

EXPOSURE DRAFT EXPLANATORY STATEMENT

Issued by authority of the Assistant Treasurer and Minister for Financial Services

Insurance Act 1973

Insurance Regulations 2023

Section 132 of the *Insurance Act 1973* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Act provides for the regulation of general insurers by the Australian Prudential Regulation Authority (APRA). The *Insurance Regulations 2023* (the Regulations) set out:

- circumstances in which foreign insurers who are not authorised under the Act are able to enter into insurance contracts in Australia;
- certain entities and types of insurance business to which the Act does not apply;
- prescribed bodies corporate and insurance businesses to which the Act does not apply; and
- technical details associated with the Act's financial claims scheme.

The purpose of the Regulations is to remake and improve the *Insurance Regulations 2002* (the 2002 Regulations) prior to the 2002 Regulations sunseting.

The *Legislation Act 2003* provides that all legislative instruments, other than exempt instruments, are automatically repealed according to the progressive timetable set out in section 50 of that Act. The Attorney-General may defer sunseting in certain circumstances, pursuant to section 51 of the *Legislation Act 2003*. Legislative instruments generally cease to have effect after a specific date unless further legislative action is taken to extend their operation, such as remaking the instrument.

The *Legislation (Insurance Instruments) Sunset-altering Declaration 2018* aligned the sunseting date for the 2002 Regulations, *Insurance Acquisitions and Takeovers (Notices) Regulations 1992*, *Life Insurance Regulations 1995* and *Insurance Acquisitions and Takeovers Act 1991- Decision-Making Principles IDM 1/1992* to 1 October 2023 to enable Treasury to conduct a comprehensive thematic review of regulation imposed on the insurance industry. Relevant provisions of the enabling Acts; that is, the Act, the *Insurance Acquisitions and Takeovers Act 1991* and the *Life Insurance Act 1995*, were also considered.

As part of the thematic review, Treasury found that the 2002 Regulations are still required to support the operation of the Act, subject to the removal of redundant provisions and drafting improvements. The Regulations implement these findings.

The Act does not specify any conditions that need to be met before the power to make the Regulations may be satisfied.

Details of the Regulations are set out in Attachment A.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commenced at the same time as Schedule 1 to the *Treasury Laws Amendment (Measures for Consultation) Act 2023* and have effect from the date of commencement.

The 2002 Regulations are repealed by the *Treasury Laws Amendment (Insurance) Regulations 2023* which also commenced at the same time as Schedule 1 to the *Treasury Laws Amendment (Measures for Consultation) Act 2023*.

The finding table in Attachment B represents the previous numbering of the 2002 Regulations and the updated numbering in the Regulations.

Details of the *Insurance Regulations 2023*

This Attachment sets out further details of the *Insurance Regulations 2023* (the Regulations). All references are to the Regulations unless otherwise stated.

The Regulations improve the *Insurance Regulations 2002* (the 2002 Regulations) by removing redundant provisions, simplifying language and restructuring and renumbering provisions for ease of navigation.

Changes of a minor or machinery nature, such as the increased use of headings and references to ‘section’ rather than ‘regulation’ in accordance with modern drafting practice, are generally not specifically identified in this Attachment. Where changes are made that are intended to apply in a different way or require further explanation, these are identified and explained in this Attachment.

Part 1—Preliminary

Section 1 – Name of the Regulations

This section provides that the name of the Regulations is the *Insurance Regulations 2023*.

Section 2 – Commencement

The Regulations commence at the same time as Schedule 1 to the *Treasury Laws (2023 Measures for Consultation) Act 2023*.

Section 3 – Authority

This section provides that the Regulations are made under the *Insurance Act 1973* (the Act).

Section 4 – Definitions

This section sets out the definitions for terms used in the Regulations. The note to this section directs the reader to a number of expressions used in the Regulations that are defined in the Act.

Section 5 – Meaning of *unauthorised foreign insurer*

This section remakes the definition of *unauthorised foreign insurer* (UFI) in regulation 4 of the 2002 Regulations.

