice of assumptions for the valuation of the rights concerned. The Minister may, by further written notice given to the expert, revoke, but not vary, notice of the assumptions. A notice under this subsection is not a legislative instrument.

Contravention does not invalidate act

- (7) A contravention of subsection (1), (2), (3), (5) or (9) does not affect the validity of anything done under section 168A.

Exemption from subsection (1)

- (8) APRA may determine in writing that subsection (1) does not apply in relation to an act relating to shares or rights if APRA is satisfied

that delaying the act to enable compliance with that subsection in relation to the act would detrimentally affect:

- (a) policy owners of the life company concerned; and
 - (b) financial system stability in Australia.
- (9) APRA must:
- (a) publish a copy of a determination under subsection (8) in the *Gazette*; and
 - (b) give a copy of a determination under subsection (8) to the judicial manager concerned.
- (10) A determination made under subsection (8) is not a legislative instrument.

168C Act under section 168A not ground for denying obligation

- (1) This section applies if a life company is party to a contract, whether the proper law of the contract is Australian law (including the law of a State or Territory) or law of a foreign country (including the law of part of a foreign country).
- (2) The fact that a judicial manager does an act under subsection 168A(1) relating to the life company does not allow the contract, or any other party to the contract, to do any of the following:
 - (a) deny any obligations under that contract;
 - (b) accelerate any debt under that contract;
 - (c) close out any transaction relating to that contract.

14 Application

- (1) Section 168A of the *Life Insurance Act 1995* applies to a judicial manager appointed on or after the commencement of that section.
- (2) Section 168C of that Act applies to contracts made after the commencement of that section.

15 Paragraph 175(1)(a)

After “company”, insert “while promoting financial system stability in Australia”.

16 After paragraph 175(2)(b)

Insert:

- (ba) to do one or more of the acts described in subsection 168A(1) (which is about various measures to recapitalise the life company);

17 Paragraph 175(2)(d)

Repeal the paragraph, substitute:

- (d) to take such other course of action as the judicial manager considers desirable, which may, for example, be a course of action that includes either or both of the following:
 - (i) altering the constitution, rules or other arrangements for governance of the company, if it is registered under the *Corporations Act 2001*, to enable or facilitate the performance of the judicial manager's functions and duties, the exercise of the judicial manager's powers or a course of action described in paragraph (a), (b), (ba) or (c);
 - (ii) one or more of the courses of action described in paragraphs (a), (b), (ba) and (c).

18 Subsection 175(4)

After "(b)", insert ", (ba)".

19 At the end of paragraph 176(1)(b)

Add ", while promoting financial system stability in Australia".

20 Subsection 176(2)

Repeal the subsection, substitute:

- (2) The course or courses of action to which an order may give effect may be one or more of the following:
 - (a) one or more of the courses of action set out in subsection 175(2);
 - (b) one or more other courses of action.

21 Paragraph 176(3)(b)

Repeal the paragraph, substitute:

- (b) takes effect despite anything in any of the following:
 - (i) the *Corporations Act 2001*;
 - (ii) the constitution or other rules of the company;

- (iii) any contract or arrangement to which the company is party;
- (iv) any listing rules (as defined in section 761A of the *Corporations Act 2001*) of a financial market (as defined in that section) in whose official list the company is included.

22 Application

The amendments of sections 175 and 176 of the *Life Insurance Act 1995* made by this Schedule apply in relation to judicial management commencing on or after the commencement of this Schedule.

23 At the end of Division 1 of Part 8

Add:

179A Exceptions to Part IV of the *Trade Practices Act 1974*

For the purposes of subsection 51(1) of the *Trade Practices Act 1974*, the following things are specified and specifically authorised:

- (a) the acquisition of assets in:
 - (i) a sale or disposal of property of a life company under this Division by a judicial manager of the life company or part of the business of the life company; or
 - (ii) a transfer of insurance business of a life company under a scheme prepared by a judicial manager of the life company, or part of the business of the life company, and confirmed (with or without modifications) by the Court under Part 9;(whether the assets are shares in another body corporate or other assets);
- (b) an agreement or deed for carrying out a transfer described in subparagraph (a)(ii);
- (c) arrangements necessary to give effect to a scheme described in subparagraph (a)(ii);
- (d) the acquisition of shares in a life company as a direct result of:
 - (i) the issue or sale of the shares under this Division by a judicial manager of the life company; or

- (ii) the exercise of a right to acquire shares that was issued or sold under this Division by a judicial manager of the life company.

24 Application

Section 179A of the *Life Insurance Act 1995* applies to acquisitions occurring on or after the commencement of that section.

25 After Division 1 of Part 8

Insert:

Division 1A—Other external administration

179B Relationship of this Division with Chapter 5 of the Corporations Act 2001

This Division applies in relation to a life company in addition to Chapter 5 of the *Corporations Act 2001*.

