

# EXPOSURE DRAFT



EXPOSURE DRAFT

## Insurance Regulations 2023

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I, General the Honourable David Hurley AC DSC (Retd), Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulations.

Dated 2023

David Hurley  
Governor-General

By His Excellency's Command

Stephen Jones [DRAFT ONLY—NOT FOR SIGNATURE]  
Assistant Treasurer  
Minister for Financial Services

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Preliminary **Part 1**

Section 1

## Part 1—Preliminary

### 1 Name

This instrument is the *Insurance Regulations 2023*.

### 2 Commencement

- (1) Each provision of this instrument 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     |
| Provisions                      | Commencement   | Date/Details |
| 1. The whole of this instrument | At the same time as Schedule 1 to the <i>Treasury Laws Amendment (Measures for Consultation) Act 2023</i> commences. |              |

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

### 3 Authority

This instrument is made under the *Insurance Act 1973*.

### 4 Definitions

Note: A number of expressions used in this instrument are defined in the Act, including the following:

- (a) APRA;
- (b) Australia;
- (c) financial year;
- (d) insurance business;
- (e) protected policy.

In this instrument:

**accounting standard** has the same meaning as in the *Corporations Act 2001*.

Note: In 2023, the accounting standards were accessible at <http://www.aasb.gov.au>.

**Act** means the *Insurance Act 1973*.

**Australian insurance broker** means a person who is authorised, by the conditions on an Australian financial services licence (within the meaning of the *Corporations Act 2001*) held by:

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## Part 1 Preliminary

### Section 5

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- (a) the person; or
- (b) if the person is a representative (within the meaning of section 910A of that Act) of another person—the other person;

to assume or use the expression “insurance broker” or “general insurance broker”, as mentioned in section 923B of that Act.

**Australian insurer** means a person who is authorised or permitted under the Act (including by way of a determination under subsection 7(1) of the Act) to carry on insurance business in Australia.

**Australian operating revenue**: see subsection 9(2).

**body** has the same meaning as in the *Corporations Act 2001*.

**corporation** has the same meaning as in the *Corporations Act 2001*.

**entity** has the same meaning as in Chapter 7 of the *Corporations Act 2001*.

**equestrian package**: see subsection 10(3).

**family trust** has the meaning given by section 272-75 in Schedule 2F to the *Income Tax Assessment Act 1936*.

**gross Australian assets**: see subsection 9(3).

**high-value insured**: see subsection 9(1).

**member** of a related group: see section 6.

**number of Australian employees**: see subsection 9(4).

**permanent resident** has the same meaning as in the *Australian Citizenship Act 2007*.

**related group**: see section 6.

**small business entity**: a person is a **small business entity** at a time if the person is a small business entity (within the meaning of the *Income Tax Assessment Act 1997*) for the income year in which the time occurs.

**unauthorised foreign insurer**: see section 5.

### 5 Meaning of *unauthorised foreign insurer*

- (1) An insurer is an **unauthorised foreign insurer** if:
  - (a) either:
    - (i) the insurer is a body corporate incorporated in a foreign country; or
    - (ii) subsection (2) applies to the insurer; and
  - (b) immediately before 1 July 2008:
    - (i) the insurer was not authorised under the Act to carry on insurance business in Australia; and
    - (ii) the insurer was not required to be authorised under the Act in order to carry on insurance business in Australia; and

- (iii) there was no determination in force under subsection 7(1) of the Act that subsection 9(1), 10(1) or 10(2) of the Act does not apply to the insurer; and
  - (c) if the insurer is not a body corporate or a Lloyd's underwriter—there is no determination in force under subsection 7(1) of the Act that subsection 9(1) of the Act does not apply to the insurer; and
  - (d) if the insurer is a body corporate (other than a Lloyd's underwriter):
    - (i) the insurer is not a general insurer; and
    - (ii) there is no determination in force under subsection 7(1) of the Act that subsection 10(1) of the Act does not apply to the insurer; and
  - (e) if the insurer is a Lloyd's underwriter:
    - (i) section 93 of the Act has ceased to have effect; and
    - (ii) there is no determination in force under subsection 7(1) of the Act that subsection 10(2) of the Act does not apply to the insurer.
- (2) For the purposes of subparagraph (1)(a)(ii), this subsection applies to an unincorporated body that:
- (a) is established under a law of a foreign country; and
  - (b) under a law of that foreign country, may sue or be sued, or may hold property in the name of its secretary or of an office holder of the body duly appointed for that purpose; and
  - (c) does not have its head office or principal place of business in Australia.

