



Financial Sector (Transfers of Business) Act 1999

No. 45, 1999



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**An Act to provide for transfers of business between
some kinds of financial institutions**

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Financial Sector (Transfers of Business) Act 1999

No. 45, 1999

An Act to provide for transfers of business between some kinds of financial institutions

[Assented to 17 June 1999]

The Parliament of Australia enacts:

Part 1—Preliminary

1 Short title

This Act may be cited as the *Financial Sector (Transfers of Business) Act 1999*.

Section 2

2 Commencement

This Act commences on the date that is the transfer date for the purposes of the *Financial Sector Reform (Amendments and Transitional Provisions) Act (No. 1) 1999*.

3 Additional operation of Act

Without prejudice to its effect apart from this section, this Act also has the effect it would have if each reference to a body corporate were, by express provision, confined to a body corporate that is a corporation to which paragraph 51(xx) of the Constitution applies.

4 Definitions

- (1) In this Act, the following words and expressions have the meanings set out below:

ADI (authorised deposit-taking institution) means a body corporate that is an ADI for the purposes of the *Banking Act 1959*.

approved section 20 statement means a statement given to APRA under subsection 20(1) in relation to which an approval under subsection 20(2) is in force.

approved section 30 statement means a statement given to APRA under subsection 30(1) in relation to which an approval under subsection 30(2) is in force.

APRA means the Australian Prudential Regulation Authority.

APRA board member means a member of APRA's board of management, including APRA's Chair and Chief Executive Officer.

APRA staff member has the same meaning as in the *Australian Prudential Regulation Authority Act 1998*.

asset means property, or a right, of any kind, and includes:

- (a) any legal or equitable estate or interest (whether present or future, vested or contingent, tangible or intangible, in real or personal property) of any kind; and

- (b) any chose in action; and
- (c) any right, interest or claim of any kind including rights, interests or claims in or in relation to property (whether arising under an instrument or otherwise, and whether liquidated or unliquidated, certain or contingent, accrued or accruing); and
- (d) any asset within the meaning of Part IIIA of the *Income Tax Assessment Act 1936*.

authorised APRA officer, when used in a particular provision of this Act, means a person authorised under subsection (2) to perform or exercise the functions or powers of an authorised APRA officer under that provision.

business in relation to a body, includes the assets and liabilities of the body.

certificate of transfer:

- (a) in relation to a voluntary transfer—means a certificate issued under section 18; and
- (b) in relation to a compulsory transfer—means a certificate issued under section 33.

compulsory transfer determination means a determination made under section 25.

established—a body is established in a State or Territory if:

- (a) it is registered under the Corporations Law of that State or Territory; or
- (b) it is otherwise established by or under a law of that State or Territory.

instrument includes a document and an oral agreement.

interest, in relation to land, includes:

- (a) a legal or equitable estate or interest in the land; or
- (b) a right, power or privilege over, or in relation to, the land.

liability includes a duty or obligation of any kind (whether arising under an instrument or otherwise, and whether actual, contingent or prospective).

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life insurance company means a body corporate that is registered under the *Life Insurance Act 1995*.

partial transfer has the meaning given by subsection 8(2).

receiving body means a body to which another body is to transfer, or has transferred, business under this Act.

regulated body means a body corporate that is:

- (a) an ADI; or
- (b) a life insurance company.

regulated business, in relation to a regulated body, means:

- (a) for a body that is an ADI—the body’s banking business (within the meaning of the *Banking Act 1959*); or
- (b) for a body that is a life insurance company—the body’s life insurance business (within the meaning of the *Life Insurance Act 1995*).

regulatory legislation, in relation to a regulated body, means:

- (a) for a body that is an ADI—the *Banking Act 1959*, including any regulations or other instruments made under that Act, or conditions imposed under that Act; or
- (b) for a body that is a life insurance company—the *Life Insurance Act 1995*, including any regulations or other instruments made under that Act, or conditions imposed under that Act.

statement of detail, in relation to a partial transfer, means a statement that satisfies the requirements of section 19.

total transfer has the meaning given by subsection 8(3).

transferred asset, in relation to a receiving body, means an asset that has become, under this Act, an asset of the receiving body.

transferred liability, in relation to a receiving body, means a liability that has become, under this Act, a liability of the receiving body.

transferring body means a body that is to transfer, or has transferred, business under this Act.

transfer rules means rules in force under section 46.

voluntary transfer approval means an instrument of approval under section 11.

- (2) APRA may, in writing, authorise a person who is an APRA board member, or an APRA staff member, to perform or exercise the functions or powers of an authorised APRA officer under a particular provision of this Act.

5 Act binds the Crown

- (1) This Act binds the Crown in each of its capacities.
- (2) This Act does not make the Crown liable to be prosecuted for an offence.

6 External Territories

This Act extends to every external Territory.

7 Application of *Criminal Code*

The *Criminal Code* applies to all offences against this Act.

