

A Quick Guide to the Private Health Insurance Ombudsman's New Inspection Powers

The role of the Private Health Insurance Ombudsman (PHIO) is to protect the interests of people covered by private health insurance. PHIO carries out this role in a number of ways, including our independent complaints handling service, our education and advice services for consumers and our advice to industry and government about issues of concern to consumers.

The focus of PHIO's complaints handling service is on ensuring we are independent, objective, accessible, effective and timely. In dealing with complaints, we assist people to resolve disputes and act as an umpire in dispute resolution at all levels within the private health insurance industry.

What are the new powers?

In September 2018, the *Private Health Insurance Legislation Amendment Act 2018* amended the *Ombudsman Act 1976*, providing the PHIO with new inspection powers.

As outlined under Divisions 3A and 4 of Part IID of the *Ombudsman Act 1976*, with at least 48 hours written notice of the PHIO's intention to conduct an inspection, the PHIO may, at any reasonable time of the day, enter:

- the premises of a private health insurer or private health insurance broker, or
- a place where documents or other records relating to a private health insurer, a private health insurance broker, or the carrying on of health insurance business are kept.

The PHIO may then exercise the following powers:

- the power to inspect any documents or other records to verify evidence provided in relation to a complaint
- the power to inspect any documents or other records for the purpose of investigating the practices and procedures of a private health insurer or private health insurance broker
- the power to take extracts from, or make copies of, any such document or other record.

Offence provisions have been established under ss 20ZHB and s 36(1) (c)-(d) to support the enforcement of these powers. Persons who occupy, or are in charge of the above named places must provide the PHIO with reasonable facilities and assistance for the effective exercise of inspection powers.

When will inspections be conducted?

The PHIO will conduct inspections when there is a need to confirm the veracity of information provided by a complainant, a private health insurer, or a private health insurance broker in relation to a complaint (s 20SA).

The PHIO may also, on our own initiative, use inspection powers during an investigation of the practices and procedures of a private health insurer or a private health insurance broker (s 20TA).

The inspection power addresses the theoretical possibility that a respondent may not voluntarily consent to the PHIO entering the premises.

What is the inspection process?

The PHIO is committed to developing a practical inspection process that will assist the industry in improving practices for the benefit of consumers.

The best results can be achieved from an inspection when an insurer or broker works cooperatively with the PHIO, is open and transparent, and provides information in a timely manner.

In conducting an inspection, the PHIO will also work to educate organisations within the industry and increase their understanding of how they can improve practices to reduce the causes of consumer complaints.

Prior to an inspection

The PHIO will formally notify the occupier in writing of his or her intention to conduct an inspection with at least 48 hours written notice. The occupier is typically the insurer's CEO. The notification will state the purpose of the inspection and include inspection details (date, time and location), and which inspection powers are being exercised by PHIO (s 20SA or s 20TA). The notification will include a summary of PHIO's inspection powers and the obligations of the persons in charge at the relevant premises.

A PHIO officer may subsequently request the insurer or broker provide a list of relevant records or documents to be examined at the inspection.

Inspection staff will carry official PHIO identity cards during an inspection and a list of attending inspection officers will be provided prior to the inspection.

The number of officers conducting an inspection may vary but will usually be greater than two in order to ensure the veracity of inspection findings.

If PHIO attends the premises of a service provider to an insurer or a broker, a copy of the written notice of inspection will be provided to the occupier of those premises within the same timeframe as notification is provided to the head of the insurer or broker.

During an inspection

An inspection will begin with an 'opening briefing'. The purpose of the opening briefing is to set the inspection objectives and let the insurer or broker raise any issues it considers important.

Following the opening briefing, relevant information is collected through an examination of records and documents, and through interviews with relevant staff.

We appreciate that insurers and brokers have their own internal systems of checks and balances, and invite them to provide us with this information. This may include providing copies of internal guidance documents and other instructional materials.

PHIO staff will observe workplace health and safety (WHS) related instructions while on the premises and comply with any WHS officer directions, provided this does not create any administrative difficulties or impede staff's ability to conduct their official duties.

We then hold an 'exit briefing' with relevant insurer or broker representatives and provide a briefing follow-up in writing. Preliminary inspection findings are discussed, enabling immediate remedial action (if any) to take place. We may also request further information to clarify inspection findings where necessary.

Post inspection

An inspection report is drafted and provided to the insurer or broker for comment. We are committed to reporting fairly and accurately, taking into account all relevant factors.

Within the report, the PHIO may recommend either or both of the following:

- to a private health insurer, that the insurer take a specific course of action or make changes to its rules, or both;
- to a health care provider or private health insurance broker, that the provider or broker take a specific course of action.

If a recommendation is made, the PHIO may issue a written notice to the insurer or broker, requiring it to report to the PHIO on proposed actions to give effect to the recommendation.