## 6 Meaning of *related group*

- (1) If a person is a partner in a partnership, there is a ***related group*** that consists of the following ***members***:
  - (a) the person;
  - (b) each other partner in the partnership.
- (2) If an entity (the ***associate***) is an associated entity (within the meaning of the *Corporations Act 2001*) of another entity, and is not a partner in a partnership, there is a ***related group*** that consists of the following ***members***:
  - (a) the associate;
  - (b) each entity of which the associate is an associated entity.

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## Part 2 Insurance contracts that are not insurance business

### Section 7

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## Part 2—Insurance contracts that are not insurance business

### 7 Simplified outline

This Part specifies circumstances in which an unauthorised foreign insurer undertaking liability under a contract of insurance is not insurance business for the purposes of the Act.

### 8 Circumstances in which undertaking liability under insurance contracts is not insurance business

- (1) For the purposes of subsection 3A(1) of the Act, the circumstance mentioned in subsection (2) of this section is specified in relation to a person (the *insurer*) undertaking liability under a contract of insurance.
- (2) For the purposes of subsection (1), the circumstance is that, when the liability is undertaken:
  - (a) the insurer is an unauthorised foreign insurer (see section 5); and
  - (b) any of the following subparagraphs applies:
    - (i) at least one party to the contract (other than the insurer) is a high-value insured (see section 9);
    - (ii) section 10 (insurance contracts for atypical risks) applies to the contract;
    - (iii) an Australian insurance broker has certified in writing that the risks insured under the contract cannot reasonably be placed with an Australian insurer (see section 11);
    - (iv) section 12 (insurance contracts required by foreign laws to be issued by specified insurers) applies.

### 9 Meaning of *high-value insured*

#### *Meaning of high-value insured*

- (1) A person is a *high-value insured* at a time (the *test time*) in a financial year if:
  - (a) the average of the person's Australian operating revenue for the 3 previous financial years is at least \$200 million; or
  - (b) the average of the person's gross Australian assets for the 3 previous financial years is at least \$200 million; or
  - (c) the average of the person's number of Australian employees for the 3 previous financial years is at least 500.
- (2) The person's *Australian operating revenue* for a financial year is the total of the operating revenue (within the meaning of the accounting standards, as applying in relation to the year), of the entities mentioned in subsection (6), derived in Australia in the year.



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- (3) The person's **gross Australian assets** for a financial year is the total of the value of the gross assets (within the meaning of the accounting standards, as applying in relation to the year), of the entities mentioned in subsection (6), in Australia at the end of the year.
- (4) The person's **number of Australian employees** for a financial year is the total of the number of Australian-based employees (within the meaning of the *Fair Work Act 2009*), of the entities mentioned in subsection (6), at the end of the year.
- (5) For the purposes of subsection (4), it does not matter whether an employee was employed:
  - (a) on a full-time or part-time basis; or
  - (b) on a permanent or casual basis.

### *Relevant entities*

- (6) For the purposes of subsections (2), (3), (4) and (7), the entities are:
  - (a) the person mentioned in subsection (1); and
  - (b) if that person is a member of a related group at the test time—each other entity that is a member of the group at the test time.

### *Entities not in existence during previous 3 years*

- (7) Treat a reference in subsection (1) to the 3 previous financial years as being a reference to:
  - (a) if none of the entities mentioned in subsection (6) was in existence at the end of the second of those 3 financial years—the latest of those 3 financial years; or
  - (b) if none of the entities mentioned in subsection (6) was in existence at the end of the earliest of those 3 financial years, but at least one of those entities was in existence at the end of the second of those 3 financial years—the latest 2 of those 3 financial years.
- (8) For the purposes of subsection (2), (3) or (4), treat:
  - (a) the operating revenue of an entity in a financial year; or
  - (b) the value of an entity's gross assets at the end of a financial year; or
  - (c) the number of Australian-based employees of an entity at the end of a financial year;(whichever is relevant) as being nil if the entity was not in existence at the end of the year.