Part 2—Overview of Act

8 Overview of Act

- (1) This Act provides for 2 kinds of transfers of business of regulated bodies:
 - (a) *voluntary transfers* (these are transfers under Part 3); and
 - (b) *compulsory transfers* (these are transfers under Part 4).Either kind of transfer may be a partial transfer or a total transfer.
- (2) A transfer of business of a regulated body is a *partial transfer* if it relates to some, but not all, of the transferring body's business (including any business that is not regulated business). It cannot however relate only to business that is not regulated business.
- (3) A transfer of business of a regulated body is a *total transfer* if it relates to all of the transferring body's business (including any business that is not regulated business).
- (4) For a voluntary transfer of business to take effect, APRA must:
 - (a) receive an application for the transfer from the regulated bodies concerned (the *transferring body* and the *receiving body*); and
 - (b) approve the application in writing (the *voluntary transfer approval*); and
 - (c) issue a certificate (the *certificate of transfer*) stating that the transfer is to take effect.

The transfer of business takes effect when the certificate of transfer comes into force.

- (5) For a compulsory transfer of business to take effect, APRA must:
 - (a) make a determination (the *compulsory transfer determination*) that there is to be a transfer of business between the regulated bodies concerned (the *transferring body* and the *receiving body*); and
 - (b) issue a certificate (the *certificate of transfer*) stating that the transfer is to take effect.

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The transfer of business takes effect when the certificate of transfer comes into force.

- (6) Business of regulated bodies may also be transferred otherwise than under this Act, for example in accordance with section 63 of the *Banking Act 1959* or Part 9 of the *Life Insurance Act 1995*.

Part 3—Voluntary transfers

Division 1—Outline of Part

9 Outline of Part

- (1) For a voluntary transfer of business to take effect, APRA must:
 - (a) receive an application for the transfer from the regulated bodies concerned (the *transferring body* and the *receiving body*) (see section 10); and
 - (b) approve the application in writing (the *voluntary transfer approval*) (see section 11); and
 - (c) issue a certificate (the *certificate of transfer*) stating that the transfer is to take effect (see section 18).
- (2) APRA must make the voluntary transfer approval if specified criteria are met (see section 11).
- (3) The voluntary transfer approval may impose conditions to be complied with by the transferring body or the receiving body either before or after the certificate of transfer is issued (see section 16).
- (4) APRA may only issue the certificate of transfer if specified criteria are met. The certificate must specify when it comes into force (see section 18).
- (5) The transfer of business takes effect when the certificate of transfer comes into force (see section 22).

Division 2—Approval of voluntary transfers

10 Application for approval of voluntary transfer

- (1) 2 regulated bodies of the same kind may apply in writing to APRA for approval of a transfer of business from one of the bodies to the other body. The transfer cannot relate only to business of the transferring body that is not regulated business.
- (2) The application must be in the form prescribed by the transfer rules and must contain or be accompanied by the information required by the transfer rules.

Note: APRA may impose a charge in respect of the application—see section 51 of the *Australian Prudential Regulation Authority Act 1998*.

- (3) For the purposes of this section, 2 regulated bodies are of the same kind if:
 - (a) they are both ADIs; or
 - (b) they are both life insurance companies.

11 Approval of applications

- (1) Subject to subsection (2), APRA must, in writing (the ***voluntary transfer approval***), approve a transfer of business if APRA considers that:
 - (a) application for approval of the transfer has been made in accordance with section 10; and
 - (b) the transfer has been adequately adopted (see section 13) by:
 - (i) the transferring body; and
 - (ii) the receiving body; and
 - (c) the transfer should be approved, having regard to:
 - (i) the interests of the depositors or policy owners of the transferring body when viewed as a group; and
 - (ii) the interests of the depositors or policy owners of the receiving body when viewed as a group; and
 - (iii) the interests of the financial sector as a whole; and
 - (iv) any other matters that APRA considers relevant; and

Part 3 Voluntary transfers

Division 2 Approval of voluntary transfers

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- (d) legislation to facilitate the transfer that satisfies the requirements of section 14 has been enacted in the State or Territory in which the transferring body is established and the State or Territory in which the receiving body is established; and
- (e) either:
 - (i) the Minister has consented to the transfer; or
 - (ii) the Minister's consent to the transfer is not required (see section 15).
- (2) APRA must not approve the transfer of business if it considers that the transfer should not be approved, having regard to provisions of another Act:
 - (a) that are prescribed for the purposes of subsection 43(4); or
 - (b) referred to in subsection 43(5), (6), (7) or (8).
- (3) The voluntary transfer approval must be signed by an authorised APRA officer.

12 Consultation about approving the application

- (1) In deciding whether to approve the transfer of business, APRA may consult with any or all of the following:
 - (a) officers or employees of the States and Territories;
 - (b) the Reserve Bank of Australia;
 - (c) any other person or body that APRA considers should be consulted.
- (2) Subject to subsections (3) and (4), in deciding whether to approve the transfer of business, APRA must consult with:
 - (a) the Australian Competition and Consumer Commission; and
 - (b) the Australian Securities and Investments Commission.
- (3) APRA does not have to consult with the Australian Competition and Consumer Commission in relation to the transfer of business if the Commission has notified APRA, in writing, that it does not wish to be consulted about:
 - (a) the transfer; or
 - (b) a class of transfers that includes the transfer.