We acknowledge that mistakes will occur from time to time. Apart from identifying deficiencies, we are also interested to see how an insurer or broker responds to these matters. A constructive attitude towards identified issues, one where it becomes a mechanism for the insurer or broker to identify areas for improvement or reform, is highly regarded.

Reports to the Health Minister

The PHIO may report to the Health Minister on any recommendations made to an insurer or broker as a result of an inspection, and any responses to those recommendations. The PHIO may also report on any recommendations to general changes in regulatory practice or industry practices relating to issues encountered during inspections. If a report is provided to the Health Minister, the PHIO must also notify any insurer or broker named in a report provided to the Minister of that fact, unless doing so would, or could reasonably be expected to, prejudice the conduct of a current or pending investigation.

If inspection powers were used to support an investigation initiated by the PHIO, the PHIO may report to the Minister on the outcome of the investigation, including any recommendations. Before reporting to the Minister, the PHIO must inform the subject of the report of the nature of any criticism in the report, and provide the opportunity for comment.

Confidentiality of Information

Section 35 of the *Ombudsman Act 1976* outlines the requirements of inspection officers to observe confidentiality in the course of their work duties.

Inspection officers are permitted to make records, divulge or communicate information acquired in the performance of their duties as an officer for purposes connected with the exercise of the powers and performance of the functions of the Ombudsman. Sections 20SA and 20TA also define an inspection officer's power to inspect documents, take extracts from, or make copies of documents or records at an inspection.

Outside of these functions, officers are not permitted to make a record of, or divulge or communicate to any person, any information acquired during the course of their duties unless consent has been obtained from the individual to whom the information relates.

The statutes under which the Ombudsman conducts inspections and investigations contain provisions allowing full access to all the relevant records. This can include legal advice that is subject to legal

professional privilege. The Ombudsman's approach is to treat all information received during an inspection in the strictest confidence and to act consistently with the maintenance of an organisation's legal professional privilege (LPP).

If a person discloses legal advice which is protected by LPP to the Ombudsman in the course of an investigation, such information cannot be used against the relevant person or body in proceedings.¹ As a general rule, where access to a privileged document is requested under an inspections or other power, the privilege is not waived because the organisation is compelled to provide it under legislation. Only the recipient of legal advice, in this case an insurer, can waive LPP either expressly or by acting inconsistently with the privilege. Insurers should highlight privileged material to make it clear that they are not waiving the privilege.

¹ See *Ombudsman Act 1976* s 20ZF(5)(c)-(e).

Frequently Asked Questions

1. What matters will trigger the application of inspection powers?

PHIO anticipates that in most cases, the inspection powers will be a reserve power to be applied in cases where we are unable to obtain information through our existing complaint investigation arrangements.

2. Can an insurer or broker negotiate dates/times/locations of inspections with the PHIO?

If the date or time of the proposed inspection is not convenient for the insurer or broker due to staff availability or other reasons, we will accommodate a request to amend the date or time of the inspection, where possible. Such a request must be made within a reasonable timeframe, for a valid reason, and the alternate proposed date or time must not negatively impact the PHIO's inspection objectives.

3. Will an insurer or broker be financially compensated for assisting with an inspection?

No. We will conduct inspections in a professional and expeditious manner whilst ensuring we obtain access to the most reliable source(s) of information for inspection purposes.

4. If extracts are taken from documents or records, or if copies are made of such documents, how long are records retained by the Ombudsman before destruction?

Extracts and copies of documents or records obtained during an inspection will be retained until they are due for destruction under our records management authority process.

5. Will the inspections report or any recommendations made to an insurer or broker be made public?

A summary of the exercise of PHIO's inspection powers will be included in the Ombudsman's annual report, which is tabled before Parliament and available for public view.

Reports relating to specific inspections will not generally be published, except in cases where it is in the public interest to do so. Reports will not be published if it is likely to interfere with any other investigation or the making of a report.

6. Will an insurer or broker have the opportunity to comment on findings and recommendations before they are finalised?

Yes. Procedural fairness plays an important role throughout the inspection process. In addition to reasonable opportunities to clarify and provide further information during an inspection, an inspected entity will be provided with the opportunity to comment on the PHIO's draft inspection report including the timeframe within which insurers will be asked to respond to recommendations. Any comments will be incorporated into the finalised inspection report.

7. Do insurer or broker staff have to cooperate with inspection staff?

Section 20ZHB of the *Ombudsman Act 1976* imposes a penalty for persons who do not provide the PHIO with reasonable facilities and assistance for the effective exercise of inspection powers.

8. How do insurer or broker staff know who to provide information to?

Inspection staff will carry official PHIO identity cards during an inspection. A list of attending inspection officers will be provided prior to the inspection.