The definition prescribes relevant tests for determining whether a particular entity—a body corporate, Lloyd’s underwriter or unincorporated body—is an unauthorised foreign insurer for the purposes of the Regulations and the Act.

In certain circumstances (set out elsewhere in the Regulations), the Act does not apply to unauthorised foreign insurers.

Section 6 – Meaning of *related group*

This section remakes the definition of *related group* in regulation 4B of the 2002 Regulations. It sets out relevant tests for defining a related group and *members* of a related group in relation to partnerships and associated entities.

Part 2—Insurance contracts that are not insurance business

Section 7 – Simplified Outline

This section provides a simplified outline of Part 2 of the Regulations.

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

This section remakes regulation 4A of the 2002 Regulations by prescribing certain insurance contracts that are taken not to be insurance businesses for the purposes of section 3A(1) of the Act. It exempts from the definition of insurance business in section 3 of the Act, undertaking liability under a contract of insurance, or a kind of contract of insurance in circumstances where the insurer is a UFI and the contract of insurance, or kind of contract of insurance, is any of the following:

- a contract of insurance with a high-value insured;
- a contract of insurance for an atypical risk;
- a contract of insurance for risks that cannot reasonably be placed with an Australian insurer; and
- a contract of insurance required by a foreign law.

If an insurance contract with a UFI falls within an exemption, then the Act will not apply to those contracts of insurance. The insurance business can then be placed with an offshore insurer without that insurer needing to be authorised in Australia. As unauthorised insurers based in Australia are not UFIs they cannot rely on the exemptions in this regulation.

This exemption is also relevant to certain exemptions under the *Corporations Act 2001* (Corporations Act). Section 985D(1) of the Corporations Act prohibits Australian financial services licence holders and authorised representatives from dealing in a general insurance products unless the general insurance product is issued by an authorised insurer under the Act, a Lloyd's underwriter or an exemption in the Insurance Act applies, however section 985D(2) of the Corporations Act provides that the prohibition in section 985D(1) of the Corporations Act does not apply if undertaking liability under the contract of insurance concerned is not, or would not be, insurance business for the purposes of the Insurance Act. Regulation 7.6.01AAAB of the *Corporations Regulations 2001* allows an unauthorised foreign insurer to handle insurance claims without an Australian financial services licence if they authorise another person who has an Australian financial service licence for handling claims.

Section 9 – Meaning of *high-value insured*

This section remakes regulation 4B of the 2002 Regulations. It establishes what constitutes a ***high-value insured*** for the purposes of subparagraph 8(2)(b)(i) of the Regulations. If at least one of the policyholders on the insurance contract meets the definition of high-value insured, the insurance business can then be placed with a UFI.

The thresholds are calculated by averaging the revenue, assets or employees at the end of each of the previous three financial years.

The high-value insured exemption will allow Australia's largest businesses and global companies headquartered in Australia to use UFIs as part of their risk management frameworks and to cover their global risks. It recognises that high-value insureds are likely to be sophisticated purchasers of general insurance with complex risks that may not be able to be covered solely through authorised insurers.

Subsections (2) to (5) clarify the meaning and accounting standards of ***Australian operating revenue***, ***gross Australian assets*** and ***number of Australian employees*** for determining the high-value insured status of an entity. Employees include people employed on a full-time or part-time basis and both casual and permanent employees.

Subsection (6) defines the scope of the relevant entities to which the exemption applies, specifically in relation to related groups.

Subsections (7) and (8) provide for how an entity's operating revenue, gross assets and number of Australian-based employees are to be treated if the entity was not in existence at the end of a relevant financial year.

Section 10 – Insurance contracts for atypical risks

This section remakes regulation 4C of the 2002 Regulations. It establishes what constitutes an atypical risk for the purposes of subparagraph 8(2)(b)(ii).

There are a number of limited specific atypical insurance risks that currently cannot be placed, on a stand-alone basis, with authorised insurers. Some risks are offered in a global market by a very limited number of global insurers. For other risks, while there may be limited cover available, there may not be sufficient capacity to satisfy local demand, or the cover may only be available if bundled with other risks.