- (4) APRA does not have to consult with the Australian Securities and Investments Commission in relation to the transfer of business if the Commission has notified APRA, in writing, that it does not wish to be consulted about:
- (a) the transfer; or
 - (b) a class of transfers that includes the transfer.

13 Adequate adoption

For the purposes of paragraph 11(1)(b), the transfer of business has been *adequately adopted* by a body if:

- (a) the transfer has been adopted by or on behalf of the body, or by or on behalf of the members or a class of the members of the body, in a way prescribed by the transfer rules; and
- (b) APRA considers that adoption of the transfer in that way adequately takes into account the interests of members of the body.

14 Complementary State or Territory legislation

State or Territory legislation referred to in paragraph 11(1)(d) must include provision to ensure that, when a certificate of transfer comes into force under Division 3, the receiving body is taken to be the successor in law to the transferring body, to the extent of the transfer. In particular, the legislation must provide that:

- (a) assets of the transferring body vest in the receiving body, to the extent of the transfer; and
- (b) liabilities of the transferring body become liabilities of the receiving body, to the extent of the transfer; and
- (c) the duties, obligations, immunities, rights and privileges applying to the transferring body apply to the receiving body, to the extent of the transfer; and
- (d) if there is an approved section 20 statement in relation to the transfer that specifies:
 - (i) that particular things are to happen or are taken to be the case—those things are taken to happen, or to be the case, in accordance with the statement; or

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- (ii) a mechanism for determining things that are to happen or are taken to be the case—things determined in accordance with that mechanism are taken to happen, or to be the case, as determined in accordance with that mechanism.

15 Minister's power to decide that his or her consent is not required

The Minister's consent to the transfer of business (see paragraph 11(1)(e)) is not required if the Minister has, in writing, determined that his or her consent is not required in relation to:

- (a) the transfer; or
- (b) a class of transfers that includes the transfer.

16 Approval may impose conditions

- (1) The voluntary transfer approval may impose conditions of either or both of the following kinds:
 - (a) conditions to be complied with by the transferring body or the receiving body before a certificate of transfer is issued in relation to the transfer of business;
 - (b) conditions to be complied with by the transferring body or the receiving body after a certificate of transfer has been issued or has come into force in relation to the transfer of business.
- Note 1: Failure to comply with a condition referred to in paragraph (a) will mean that a certificate of transfer cannot be issued (see subsection 18(1)).
- Note 2: Failure to comply with a condition referred to in paragraph (b) will not prevent the issue of a certificate of transfer, but will be an offence under subsection (4).
- (2) The transferring body or the receiving body may apply in writing to APRA to have a condition that applies to it varied or revoked.
 - (3) APRA may, by notice in writing given to the body that made the application, approve the variation or revocation if it is satisfied that the variation or revocation is appropriate. A variation or revocation that is approved by APRA has effect accordingly.

- (4) The transferring body or the receiving body is guilty of an offence if:
- (a) a condition of a kind referred to in paragraph (1)(b) applies to that body; and
 - (b) that body fails to comply with the condition.

Maximum penalty for contravention of this subsection: 200 penalty units.

Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Note 2: If a body corporate is convicted of an offence against this subsection, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the penalty stated above.

17 Notice of decision

- (1) If APRA approves the transfer of business, APRA must give a copy of the voluntary transfer approval to the transferring body and the receiving body.
- (2) If APRA refuses to approve the transfer of business, APRA must give written notice of the refusal to the transferring body and the receiving body. The notice must include a statement of the reasons why the approval was refused.

Division 3—Process by which voluntary transfers take effect

18 Certificate of transfer

(1) If APRA:

- (a) has made a voluntary transfer approval; and
- (b) considers that all conditions of a kind referred to in paragraph 16(1)(a) that are imposed by the approval have been complied with; and
- (c) if the transfer is a partial transfer—has been given a statement of detail in relation to the partial transfer (see section 19); and
- (d) is not aware of any reason why the transfer should not go ahead;

APRA must, in writing, issue a certificate (a *certificate of transfer*) stating that the transfer is to take effect.

(2) The certificate must:

- (a) include the names of the transferring body and the receiving body; and
- (b) state whether the transfer is a total transfer or a partial transfer; and
- (c) if it is a partial transfer—include, or have attached to it:
 - (i) the statement of detail (see section 19); and
 - (ii) any approved section 20 statement; and
- (d) subject to subsection (3), state when the certificate is to come into force (either by specifying a date as the date it comes into force, or by specifying that the date it comes into force is a date worked out in accordance with provisions of the certificate); and
- (e) be signed by an authorised APRA officer.

(3) APRA must, in deciding when the certificate is to come into force, take into account the wishes of the transferring body and the receiving body.