## **10 Insurance contracts for atypical risks**

- (1) For the purposes of subparagraph 8(2)(b)(ii), and subject to subsection (2) of this section, this section applies to a contract of insurance if each risk insured under the contract is a risk of any of the following:
  - (a) loss or liability arising from the hazardous properties (including radioactive, toxic or explosive properties) of nuclear fuel, nuclear material or nuclear waste;

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## Part 2 Insurance contracts that are not insurance business

### Section 11

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- (b) loss or liability arising from the hazardous properties of biological material or biological waste;
- (c) loss or liability arising from war or warlike activities (within the meaning of the *Insurance Contracts Regulations 2017*);
- (d) loss or liability arising from a terrorist act (within the meaning of section 100.1 of the *Criminal Code*);
- (e) liability arising from health-care related research;
- (f) loss of, or liability arising from the operation of, a space object (within the meaning of the *Space (Launches and Returns) Act 2018*);
- (g) liability arising from the ownership or operation of an aircraft (but not loss of the aircraft or its cargo);
- (h) liability and expenses arising from a person owning, chartering, managing, operating or being in possession of a vessel other than a pleasure craft (within the meaning of subsection 9A(2) of the *Insurance Contracts Act 1984*);
- (i) loss or liability arising from equine mortality or fertility and related risks;
- (j) loss or liability incidental to a loss or liability mentioned in paragraphs (a) to (i).

#### *Equestrian packages*

- (2) This section does not apply to a contract of insurance if the contract of insurance is an equestrian package.
- (3) A contract of insurance is an ***equestrian package*** if each risk insured under the contract is a risk associated with:
  - (a) horse-riding; or
  - (b) owning or possessing a horse for purposes relating to horse-riding.

### **11 Obligations of Australian insurance brokers in relation to certifying that risks cannot reasonably be placed in Australia**

- (1) This section is made for the purposes of paragraph 3A(3)(b) of the Act.
- (2) An Australian insurance broker must not certify a matter under subparagraph 8(2)(b)(iii) of this instrument in relation to the risks insured under a contract of insurance unless, after making reasonable enquires, the Australian insurance broker is satisfied, on reasonable grounds, that, for each of the risks:
  - (a) there is no Australian insurer that will insure against the risk; or
  - (b) the terms (including price) on which any Australian insurer will insure against the risk are substantially less favourable to the insured than the terms on which the relevant unauthorised foreign insurer will insure against the risk; or
  - (c) insurance with an Australian insurer would be substantially less favourable to the insured than with the relevant unauthorised foreign insurer because of other circumstances.

Example: Paragraph (c)—the insured and the unauthorised foreign insurer have a pre-existing relationship, and the maintenance of that relationship will have significant benefits for the insured.

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Insurance contracts that are not insurance business **Part 2**

## Section 12

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- (3) An Australian insurance broker that certifies a matter under subparagraph 8(2)(b)(iii) in relation to the risks insured under a contract of insurance:
- (a) must keep written records of:
    - (i) its inquiries into the matters mentioned in subsection (1) of this section; and
    - (ii) its reasons for being satisfied of those matters; and
  - (b) must, if requested by the insured, give a copy of the certificate under subsection (2) of this section to the insured.

Note: Failure by an Australian insurance broker to properly discharge the obligations in this section may be a matter affecting the financial services licence of that broker. For financial services licenses, see Part 7.6 of the *Corporations Act 2001*.

### **12 Insurance contracts required by foreign laws to be issued by specified insurers**

For the purposes of subparagraph 8(2)(b)(iv), this section applies in relation to an unauthorised foreign insurer undertaking liability under a contract of insurance if:

- (a) a law of a foreign country requires that the contract be issued by an insurer, or a kind of insurer, authorised or permitted under a law of that country to issue that kind of contract; and
- (b) the unauthorised foreign insurer is so authorised or permitted, or is an insurer of that kind.

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## Part 3 Insurance business to which the Act does not apply

### Section 13

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## Part 3—Insurance business to which the Act does not apply

### 13 Simplified outline

The Act does not apply to or with respect to insurance business:

- (a) carried on by a body corporate prescribed by section 14 of this instrument; or
- (b) prescribed by section 15 of this instrument.

### 14 Prescribed bodies corporate

For the purposes of paragraph 5(2)(b) of the Act, the following bodies corporate are prescribed.

- (a) the Export Finance and Insurance Corporation;
- (b) Coal Mines Insurance Pty Limited;
- (c) the Insurance Commission of Western Australia;
- (d) a body corporate that:
  - (i) is not a company registered under the *Corporations Act 2001*; and
  - (ii) is established or constituted under a law of the Commonwealth or of a State or Territory; and
  - (iii) is required under a law of the Commonwealth or of a State or Territory to carry on any business of insurance or to undertake liability under a contract of insurance.