Subsection (2) provides that the exemption does not apply to contracts of insurance that fall within the definition of ***equestrian package***. Subsection (3) defines an equestrian package to be an insurance policy that covers risks arising from horse-riding or the ownership or possession of a horse for purposes related to horse-riding.

Atypical risks are defined to be:

Nuclear	Loss or liability arising from the hazardous properties (including radioactive, toxic or explosive properties) of nuclear fuel, nuclear material or nuclear waste.
Biological	Loss or liability arising from the hazardous properties of biological material or biological waste.
War	Loss or liability arising from war or warlike activities (within the meaning of the <i>Insurance Contracts Regulations 2017</i>).
Terrorism	Loss or liability arising from a terrorist act (within the meaning of section 100.1 of the <i>Criminal Code</i>).
Medical clinical trials	Liability arising from health-care related research.
Space	Loss of, or liability arising from the operation of, a space object (within the meaning of the <i>Space (Launches and Returns) Act 2018</i>).
Aviation liability	Liability arising from the ownership or operation of an aircraft (but not loss of the aircraft or its cargo).
Protection & indemnity for ships other than for pleasure craft	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 <i>Insurance Contracts Act 1984</i>).
Equine other than equestrian packages	Loss or liability arising from equine mortality or fertility and related risks.
Incidental cover	Loss or liability incidental to any loss or liability set out above. An incidental risk being covered by the contract is a risk of lesser importance than, and covered in conjunction with, the other atypical risks.

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

This section remakes regulation 4D of the 2002 Regulations for the purposes of paragraph 3A(3)(b) of the Act. This section prescribes the requirements that Australian insurance brokers must have regard to in certifying that a risk cannot

reasonably be placed in Australia. If these are fulfilled, then a certificate can be given under subparagraph 8(2)(b)(iii). This adds capacity to the Australian insurance market for certain risks.

An assessment will be made in writing by an insurance broker to determine if a specific risk cannot reasonably be placed with an authorised insurer. If the insurance broker is satisfied that the risk cannot reasonably be placed with an authorised insurer, the business could then be placed with a UFI.

An 'insurance broker' is defined to be a person who is permitted under section 923B of the Corporations Act to use the expression 'insurance broker' or 'general insurance broker'.

The insurance broker, in making their assessment, must be satisfied that:

- there is no Australian insurer that will insure against the risk; or
- 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 UFI will insure against the risk; or
- there are other circumstances that mean that insurance with an Australian insurer is substantially less favourable to the insured than with the UFI.

The insurance broker's assessment needs to be reasonable. The section clarifies that the insurance broker's certification needs to be based on a reasonable level of investigation and market analysis.

Subsection (3) provides that the insurance broker must also keep written records of its inquiries, its decision and reasons for its decision. If asked by an insured, the broker must provide the insured with a copy of the certificate which certifies that the insurance broker has made an assessment that the risk cannot reasonably be placed in Australia. This will allow an insured to use another intermediary, for example, an insurance agent, to place their business with a UFI without breaching the prohibitions. The certificate from the insurance broker is required because only an insurance broker can make an assessment under the Regulations.

This section recognises that there will be a range of circumstances where a business or consumer has a unique risk that cannot be placed with an authorised insurer or with a UFI under the previous two limbs of the exemption (that is, high-value insured and atypical risk). This may include where an Australian insurer does not offer the necessary terms and conditions to cover a particular risk or where the capacity of the Australian market in a particular line has been exhausted (for example, for environmental impairment) or where there are benefits that accrue to an insured through a longstanding on-going relationship with an insurer.

Section 12 – Insurance contracts required by foreign laws to be issued by specific insurers

This section remakes regulation 4E of the 2002 Regulations. It sets out circumstances, for the purposes of subparagraph 8(2)(b)(iv) (insurance contracts required by foreign laws to be issued by specified insurers). For example, an Australian business operating in Country A that is required by the law of Country A to take out workers'

compensation insurance with an insurer authorised in Country A will be able to place this business with a UFI in Country A.