- (4) The certificate comes into force in accordance with the statement included in the certificate as required by paragraph (2)(d).

19 Partial transfer—statement of detail to be provided

If the transfer is a partial transfer, before APRA issues a certificate of transfer in relation to the transfer, APRA must be provided with a written statement:

- (a) that lists, in detail, the assets and liabilities of the transferring body that are to be transferred to the receiving body; and
- (b) that APRA is satisfied has been agreed to by the transferring body and the receiving body.

20 Agreements about matters connected with the transfer

- (1) The transferring body or the receiving body, or both of those bodies, may provide APRA with a written statement specifying, or specifying a mechanism for determining, things that are to happen, or that are taken to be the case, in relation to assets and liabilities that are to be transferred, or in relation to the transfer of business that is to be effected.

Note: If the transfer is a partial transfer, the statement may be included with the statement of detail under section 19.

- (2) APRA may, in writing, approve the statement before issuing the certificate of transfer if APRA is satisfied that:
- (a) the statement has been agreed to by the transferring body and the receiving body; and
 - (b) the matters specified in the statement are appropriate.

21 Notice of decision

- (1) If APRA issues the certificate of transfer, APRA must give a copy of the certificate to the transferring body and the receiving body.
- (2) If APRA refuses to issue the certificate of transfer, APRA must give written notice of the refusal to the transferring body and the receiving body. The notice must include a statement of the reasons why the certificate was not issued.

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22 Time and effect of voluntary transfer

- (1) When the certificate of transfer comes into force, the receiving body becomes the successor in law of the transferring body, to the extent of the transfer. In particular:
 - (a) if the transfer is a total transfer—all the assets and liabilities of the transferring body, wherever those assets and liabilities are located, become (respectively) assets and liabilities of the receiving body without any transfer, conveyance or assignment; and
 - (b) if the transfer is a partial transfer—all the assets and liabilities of the transferring body that are included in the list of assets and liabilities specified in the statement of detail, wherever those assets and liabilities are located, become (respectively) assets and liabilities of the receiving body without any transfer conveyance or assignment; and
 - (c) to the extent of the transfer, the duties, obligations, immunities, rights and privileges applying to the transferring body apply to the receiving body.
- (2) If there is an approved section 20 statement in relation to the transfer, then:
 - (a) if the statement specifies that particular things are to happen or are taken to be the case—those things are, by force of this section, taken to happen, or to be the case, in accordance with the statement; and
 - (b) if the statement specifies a mechanism for determining things that are to happen or are taken to be the case—things determined in accordance with that mechanism are, by force of this section, taken to happen, or to be the case, as determined in accordance with that mechanism.
- (3) Subject to subsection (2), if:
 - (a) the transfer is a total transfer; and
 - (b) immediately before the certificate comes into force, proceedings (including arbitration proceedings) to which the transferring body was a party were pending or existing in any court or tribunal;

the receiving body is, on and after the day when the certificate comes into force, substituted for the transferring body as a party to the proceedings and has the same rights in the proceedings as the transferring body had.

Note: An alternative way of dealing with substitution of parties (which is available for total or partial transfers) is to deal with the matter in an approved section 20 statement (see subsection (2)).

- (4) Subject to subsection (2), if:
- (a) the transfer is a total transfer; and
 - (b) on the day when the certificate comes into force, documentary or other evidence would (disregarding the transfer) have been admissible for or against the interests of the transferring body;

that evidence is admissible, on or at any time after that day, for or against the interests of the receiving body.

Note: An alternative way of dealing with admissibility of evidence (which is available for total or partial transfers) is to deal with the matter in an approved section 20 statement (see subsection (2)).

- (5) Subject to subsection (2), if the transfer is a total transfer, on and after the day when the certificate comes into force, each translated instrument continues to have effect, according to its tenor, as if a reference in the instrument to the transferring body were a reference to the receiving body. For this purpose:

translated instrument means an instrument (including an Act or other legislative instrument) subsisting immediately before the day when the certificate comes into force:

- (a) to which the transferring body is a party; or
- (b) that was given to, by or in favour of, the transferring body; or
- (c) that refers to the transferring body; or
- (d) under which money is, or may become, payable, or other property is, or may become, liable to be transferred, to or by the transferring body.

Note: An alternative way of dealing with references in instruments (which is available for total or partial transfers) is to deal with the matter in an approved section 20 statement (see subsection (2)).

Part 3 Voluntary transfers

Division 3 Process by which voluntary transfers take effect

Section 23

- (6) Subject to subsection (2), on and after the day when the certificate comes into force, a place that, immediately before that day, was a place of business for the transferring body in relation to business that was transferred to the receiving body is taken to be a place of business for the receiving body.

Note: An alternative way of dealing with places of business is to deal with the matter in an approved section 20 statement (see subsection (2)).