179C Involving APRA in applications to appoint external administrators of life companies

- (1) Before a person (other than APRA) makes an application to a court under Chapter 5 of the *Corporations Act 2001* for the appointment of an external administrator of a life company, the person must give APRA written notice that the person proposes to make the application.
- (2) APRA is entitled to be heard on the application.
- (3) After receiving the notice, APRA may request the person to provide details of the proposed application.

Offence

- (4) A person (other than APRA) commits an offence if:
 - (a) the person makes an application to a court under Chapter 5 of the *Corporations Act 2001* for the appointment of an external administrator of a life company; and
 - (b) before making the application, the person did not give APRA written notice indicating that the person proposed to make the application.
-

Penalty: 60 penalty units.

(5) An offence against subsection (4) is an offence of strict liability.

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

26 Subsection 183(1)

Omit “intends”, substitute “proposes”.

27 At the end of subsection 185(2)

Add:

Note: Action may be taken under the *Corporations Act 2001* against a liquidator who does not comply with such a request.

28 Section 194

Before “The Court”, insert “(1)”.

29 At the end of section 194

Add:

(2) In deciding whether to confirm a scheme (with or without modifications), the Court must have regard to:

- (a) the interests of the policy owners of a company affected by the scheme; and
- (b) if a report relevant to all or part of the scheme has been filed with the Court under section 175—that report; and
- (c) any other matter the Court considers relevant.

30 Application

The amendments of section 194 of the *Life Insurance Act 1995* made by this Schedule apply in relation to decisions relating to applications made on or after the commencement of this Schedule for confirmation of schemes.

31 Subsection 230C(1)

Repeal the subsection, substitute:

- (1) This section applies if a life company or subsidiary of a life company is party to a contract, whether the proper law of the contract is Australian law (including the law of a State or

Territory) or law of a foreign country (including the law of part of a foreign country).

- (1A) The fact that the life company is subject to a direction by APRA under section 230B does not allow the contract, or a party to the contract, other than the life company or subsidiary, to do any of the following:
- (a) deny any obligations under that contract;
 - (b) accelerate any debt under that contract;
 - (c) close out any transaction relating to that contract.
- This subsection has effect subject to subsections (2) and (3).

32 Subsection 230C(2)

Omit “a life company is prevented from fulfilling its obligations under a”, substitute “the life company or subsidiary is prevented from fulfilling its obligations under the”.

33 Subsection 230C(2)

Omit “the company”, substitute “the life company or subsidiary”.

34 After section 251

Insert:

251A Authorising contracts etc. for protecting policy owners’ interests and financial system stability

Authorising the making of contracts and arrangements

- (1) With the Finance Minister’s written approval, the Minister may authorise the making of contracts and arrangements by the Commonwealth for the purposes of:
- (a) protecting the interests of the owners and prospective owners of life insurance policies in a manner consistent with the continued development of a viable, competitive and innovative life insurance industry; or
 - (b) protecting financial system stability in Australia.

Specifying amounts to be credited to Special Account

- (2) The authorisation must specify the amount (if any) to be credited to the Financial System Stability Special Account, so that the total
-

described in subsection (3) does not exceed by more than \$10,000,000,000 the total described in subsection (4).

Note: This ensures that the balance of the Special Account directly attributable to authorisations under this section cannot exceed \$10,000,000,000 at any time.

- (3) The total described in this subsection is the total of all the amounts specified under subsection (2) in authorisations made under this section (taking account of any amendments of those authorisations).
- (4) The total described in this subsection is the total of all the amounts taken under subsection 21(2) of the *Financial Management and Accountability Act 1997* to be debited from the Financial System Stability Special Account for expenditure for the purpose described in paragraph 70G(c) of the *Banking Act 1959*.

Note: That purpose is making a payment under a contract or arrangement whose making was authorised under this section.

Amending specification of amount to be credited

- (5) The Minister may amend an authorisation made under this section, but only to change the specification of an amount under subsection (2), within the limit set out in that subsection.

Authorisation cannot be revoked

- (6) The Minister cannot revoke an authorisation made under this section.

Authorisation or amendment not disallowable or subject to expiry

- (7) An authorisation or amendment made under this section is a legislative instrument, but neither section 42 (disallowance) nor Part 6 (sunsetting) of the *Legislative Instruments Act 2003* applies to the authorisation or amendment.

When authorisation or amendment takes effect

- (8) The authorisation or amendment takes effect from the time it is made, despite subsections 12(1) and (2) of the *Legislative Instruments Act 2003*.

251B Borrowing funds for payments under authorised contracts etc.