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

Section 13 – Simplified Outline

This section provides a simplified outline of Part 3 of the Regulations.

Section 14 – Prescribed bodies corporate

This section remakes regulation 5 and Schedule 1 to the 2002 Regulations. This section provides that certain bodies corporate are exempted from the application of the Act for the purposes of paragraph 5(2)(b) of the Act.

This section contains the same bodies corporate as in the 2002 Regulations, however the reference to the Motor Vehicle Insurance Trust constituted under the *Motor Vehicle (Third Party Insurance Act 1943* (WA) has been changed to the Insurance Commission of Western Australia. Section 8 of Schedule 4 of the *Insurance Commission of Western Australia Act 1986* (WA) provides that references to the Motor Vehicle Investment Trust should be read as references to the State Government Insurance Commission. The State Government Insurance Commission was renamed the Insurance Commission of Western Australia in the *Acts Amendment (ICWA) Act 1986* (WA).

Section 15 – Prescribed insurance business

This section remakes regulation 6 and Schedule 2 to the 2002 Regulations for the purposes of paragraph 5(2)(c) of the Act. It provides that certain kinds of insurance businesses are exempted from the operation of the Act.

The exempted kinds of insurance businesses in paragraphs 15(a) and 15(b) are regulated by New South Wales and Victoria.

The exempted kinds of insurance business in paragraph 15(c) are for contracts that were entered into prior to 1 July 2008 and have not been varied, renewed, or extended on or after 1 July 2008. This provision has been remade because businesses relying on and operating under this exemption are offshore, and so the number of businesses continuing to rely on it is unknown.

Item 2 of Schedule 2 to the 2002 Regulations prescribed the carrying on by the Municipal Association of Tasmania of the business of fidelity guarantee insurance. The Municipal Association of Tasmania no longer exists, as it has been replaced by the Local Government Association of Tasmania under the *Municipal Association Act 1993* (TAS). In addition, Tasmania no longer runs its own insurance schemes, and has joined the Victorian scheme. The Victorian scheme is covered under paragraph 6(b). Item 2 has therefore not been remade.

Part 4—Financial claims scheme

Part 4 relates to the Financial Claims Scheme (the FCS). The FCS is a government-backed safety net, covering most general insurance policies for claims up to \$5,000, with claims above \$5,000 eligible if they meet certain criteria. It provides protection to general insurance policyholders and claimants, in the event that one of those financial institutions fails.

Section 16 – Simplified Outline

This section provides a simplified outline of Part 4 of the Regulations.

Section 17 – Policies that are not protected policies

This section remakes regulation 7B of the 2002 Regulations.

Paragraph (a) of the definition of *protected policy* in subsection 3(1) of the Act permits regulations to be made prescribing certain policies to not be protected policies for the purposes of the Act. This means that certain categories of insurance policies can be excluded from coverage under the FCS where this is appropriate; for example, where a foreign insurer was not regulated by APRA at the time the policy was issued.

This mechanism ensures that the FCS is targeted to those individuals and businesses that are least able to assess risk and to promote market discipline by those excluded from the FCS.

This section excludes:

- State or Territory mandated policies that are already protected through arrangements administered by the State or Territory;
- policies that are pre-authorisation liabilities of foreign general insurers;
- policies that are reinsurance or a retrocession of other policies;
- policies that are indemnifications of other policies.

A pre-authorisation liability is defined in the Act as a liability that was taken on by a general insurer before it became authorised to conduct general insurance business under section 12 of the Act.

Different prudential supervision arrangements apply to the pre-authorisation liability of a foreign general insurer's Australian branch and those of an Australian general insurer or a foreign general insurer's Australian subsidiary (together, Australian-established general insurers). Unlike an Australian-established general insurer, a foreign general insurer's Australian branch is not required to maintain assets to meet its pre-authorisation liabilities.

The pre-authorisation liabilities of foreign general insurers are excluded because, in accordance with the different treatment of the Australian branches' pre-authorisation liabilities, the FCS is not intended to apply to these liabilities. The FCS is intended to apply to all the liabilities of an Australian-established general insurer, whether the liability was acquired before or after its authorisation under section 12 of the Act.