23 Employment unaffected

- (1) This section applies to every person who, immediately before the day when the certificate of transfer comes into force, was performing duty in the transferring body.
- (2) The terms and conditions of employment (including any accrued entitlement to employment benefits) of each person to whom this section applies are not affected by the operation or effect of this Part or of any State or Territory legislation referred to in paragraph 11(1)(d).

Part 4—Compulsory transfers

Division 1—Outline of Part

24 Outline of Part

- (1) For a compulsory transfer of business to take effect, APRA must:
 - (a) make a determination (the *compulsory transfer determination*) that there is to be a transfer of business between the regulated bodies concerned (the *transferring body* and the *receiving body*) (see section 25); and
 - (b) issue a certificate (the *certificate of transfer*) stating that the transfer is to take effect (see section 33).
- (2) APRA may only make the compulsory transfer determination if specified criteria are met (including that APRA is satisfied that the board of directors of the receiving body has consented to the transfer) (see section 25).
- (3) The compulsory transfer determination may impose conditions to be complied with by the transferring body or the receiving body either before or after the certificate of transfer is issued (see section 31).
- (4) APRA may only issue the certificate of transfer if specified criteria are met. The certificate must specify when it comes into force (see section 33).
- (5) The transfer of business takes effect when the certificate of transfer comes into force (see section 35).

Division 2—Compulsory transfer determinations

25 Compulsory transfer determinations

- (1) APRA may, in writing, make a determination (the *compulsory transfer determination*) that there is to be a transfer of business from one regulated body to another regulated body. The transfer cannot relate only to business of the transferring body that is not regulated business.
- (2) APRA may only make the determination if:
 - (a) APRA is satisfied that:
 - (i) the transferring body has contravened a provision of its regulatory legislation; or
 - (ii) if the transferring body is an ADI—the 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) if the transferring body is an ADI—APRA has appointed a person, under subsection 13A(1) of the *Banking Act 1959*, to investigate the affairs of the body, or to take control of the body's business; or
 - (iv) if the transferring body is an ADI—APRA has appointed an administrator, under subsection 13A(1) of the *Banking Act 1959*, to take control of the body's business; or
 - (v) if the transferring body is an ADI—APRA has appointed a person to investigate and report on prudential matters in relation to the body under subsection 61(1) of the *Banking Act 1959*; or
 - (vi) if the transferring body is a life insurance company—APRA has given the 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

- (vii) if the transferring body is a life insurance company—a judicial manager of the 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 depositors or 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 transferring body and the receiving body are regulated bodies of the same kind; and
 - (d) APRA is satisfied that the board of directors of the receiving body has consented to the transfer; and
 - (e) APRA is satisfied that the transfer is appropriate, having regard to:
 - (i) the interests of depositors or policy owners of the receiving body when viewed as a group; and
 - (ii) the interests of the financial sector as a whole; and
 - (iii) any other matters that APRA considers relevant; and
 - (f) APRA is satisfied that legislation to facilitate the transfer that satisfies the requirements of section 28 has been enacted in the State or Territory in which the transferring body is established and the State or Territory in which the receiving body is established; and
 - (g) either:
 - (i) the Minister has consented to the transfer; or
 - (ii) the Minister's consent to the transfer is not required (see section 29).
- (3) The determination must include particulars of the transfer, including:
- (a) the names of the transferring body and the receiving body; and
 - (b) whether it will be a total transfer or a partial transfer; and
 - (c) if it will be a partial transfer—an identification of the part of the transferring body's business that is to be transferred.

Part 4 Compulsory transfers

Division 2 Compulsory transfer determinations

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- (4) The determination must include a statement of the reasons why the determination has been made.
- (5) The determination must be signed by an authorised APRA officer.
- (6) For the purposes of this section, 2 regulated bodies are of the same kind if:
 - (a) they are both ADIs; or
 - (b) they are both life insurance companies.

26 Consultation about making the determination

- (1) In deciding whether to make the compulsory transfer determination, APRA may consult with any or all of the following:
 - (a) officers or employees of the States and Territories;
 - (b) the Reserve Bank of Australia;
 - (c) any other person or body that APRA considers should be consulted.
- (2) Subject to subsections (3) and (4), in deciding whether to make the compulsory transfer determination, APRA must consult with:
 - (a) the Australian Competition and Consumer Commission; and
 - (b) the Australian Securities and Investments Commission.
- (3) APRA does not have to consult with the Australian Competition and Consumer Commission in relation to the making of the compulsory transfer determination if the Commission has notified APRA, in writing, that it does not wish to be consulted about:
 - (a) the transfer concerned; or
 - (b) a class of transfers that includes that transfer.
- (4) APRA does not have to consult with the Australian Securities and Investments Commission in relation to the making of the compulsory transfer determination if the Commission has notified APRA, in writing, that it does not wish to be consulted about:
 - (a) the transfer concerned; or
 - (b) a class of transfers that includes that transfer.