### 15 Prescribed insurance business

For the purposes of paragraph 5(2)(c) of the Act, the following insurance business is prescribed:

- (a) workers compensation insurance business carried on by a company that is:
  - (i) registered under the *Corporations Act 2001*; and
  - (ii) licensed under Division 3 of Part 7 of the *Workers Compensation Act 1987* (NSW); and
  - (iii) required under that Act to establish and maintain statutory funds;
- (b) the carrying on by the Municipal Association of Victoria of the following kinds of insurance business:
  - (i) fidelity guarantee insurance;
  - (ii) personal accident insurance;
- (c) insurance business carried on by an unauthorised foreign insurer relating to a contract of insurance that meets the following criteria:
  - (i) the contract was entered into before 1 July 2008;
  - (ii) the contract has not been renewed or extended beyond its original term on or after 1 July 2008;
  - (iii) the terms of the contract have not been varied on or after 1 July 2008.

## Part 4—Financial claims scheme

### 16 Simplified outline

This Part prescribes matters for the purposes of Part VC of the Act. Part VC of the Act provides for a scheme relating to general insurers that are insolvent, under statutory management or for which an external administrator has been appointed.

### 17 Policies that are not protected policies

For the purposes of paragraph (a) of the definition of *protected policy* in subsection 3(1) of the Act, the following policies are not protected policies:

- (a) a policy:
  - (i) that is required to be held under a law of a State or Territory; and
  - (ii) that is protected through arrangements administered by the State or Territory;
- (b) a policy that is a pre-authorisation liability of a foreign general insurer;
- (c) a policy that is a reinsurance or a retrocession of another policy;
- (d) a policy that is an indemnification of another policy.

### 18 Entitlement to payment of claimant under protected policy—period for making claim

#### *Start day*

- (1) For the purposes of subparagraph 6ZZZF(1)(b)(i) of the Act, the day on which the period mentioned in paragraph 6ZZZF(1)(b) of the Act starts in relation to:
- (a) a person who is entitled to claim under insurance cover as mentioned in paragraph 6ZZZF(1)(a) of the Act; and
  - (b) a general insurer;
- is specified in the following table.

| <b>Start day</b> |  |   |
|------------------|--|---|
| <b>Item</b>      | <b>Column 1<br/>If ...</b>   | <b>Column 2<br/>the day on which the<br/>period starts is ...</b> |
| 1                | the person did not make a claim under the insurance cover before the Minister made the declaration, under subsection 6ZZZC(1) of the Act, that Division 3 of Part VC of the Act applies in relation to the general insurer | the day on which the Minister made the declaration.               |
| 2                | the person made a claim under the insurance cover before the Minister made the declaration, under subsection 6ZZZC(1) of the Act, that Division 3 of Part VC of the Act applies in relation                                | the day on which the person made the claim.                       |

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## Part 4 Financial claims scheme

### Section 19

#### Start day

| Item | Column 1<br>If ...     | Column 2<br>the day on which the<br>period starts is ... |
|------|------------------------|--|
|      | to the general insurer |  |

#### *End day*

- (2) For the purposes of subparagraph 62ZZF(1)(b)(ii) of the Act, the day on which the period mentioned in paragraph 62ZZF(1)(b) of the Act ends is the day that occurs 12 months after the day on which the Minister made the declaration, under subsection 62ZZC(1) of the Act, that Division 3 of Part VC of the Act applies in relation to the general insurer.

Note: APRA may extend the period within which a claim may be made: see subsection 62ZZA(1) of the Act.

### 19 Entitlement to payment of third party—period for making claim

#### *Start day*

- (1) For the purposes of subparagraph 62ZZG(1)(aa)(i) of the Act, the day on which the period mentioned in paragraph 62ZZG(1)(aa) of the Act starts in relation to:
- (a) a person who is entitled to make a claim in relation to a recoverable amount, as described in paragraph 62ZZG(1)(a) of the Act; and
  - (b) the general insurer specified in the determination mentioned in paragraph 62ZZG(1)(a) of the Act;
- is specified in the following table.