- (1) Subsection (2) applies if the Minister has determined under section 251A an amount to be credited to the Financial System Stability Special Account.
- (2) On behalf of the Commonwealth, the Minister may, with the Finance Minister's written approval, borrow money for not more than 24 months on terms and conditions specified in, or consistent with, the approval, so that the total unrepaid borrowing under this section is not more than \$10,000,000,000 at any time.
- (3) The Finance Minister may delegate, in writing, to an SES employee or acting SES employee in the Department that is administered by the Finance Minister, the Finance Minister's power of approval for the purposes of subsection (2).
- (4) In this section:

borrow includes raise money or obtain credit, whether by dealing in securities or otherwise, but does not include obtain credit in a transaction forming part of the day-to-day operations of the Commonwealth.

35 Schedule

Insert:

external administrator means any of the following:

- (a) a liquidator or provisional liquidator;
- (b) a receiver, manager, managing controller, receiver and manager or other controller (other than a judicial manager);
- (c) a voluntary administrator or administrator of a deed of a company arrangement or a scheme manager.

Expressions used in this definition have the same meanings as they have in the *Corporations Act 2001*.

36 Schedule

Insert:

Finance Minister means the Minister who administers the *Financial Management and Accountability Act 1997*.

37 Schedule

Insert:

Financial System Stability Special Account means the Financial System Stability Special Account established by section 70E of the *Banking Act 1959*.

38 Schedule (definition of *official liquidator*)

Repeal the definition.

Schedule 5—Other measures: transfer of business

Financial Sector (Business Transfer and Group Restructure) Act 1999

1 Subsection 4(1) (definition of *regulatory legislation*)

Repeal the definition.

2 Subsection 8(1)

After “regulated bodies”, insert “or bodies corporate related to regulated bodies”.

3 Subsection 8(2)

After “regulated body”, insert “, or of a body corporate related to a regulated body,”.

4 Subsection 8(2) (second sentence)

Repeal the sentence.

5 Subsection 8(3)

After “regulated body”, insert “, or of a body corporate related to a regulated body,”.

6 Paragraphs 8(5)(a) and 24(1)(a)

Omit “regulated”.

7 Subsection 25(1)

Repeal the subsection, substitute:

Transfer from one ADI to another

- (1) APRA may make a written determination that there is to be a total transfer or partial transfer of business from one ADI to another ADI. APRA may make the determination only if:

- (a) either the Minister has declared under section 25A that a transfer of business should occur from the transferring body to the receiving body or APRA is satisfied that:
 - (i) the transferring body has contravened a provision of the *Banking Act 1959*, any regulations or other instruments made under that Act or conditions imposed under that Act; or
 - (ii) the transferring body has informed APRA under subsection 13(3) of the *Banking Act 1959* that it considers that it is likely to become unable to meet its obligations, or that it is about to suspend payment; or
 - (iii) APRA has appointed a person, under subsection 13A(1) of the *Banking Act 1959*, to investigate the affairs of the transferring body, or to take control of the body's business; or
 - (iv) APRA has appointed an administrator, under subsection 13A(1) of the *Banking Act 1959*, to take control of the transferring body's business; or
 - (v) APRA has appointed a person to investigate and report on prudential matters in relation to the transferring body under subsection 61(1) of the *Banking Act 1959*; and
- (b) APRA has considered the interests of depositors of the transferring body (when viewed as a group) and considers that, having regard to their interests, it would be appropriate for the transfer to be made; and
- (c) APRA is satisfied that the transfer is appropriate, having regard to the interests of depositors of the receiving body when viewed as a group; and
- (d) the conditions in subsection (2) exist.

Transfer from an ADI to a body corporate that is not an ADI

- (1A) APRA may make a written determination that there is to be a partial transfer of business from an ADI to a body corporate that is not an ADI. APRA may make the determination only if:
 - (a) at least one of the following applies:
 - (i) the condition in paragraph (1)(a) is met (for the ADI as the transferring body and the body corporate that is not an ADI as the receiving body);

- (ii) APRA has made a determination relating to the transferring body under subsection (1) for the partial transfer of some or all of its regulated business to another ADI (whether or not the transfer provided for in that determination has occurred); and
- (b) APRA has considered the interests of depositors of the transferring body (when viewed as a group) and considers that, having regard to their interests, it would be appropriate for the transfer to be made; and
- (c) the conditions in subsection (2) exist.

Transfer from a body corporate related to an ADI to another body

- (1B) APRA may make a written determination that there is to be a total transfer or partial transfer of business from a body corporate that is related to an ADI and is not an ADI, general insurer or life insurance company to another body corporate (the *transferee*). APRA may make the determination only if:
 - (a) APRA is making, or has made within a reasonable period, a determination under subsection (1) or (1A) relating to the ADI for the total transfer or partial transfer of its business to a body corporate (the *original receiving body*) (whether or not the transfer provided for in that determination has occurred); and
 - (b) the transferee is the original receiving body or is related to the original receiving body.