27 When consent of receiving body is in force

- (1) The consent referred to in paragraph 25(2)(d) remains in force until it is withdrawn by the receiving body's board of directors with the agreement of APRA.
- (2) APRA may agree to the consent being withdrawn if APRA considers it appropriate to allow the consent to be withdrawn having regard to:
 - (a) circumstances that have arisen since the consent was given;
or
 - (b) circumstances that were in existence at or before the time when the consent was given but which were not known to the receiving body's board when it gave its consent; or
 - (c) any other relevant matter.

28 Complementary State or Territory legislation

State or Territory legislation referred to in paragraph 25(2)(f) must include provision to ensure that, when a certificate of transfer comes into force under Division 3, the receiving body is taken to be the successor in law to the transferring body, to the extent of the transfer. In particular, the legislation must provide that:

- (a) assets of the transferring body vest in the receiving body, to the extent of the transfer; and
- (b) liabilities of the transferring body become liabilities of the receiving body, to the extent of the transfer; and
- (c) the duties, obligations, immunities, rights and privileges applying to the transferring body apply to the receiving body, to the extent of the transfer; and
- (d) if the certificate of transfer includes provisions of a kind referred to in subsection 33(3) specifying:
 - (i) that particular things are to happen or are taken to be the case—those things are taken to happen, or to be the case, in accordance with those provisions; or
 - (ii) a mechanism for determining things that are to happen or are taken to be the case—things determined in accordance with that mechanism are taken to happen, or

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to be the case, as determined in accordance with that mechanism; and

- (e) if there is an approved section 30 statement in relation to the transfer that specifies:
 - (i) that particular things are to happen or are taken to be the case—those things are taken to happen, or to be the case, in accordance with the statement; or
 - (ii) a mechanism for determining things that are to happen or are taken to be the case—things determined in accordance with that mechanism are taken to happen, or to be the case, as determined in accordance with that mechanism.

29 Minister’s power to decide that his or her consent is not required

The Minister’s consent to the transfer of business (see paragraph 25(2)(g)) is not required if the Minister has, in writing, determined that his or her consent is not required in relation to:

- (a) the transfer; or
- (b) a class of transfers that includes the transfer.

30 Agreements about matters connected with the transfer

- (1) The transferring body or the receiving body, or both of those bodies, may provide APRA with a written statement specifying, or specifying a mechanism for determining, things that are to happen, or that are taken to be the case, in relation to assets and liabilities that are to be transferred, or in relation to the transfer of business that is to be effected.
- (2) APRA may, in writing, approve the statement before issuing the certificate of transfer if APRA is satisfied that:
 - (a) the statement has been agreed to by the transferring body and the receiving body; and
 - (b) the matters specified in the statement are appropriate.

31 Determination may impose conditions

- (1) The compulsory transfer determination may impose conditions of either or both of the following kinds:
 - (a) conditions to be complied with by the transferring body or the receiving body before a certificate of transfer is issued in relation to the transfer of business;
 - (b) conditions to be complied with by the transferring body or the receiving body after a certificate of transfer has been issued or has come into force in relation to the transfer of business.

Note: Failure to comply with a condition referred to in paragraph (a) or (b) will not prevent the issue of a certificate of transfer, but will be an offence under subsection (4).

- (2) The transferring body or the receiving body may apply in writing to APRA to have a condition of a kind referred to in paragraph (1)(b) that applies to it varied or revoked.
- (3) APRA may, by notice in writing given to the body that made the application, approve the variation or revocation if it is satisfied that the variation or revocation is appropriate. A variation or revocation that is approved by APRA has effect accordingly.
- (4) The transferring body or the receiving body is guilty of an offence if:
 - (a) a condition of a kind referred to in paragraph (1)(a) or (b) applies to that body; and
 - (b) that body fails to comply with the condition.

Maximum penalty for contravention of this subsection: 200 penalty units.

Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Note 2: If a body corporate is convicted of an offence against this subsection, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the penalty stated above.

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32 Notice of determination

APRA must give a copy of the compulsory transfer determination to the transferring body and the receiving body.

Division 3—Process by which compulsory transfers take effect

33 Certificate of transfer

- (1) If:
 - (a) APRA has made a compulsory transfer determination; and
 - (b) APRA considers that the transfer should go ahead; and
 - (c) the consent referred to in paragraph 25(2)(d) is still in force (see section 27);APRA must, in writing, issue a certificate (a *certificate of transfer*) stating that the transfer is to take effect.
- (2) The certificate must:
 - (a) include the names of the transferring body and the receiving body; and
 - (b) state whether the transfer is a total transfer or a partial transfer; and
 - (c) if it is a partial transfer—include, or have attached to it:
 - (i) a list of the assets and liabilities of the transferring body that are being transferred to the receiving body; and
 - (ii) any approved section 30 statement; and
 - (d) state when the certificate is to come into force (either by specifying a date as the date it comes into force, or by specifying that the date it comes into force is a date worked out in accordance with provisions of the certificate); and
 - (e) be signed by an authorised APRA officer.
- (3) The certificate may include provisions specifying, or specifying a mechanism for determining, other things that are to happen, or that are taken to be the case, in relation to assets and liabilities that are to be transferred, or in relation to the transfer of business that is to be effected, whether the transfer is total or partial.
- (4) The certificate comes into force in accordance with the statement included in the certificate as required by paragraph (2)(d).