Section 18 – Entitlement to payment of claimant under protected policy – period for making claim

This section remakes regulation 7C of the 2002 Regulations.

Subparagraphs 62ZZF(1)(b)(i) and 62ZZF(1)(b)(ii) of the Act enable regulations to be made, prescribing:

- the day when an eligible claimant can lodge a claim under the cover of their protected policies and be eligible for payment of their claims under the FCS, and
- the day after which no further claims under the cover can be made.

Subsection (1) provides two types of start dates for policyholders that are entitled to make a claim under the cover of a protected insurance policy.

The first type of start date applies to policyholders that have not yet made a claim under cover of their protected policy before the day on which the Minister makes a declaration in relation to the general insurer. The start date for these policyholders is the day of the Minister's declaration.

The second type of start date applies to policyholders that have already made a claim under cover of their protected policy before the day on which the Minister makes a declaration in relation to the general insurer. The start date for these policyholders is the day on which they made a claim under that cover.

Subsection (2) prescribes the final day on which an eligible claimant can make a claim under the cover of their protected policy in order to be eligible for assistance under the FCS. This is the day that occurs 12 months after the day on which the Minister made the declaration that the FCS applies to the general insurer.

If the prescribed time period under section 18 is insufficient, APRA has the power under section 62ZZA of the Act to extend the final day on which claims can be made.

Section 19 – Entitlement to payment of third party – period for making claim

This section remakes regulation 7CA of the 2002 Regulations.

Subparagraphs 62ZZG(1)(aa)(i) and 62ZZG(1)(aa)(ii) of the Act enable regulations to be made, prescribing:

- the date on which an eligible claimant can lodge a claim under the cover of their protected policies and be eligible for payment of their claims under the FCS; and
- the date on which no further claims under the cover can be made.

This section applies to a person who, as determined by APRA, is entitled to recover an amount from a general insurer under certain provisions. This entitlement is known as a 'cut-through' right and persons who hold them may be eligible for coverage under the FCS as a third-party.

This section applies the timeframes from section 18 of the Regulations so that the period for making the claim is not only for the holders of protected policies, but also extends to third party claimants entitled to a recoverable amount.

Subsection (1) specifies two types of start dates that apply to third party claimants that are entitled to make a claim for a recoverable amount with a general insurer. The first is for third party claimants that have not yet made a claim for the recoverable amount prior to the Minister making a declaration in relation to the general insurer, the start date is the day of the Minister's declaration. The second is for third party claimants that have already made a claim for the recoverable amount before the Minister making a declaration in relation to the general insurer, the start date is the day on which the claimants made the claim.

Subsection (2) prescribes the final date on which an eligible third-party claimant can make a claim for the recoverable amount and be eligible for assistance under the FCS. This is the day that occurs 12 months after the day on which the Minister made the declaration that the FCS applies to the general insurer. APRA has the power under subsection 62ZZA(1) of the Act to extend this claim period.

Section 20 – Conditions of eligibility

This section remakes regulation 7D of the 2002 Regulations.

Paragraph 62ZZF(3)(b) of the Act permits regulations to be made setting the eligibility criteria for persons who may be entitled to claim under the FCS for insurance claims worth \$5,000 or more.

This section prescribes a list of eligibility criteria. The prescribed eligibility criteria are intended to capture policyholders who are least able to effectively assess the prudential stability of the general insurers with whom they deal. Other policyholders will be eligible to recover claims in the normal course of liquidating the insurer.

For claims of \$5,000 or more, section 20 restricts the eligibility of claimants to individuals, certain Australian small businesses, trustees of family trusts, and Australian-based not-for-profit bodies. Individuals who are eligible under the FCS include Australian citizens and permanent residents with valid claims, as well as other individuals who are not citizens or permanent residents who have insurance against a risk that is in Australia.

Section 21 – Conditions of eligibility—third parties

This section remakes regulation 7E of the 2002 Regulations.