#### Start day

| Item | Column 1<br>If ...   | Column 2<br>the day on which the<br>period starts is ... |
|------|--|--|
| 1    | the person did not make a claim in relation to the recoverable amount before the Minister made the declaration, under subsection 62ZZC(1) of the Act, that Division 3 of Part VC of the Act applies in relation to the general insurer | the day on which the Minister made the declaration.      |
| 2    | the person made a claim in relation to the recoverable amount before the Minister made the declaration, under subsection 62ZZC(1) of the Act, that Division 3 of Part VC of the Act applies in relation to the general insurer         | the day on which the person made the claim.              |

#### *End day*

- (2) For the purposes of subparagraph 62ZZG(1)(aa)(ii) of the Act, the day on which the period mentioned in paragraph 62ZZG(1)(aa) of the Act ends is the day that occurs 12 months after the day on which the Minister made the declaration, under subsection 62ZZC(1) of the Act, that Division 3 of Part VC of the Act

applies in relation to the general insurer specified in the determination mentioned in paragraph 62ZZG(1)(a) of the Act.

Note: APRA may extend the period within which a claim may be made: see subsection 62ZZA(1) of the Act.

## 20 Conditions of eligibility

For the purposes of paragraph 62ZZF(3)(b) of the Act, the prescribed conditions are that the person is:

- (a) an Australian citizen; or
- (b) a permanent resident; or
- (c) an individual who has insured against a risk that is located in Australia; or
- (d) a small business entity, if the central management and control of the small business entity is located in Australia; or
- (e) a person that is entitled to claim under insurance cover provided in relation to a small business entity, if:
  - (i) the central management and control of the small business entity is located in Australia; and
  - (ii) the small business entity is not a corporation or an individual; or
- (f) a trustee of a family trust, if the central management and control of the trustee is located in Australia; or
- (g) a not-for-profit body, if the central management and control of the not-for-profit body is located in Australia; or
- (h) a person that is entitled to claim under insurance cover provided in relation to a not-for-profit body, if:
  - (i) the central management and control of the not-for-profit body is located in Australia; and
  - (ii) the not-for-profit body is not a corporation.

## 21 Conditions of eligibility—third parties

For the purposes of paragraph 62ZZG(3)(b) of the Act, the prescribed conditions are that the person is:

- (a) an Australian citizen; or
- (b) a permanent resident; or
- (c) an individual who is entitled to claim under insurance cover in respect of a risk that is located in Australia; or
- (d) a small business entity, if the central management and control of the small business entity is located in Australia; or
- (e) a person that is entitled to claim under insurance cover provided in relation to a small business entity, if:
  - (i) the central management and control of the small business entity is located in Australia; and
  - (ii) the small business entity is not a corporation or an individual; or
- (f) a trustee of a family trust, if the central management and control of the trustee is located in Australia; or

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## Part 4 Financial claims scheme

### Section 22

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- (g) a not-for-profit body, if the central management and control of the not-for-profit body is located in Australia; or
- (h) a person that is entitled to claim under insurance cover provided in relation to a not-for-profit body, if:
  - (i) the central management and control of the not-for-profit body is located in Australia; and
  - (ii) the not-for-profit body is not a corporation.

### **22 Recovery of overpayments**

- (1) This section is made for the purposes of section 62ZZS of the Act.
- (2) If:
  - (a) an amount is paid to, or applied for the benefit of, a person purportedly to meet a claim of the person under Division 3 of Part VC of the Act; and
  - (b) the amount is in excess of the person's entitlement (if any) under that Division;the excess amount is a debt due to APRA.
- (3) APRA may recover the amount of the debt:
  - (a) by bringing proceedings for recovery of the debt in a court of competent jurisdiction; or
  - (b) by withholding the amount of the debt from another payment that would otherwise be paid to the person under Division 3 of Part VC of the Act; or
  - (c) from any amount payable to the person upon the winding up of a declared general insurer that provided insurance cover to the person under a protected policy.
- (4) Nothing in this section is intended to limit the way in which APRA may recover the debt.
- (5) APRA may, if it considers it appropriate to do so in the particular circumstances of the case, waive the whole or a part of the debt.



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Application and transitional provisions **Part 5**  
Provisions relating to this instrument as originally made **Division 1**

Section 23

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## **Part 5—Application and transitional provisions**

### **Division 1—Provisions relating to this instrument as originally made**

#### **23 Certificates**

A certificate that was:

- (a) issued under subregulation 4D(1) of the *Insurance Regulations 2002*; and
- (b) in force immediately before the commencement of this section;

has effect, from that commencement, as if it had been issued under subparagraph 8(2)(b)(iii) of this instrument.