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34 Notice of certificate

APRA must give a copy of the certificate of transfer to the transferring body and the receiving body.

35 Time and effect of compulsory transfer

- (1) When the certificate of transfer comes into force, the receiving body becomes the successor in law of the transferring body, to the extent of the transfer. In particular:
 - (a) if the transfer is a total transfer—all the assets and liabilities of the transferring body, wherever those assets and liabilities are located, become (respectively) assets and liabilities of the receiving body without any transfer, conveyance or assignment; and
 - (b) if the transfer is a partial transfer—all the assets and liabilities of the transferring body that are included in the list referred to in paragraph 33(2)(c), wherever those assets and liabilities are located, become (respectively) assets and liabilities of the receiving body without any transfer conveyance or assignment; and
 - (c) to the extent of the transfer, the duties, obligations, immunities, rights and privileges applying to the transferring body apply to the receiving body.
- (2) If the certificate includes provisions of a kind referred to in subsection 33(3):
 - (a) if the provisions specify that particular things are to happen or are taken to be the case—those things are, by force of this section, taken to happen, or to be the case, in accordance with those provisions; and
 - (b) if the provisions specify a mechanism for determining things that are to happen or are taken to be the case—things determined in accordance with that mechanism are, by force of this section, taken to happen, or to be the case, as determined in accordance with that mechanism.
- (3) If there is an approved section 30 statement in relation to the transfer, then:

- (a) if the statement specifies that particular things are to happen or are taken to be the case—those things are, by force of this section, taken to happen, or to be the case, in accordance with the statement; and
 - (b) if the statement specifies a mechanism for determining things that are to happen or are taken to be the case—things determined in accordance with that mechanism are, by force of this section, taken to happen, or to be the case, as determined in accordance with that mechanism.
- (4) Subject to subsections (2) and (3), if:
- (a) the transfer is a total transfer; and
 - (b) immediately before the certificate comes into force, proceedings (including arbitration proceedings) to which the transferring body was a party were pending or existing in any court or tribunal;
- the receiving body is, on and after the day when the certificate comes into force, substituted for the transferring body as a party to the proceedings and has the same rights in the proceedings as the transferring body had.

Note: Alternative ways of dealing with substitution of parties (which are available for total or partial transfers) are:

- (a) to deal with the matter in the certificate of transfer (see subsection (2)); or
 - (b) to deal with the matter in an approved section 30 statement (see subsection (3)).
- (5) Subject to subsections (2) and (3), if:
- (a) the transfer is a total transfer; and
 - (b) on the day when the certificate comes into force, documentary or other evidence would (disregarding the transfer) have been admissible for or against the interests of the transferring body;
- that evidence is admissible, on or at any time after that day, for or against the interests of the receiving body.

Note: Alternative ways of dealing with admissibility of evidence (which are available for total or partial transfers) are:

- (a) to deal with the matter in the certificate of transfer (see subsection (2)); or

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- (b) to deal with the matter in an approved section 30 statement (see subsection (3)).

- (6) Subject to subsections (2) and (3), if the transfer is a total transfer, on and after the day when the certificate comes into force, each translated instrument continues to have effect, according to its tenor, as if a reference in the instrument to the transferring body were a reference to the receiving body. For this purpose:

translated instrument means an instrument (including a legislative instrument other than this Act) subsisting immediately before the day when the certificate comes into force:

- (a) to which the transferring body is a party; or
- (b) that was given to, by or in favour of, the transferring body; or
- (c) that refers to the transferring body; or
- (d) under which money is, or may become, payable, or other property is, or may become, liable to be transferred, to or by the transferring body.

Note: Alternative ways of dealing with references in instruments (which are available for total or partial transfers) are:

- (a) to deal with the matter in the certificate of transfer (see subsection (2)); or
- (b) to deal with the matter in an approved section 30 statement (see subsection (3)).

- (7) Subject to subsections (2) and (3), on and after the day when the certificate comes into force, a place that, immediately before that day, was a place of business for the transferring body in relation to business that was transferred to the receiving body is taken to be a place of business for the receiving body.

Note: Alternative ways of dealing with places of business are:

- (a) to deal with the matter in the certificate of transfer (see subsection (2)); or
- (b) to deal with the matter in an approved section 30 statement (see subsection (3)).

36 Employment unaffected

- (1) This section applies to every person who, immediately before the day when the certificate of transfer comes into force, was performing duty in the transferring body.
- (2) The terms and conditions of employment (including any accrued entitlement to employment benefits) of each person to whom this section applies are not affected by the operation or effect of this Part or of any State or Territory legislation referred to in paragraph 25(2)(f).