Transfer from one life insurance company to another

- (1C) APRA may make a written determination that there is to be a transfer of business from one life insurance company to another life insurance company, other than a transfer only of business of the transferring body that is not regulated business. APRA may make the determination only if:
 - (a) APRA is satisfied that:
 - (i) the transferring body has contravened the *Life Insurance Act 1995*, any regulations or other instruments made under that Act or conditions imposed under that Act; or
 - (ii) APRA has given the transferring body a written notice under subsection 139(1) of the *Life Insurance Act 1995*

stating that APRA proposes to investigate life insurance business of the body; or

- (iii) a judicial manager of the transferring body has recommended, in accordance with subsection 175(2) of the *Life Insurance Act 1995*, that a compulsory transfer determination be made in relation to the body; and
- (b) APRA has considered the interests of policy owners of the transferring body (when viewed as a group) and considers that, having regard to their interests, it would be appropriate for the transfer to be made; and
- (c) APRA is satisfied that the transfer is appropriate, having regard to the interests of policy owners of the receiving body when viewed as a group; and
- (d) the conditions in subsection (2) exist.

8 Subsection 25(2)

Omit “only make the determination”, substitute “make a determination under this section only”.

Note: The following heading to subsection 25(2) is inserted “*Common conditions for making a determination under this section*”.

9 Paragraphs 25(2)(a), (b) and (c)

Repeal the paragraphs.

10 Subparagraph 25(2)(e)(i)

Repeal the subparagraph.

11 Subsections 25(3), (4) and (5)

Omit “The determination”, substitute “A determination under this section”.

Note: The following heading to subsection 25(3) is inserted “*Formal requirements for determinations under this section*”.

12 Subsection 25(6)

Repeal the subsection, substitute:

Determinations under this section are not legislative instruments

- (6) A determination made under this section is not a legislative instrument.

13 After section 25

Insert:

25A Ministerial declaration that transfer should occur from ADI

- (1) The Minister may declare in writing given to APRA that a transfer of business should occur from a specified ADI to another specified body corporate.
- (2) A declaration made under subsection (1) is not a legislative instrument.

14 At the end of Part 4

Add:

Division 4—Effect of compulsory transfer on contracts

36AA Compulsory transfer not ground for denying obligation

- (1) This section applies if a body corporate that is, or is proposed to become, a transferring body is or was party to a contract, whether the proper law of the contract is Australian law (including the law of a State or Territory) or law of a foreign country (including the law of part of a foreign country).
- (2) The fact that an act is done for the purposes of Division 2 or 3, or that a certificate of transfer comes into force under Division 3, in connection with the body does not allow the contract, or any other party to the contract, to do any of the following:
 - (a) deny any obligations under that contract;
 - (b) accelerate any debt under that contract;
 - (c) close out any transaction relating to that contract.

15 Subsections 43(1), (2) and (3)

After “(9)”, insert “, (9A)”.

16 Subsection 43(6)

Omit “Nothing”, substitute “Subject to subsection (9A), nothing”.

17 After subsection 43(9)

Insert:

- (9A) For the purposes of subsection 51(1) of the *Trade Practices Act 1974*, the following things are specified and specifically authorised:
- (a) a transfer of business under Part 4;
 - (b) anything done to enable or facilitate a transfer of business under Part 4 (including an agreement referred to in section 30).

18 Subsection 44(1)

Repeal the subsection, substitute:

- (1) If the operation of this Act, except Parts 3 and 4A, would result in an acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person.
- (1A) If the Commonwealth and the person do not agree on the amount of the compensation under subsection (1), the person may institute proceedings in the Federal Court of Australia for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.
- (1B) If the operation of Part 3 or 4A would result in an acquisition of property from a person otherwise than on just terms, the receiving body is liable to pay a reasonable amount of compensation to the person.
- (1C) If the receiving body and the person do not agree on the amount of the compensation under subsection (1B), the person may institute proceedings in the Federal Court of Australia for the recovery from the receiving body of such reasonable amount of compensation as the court determines.

19 Application

- (1) The amendments of sections 8, 24 and 25 of the *Financial Sector (Business Transfer and Group Restructure) Act 1999* made by this Schedule apply to the making of determinations on or after the commencement of this Schedule.

Schedule 5 Other measures: transfer of business

- (2) Section 36AA of that Act applies in relation to contracts made after the commencement of this Schedule.
 - (3) The amendments of section 43 of that Act made by this Schedule apply in relation to transfers occurring on or after the commencement of this Schedule.
 - (4) The amendment of section 44 of that Act made by this Schedule applies to acquisitions of property occurring on or after the commencement of this Schedule.
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*[Minister's second reading speech made in—
House of Representatives on 15 October 2008
Senate on 16 October 2008]*

(207/08)