Paragraph 62ZZG(3)(b) of the Act permits regulations to be made setting the eligibility criteria for third party claimants who may be entitled to claim under the FCS for insurance claims worth \$5,000 or more. This section sets out the relevant criteria.

The list of eligibility criteria in this section is intended to include third parties, such as individuals and small businesses, that are more likely to be vulnerable should a

claim not be settled. Third parties who do not meet these criteria will be eligible to recover claims in the normal course of liquidating the insurer.

For claims of \$5,000 or more, section 21 restricts the eligibility of claimants to individuals, certain Australian small businesses, trustees of family trusts, and Australian-based non-profit bodies. Individuals who are eligible under the FCS include Australian citizens and permanent residents with valid claims, as well as individuals who are not citizens or permanent residents who have insurance against a risk that is in Australia.

Section 22 – Recovery of overpayments

This section remakes regulation 7F of the 2002 Regulations.

This section is made for the purpose of section 62ZZS of the Act. Section 62ZZS permits regulations to 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 under the FCS. APRA may be required to recover overpayments if a payment is incorrectly made under the FCS to a person in relation to the quantum of the payment or because of an error as to the person's eligibility.

Section 22 makes an excess payment of a person's entitlement under the FCS a debt due to APRA. APRA can recover the amount of the debt in the following ways:

- in court proceedings; or
- by withholding the amount of the debt from another payment that would otherwise be made to the person under the FCS; or
- by withholding the amount of the debt 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.

Part 5—Application and transitional provisions

Division 1—Provisions relating to this instrument as originally made

Section 23 – Certificates

This section provides that a certificate issued under subregulation 4D(1) of the 2002 Regulations which was in force immediately before section 23 commenced has effect as if it had been issued under subparagraph 8(2)(b)(iii) of the Regulations.

Together, subparagraph 8(2)(b)(iii) and section 23 remake regulation 4D of the 2002 Regulations.

Regulations not being remade

Regulation 7 of the 2002 Regulations has not been remade because the Act was amended by Schedule 1 to the *Treasury Laws Amendment (Measures for Consultation) Act 2023* to include an offence for failure to give written notice to APRA if a general insurer starts, or stops, carrying on insurance business in Australia.

Regulations 8, 9, and 10 of the 2002 Regulations were made for the purpose of section 123 of the Act. In practice, the mechanism provided by section 123 (to

prescribe matters in relation to an application under that section) is no longer used by APRA and section 123 was repealed by the *Treasury Laws Amendment (Measures for Consultation) Act 2023* . Consequently, regulations 8, 9, and 10 of the 2002 Regulations have not been remade.

Regulations 11 and 12 of the 2002 Regulations were transitional provisions that are now redundant and have not been remade.

FINDING TABLE—*Insurance Regulations 2023*

This Explanatory Statement includes a finding table to assist in identifying which provision in the *Insurance Regulations 2023* corresponds to a provision in the *Insurance Regulations 2002* that has been rewritten or consolidated, and vice versa.

In the finding table:

- **No equivalent** means that this is a new provision in the *Insurance Regulations 2023* that has no equivalent in the *Insurance Regulations 2002*. These are typically guide material.
- **Omitted** means that the provision of the *Insurance Regulations 2002* has not been rewritten into the new *Insurance Regulations 2023*. Omitted provisions are redundant or have been moved to the *Insurance Act 1973*.

<i>Old Law</i>	<i>New Law</i>
<i>Insurance Regulations 2002</i>	<i>Insurance Regulations 2023</i>
1	1
No equivalent	2
No equivalent	3
4	4
4 (definition of <i>unauthorised foreign insurer</i>)	5
4B (definition of <i>related group</i>)	6
No equivalent	7
4A	8
4B	9
4C	10
4D	11
4E	12
No equivalent	13
5 and Schedule 1	14

6 and Schedule 2	15
No equivalent	16
7	Omitted
7A	4
7B	17
7C	18
7CA	19
7D	20
7E	21
7F	22
No equivalent	23
8	Omitted
9	Omitted
10	Omitted
11	Omitted
12	Omitted