

Practice Note for section 146-5 of the PHI Act

- 1 The *Private Health Insurance Act 2007* (the **Act**) prohibits an insurer from transferring its health insurance policies to another insurer (see section 137-25(1) of the Act) unless this is done in accordance with Division 146 of the Act. PHIAC's approval for the transfer must be obtained.
- 2 Section 146-5 deals with an insurer transferring policies, assets and liabilities of a health benefits fund/s to another insurer so that the insurer to which the assets and liabilities are transferred assumes the legal responsibilities for the transferred assets and liabilities (section 146-5).
- 3 This Practice Note and the example deed accompanying it deal with a transfer under section 146-5 where an insurer is transferring all the assets and liabilities referable to the health benefits fund it conducts to the fund conducted by another insurer.
- 4 This example deed will need to be amended where a proposed transfer does not involve the transfer of *all* the policies of one insurer to the other insurer/s (as long as all the policies in a policy group (ie, by reference to States) are being transferred and/or where the transfer involves the transfer of policies to more than one insurer.
- 5 The use of this example deed is not mandated by PHIAC. However, this example deed contains the information required to be included by the *Private Health Insurance (Health Benefits Fund Administration) Rules 2007* (the **Rules**) as well as types of provisions which PHIAC considers are required for an 'arrangement' to enable a legal transfer of policies, assets and liabilities, as well as the protection of policy holders whose policies are to be transferred.
- 6 If the transfer is to involve the transfer of some or all of the insurer's employees, the clauses set out in Schedule 5 of the Deed will need to be included in the body of the Deed. Otherwise that Schedule should be deleted.
- 7 Insurers are encouraged to use the example deed, as amended to suit their particular circumstances. The arrangement provided to PHIAC with the application must be signed and dated by the parties (rule 11(2) of the Rules), but PHIAC recommends that insurers provide the draft of the Deed to it before it is signed by the parties. As far as practicable, PHIAC will attempt to give comments to the insurers to assist in a smooth application.
- 8 The deed will need to be adapted for the relevant circumstances. In particular, amendments will be needed if only some of the policy groups within a health benefits fund are being transferred and if there are more than two insurers involved.
- 9 The parties will need to specify exactly which policies, assets and liabilities are being transferred or retained, and amend the deed accordingly. It will assist in PHIAC's consideration of a transfer application if this template document is used with any changes made in mark-up.
- 10 The deed contains a number of indemnities from the insurer which is transferring policies (**Transferor**) and requirements that the Transferor must maintain sufficient cash assets and appropriate insurance to comply with its obligations. Reliance on the indemnities would be inappropriate if it is intended that the Transferor will not have any assets after the transfer, or is to be wound up after the transfer occurs. In such circumstances, the Transferee needs to consider what alternative protections are available.

PHIAC Approval

- 11 The arrangement under which policies, assets and liabilities are to be transferred from the fund of one insurer to the fund of another insurer, must be approved by PHIAC.
- 12 The arrangement cannot take effect unless (section 146-5(2) of the Act):
- (a) the insurers who enter into the arrangement apply jointly to PHIAC in the approved form for approval
 - (b) PHIAC approves the arrangement in writing; and
 - (c) the insurers comply with any requirements in the Rules.
- 13 PHIAC cannot approve the arrangement unless it is satisfied of certain matters involving the assets and liabilities to be transferred, including that the arrangement will not result in any breach of the solvency or capital adequacy standards (section 146-5(3)).
- 14 If there is only one transferring fund, PHIAC must be satisfied that the assets and liabilities to be transferred represent a reasonable estimate of what would, immediately before the restructure, be the 'net asset position' of the fund. This will be satisfied only if the net asset position of the fund immediately after the arrangement takes effect will not be greater than zero. Therefore, all of the assets of the fund must be transferred, less any amounts to meet the Transferor's liabilities (if any) after the transfer if those liabilities relate to the health insurance business that is being transferred.
- 15 If the arrangement provides for the transfer of policies from more than one fund, PHIAC must be satisfied that the assets and liabilities to be transferred represent a reasonable estimate of what would, immediately before the restructure, be the sum of the net asset positions of each of the funds, but disregarding the net asset position of the fund to the extent that it relates to insurance policies that do not belong to a policy group that is being transferred.
- 16 If the arrangement provides for the transfer of policies to more than one insurer or more than one fund conducted by the Transferee, PHIAC must also be satisfied that the assets and liabilities to be transferred would be 'fairly distributed' between the receiving funds.
- 17 PHIAC will require the insurers to provide sufficient information so that it can make decisions on the net asset position and, where necessary, the distribution of the assets and liabilities.

18 The Rules deal with when a proposed distribution of assets and liabilities between receiving funds under a proposed arrangement is not 'fairly distributed' if the proposed distribution will cause, or may contribute to causing, a transferee insurer to be in breach of:

- (a) the Act; or
- (b) any Regulations; or
- (c) any of the rules made under the Act; or
- (d) a solvency direction to which the insurer is subject; or
- (e) a capital adequacy direction to which the insurer is subject,

at one or more of the following times:

- (f) the transfer date specified in the arrangement; or
- (g) any time within the first 36 months after the transfer date; or
- (h) any time within the foreseeable future of operation of the restructuring funds beyond 36 months after the transfer date.

19 However, the Rules make it clear that this is not an exhaustive list. PHIAC may take into account other matters to form a view about the fairness of the distribution of assets and liabilities between receiving funds (rule 13(2)(3) of the Rules).

Process after the transfer of all the policies of a fund

20 If an insurer transfers all the policies of its health benefits fund so that it no longer operates health insurance business, and it does not operate such business for 12 months, PHIAC must deregister the insurer (section 126-45 of the Act).

PHIAC
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