Part 5—Evidentiary certificates

37 Certificates evidencing operation of Act etc.

- (1) An authorised APRA officer may, by signed writing, make a certificate certifying any matter in relation to the operation or effect of this Act and, in particular, may certify that:
 - (a) a specified matter or thing relevant to a receiving body is an aspect of the operation or effect of this Act; or
 - (b) a specified thing was done for a purpose connected with, or arising out of, the operation or effect of this Act in relation to that receiving body; or
 - (c) a specified asset of the transferring body has become a transferred asset of that receiving body; or
 - (d) a specified liability of the transferring body has become a transferred liability of the receiving body.
- (2) For all purposes and in all proceedings, a certificate under subsection (1) is conclusive evidence of the matters certified, except to the extent that the contrary is established.

38 Certificates in relation to land and interests in land

If:

- (a) a receiving body becomes, under this Act, the owner of land, or of an interest in land, that is situated in a State or Territory; and
- (b) there is lodged with the Registrar of Titles or other appropriate officer of the State or Territory in which the land is situated a certificate that:
 - (i) is signed by an authorised APRA officer; and
 - (ii) identifies the land or interest; and
 - (iii) states that the receiving body has, under this Act, become the owner of that land or interest;the officer with whom the certificate is lodged may:

- (c) register the matter in the same manner as dealings in land or interests in land of that kind are registered; and
- (d) deal with, and give effect to, the certificate.

39 Certificates in relation to other assets

- (1) If:
 - (a) an asset (other than land or an interest in land) becomes, under this Act, an asset of a receiving body; and
 - (b) there is lodged with the person or authority who has, under a law of the Commonwealth, a State or a Territory, responsibility for keeping a register in respect of assets of that kind a certificate that:
 - (i) is signed by an authorised APRA officer; and
 - (ii) identifies the asset; and
 - (iii) states that the asset has, under this Act, become an asset of the receiving body;

that person or authority may:

- (c) register the matter in the same manner as transactions in relation to assets of that kind are registered; and
 - (d) deal with, and give effect to, the certificate.
- (2) This section does not affect the operations of the Corporations Law.

40 Documents purporting to be certificates

A document purporting to be a certificate given under this Part is, unless the contrary is established, taken to be such a certificate and to have been properly given.

Part 6—Miscellaneous

41 Information gathering powers

- (1) For the purposes of deciding whether or how to perform or exercise functions or powers under this Act in relation to a transfer of business, or a proposed or possible transfer of business, from or to an ADI, each of the following provisions:

- (a) section 62 of the *Banking Act 1959*;
- (b) any other provision of that Act, or of another Act, prescribed by the regulations;

has effect as if this Act were part of the Act that contains the provision.

- (2) For the purpose of deciding whether or how to perform or exercise functions or powers under this Act in relation to a transfer of business, or a proposed or possible transfer of business, from or to a life insurance company, each of the following provisions:

- (a) section 131, 132 or 133 of the *Life Insurance Act 1995*;
- (b) any other provision of that Act, or of another Act, prescribed by the regulations;

has effect as if this Act were part of the Act that contains the provision.

42 Compulsory transfer—APRA may provide information to receiving body

APRA may, in connection with a compulsory transfer, or a proposed or possible compulsory transfer, provide information (including personal information or confidential commercial information) to the receiving body, or to the possible or proposed receiving body, about the business that is to be, or that may be, transferred.

Note: Subsection 56(9) of the *Australian Prudential Regulation Authority Act 1998* allows an officer of APRA who (on APRA's behalf) provides information to a body under this section to impose

conditions to be complied with by the body in relation to that information.

43 Relationship of Act with other laws etc.

- (1) Subject to subsections (4), (5), (6), (7), (8), (9) and (10), this Act has effect in spite of anything in any law of the Commonwealth or of a State or Territory, or in any contract, deed, undertaking, agreement or other instrument.

Note: For the effect of a certificate of transfer, see sections 22 and 35.

- (2) Subject to subsections (4), (5), (6), (7), (8), (9) and (10), nothing done by or under this Act:
- (a) places a receiving body, a transferring body or another person in breach of contract or confidence or otherwise makes any of them guilty of a civil wrong; or
 - (b) places a receiving body, a transferring body or another person in breach of:
 - (i) any law of the Commonwealth or of a State or Territory; or
 - (ii) any contractual provision prohibiting, restricting or regulating the assignment or transfer of any asset or liability or the disclosure of any information; or
 - (c) releases any surety, wholly or partly, from all or any of the surety's obligations.
- (3) Without limiting subsection (1), but subject to subsections (4), (5), (6), (7), (8), (9) and (10), if, apart from this Act, the advice or consent of a person would be necessary in a particular respect, the advice is taken to have been obtained or the consent is taken to have been given, as the case requires.
- (4) The regulations may provide that some or all of the provisions of another Act (not being provisions referred to in subsection (5), (6), (7) or (8)) apply in relation to a transfer of business that takes effect or may take effect under this Act, with the modifications (if any) specified in the regulations. The regulations have effect accordingly. Nothing in this section limits the operation of those provisions (as they have effect subject to any modifications specified in the regulations).

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- (5) Nothing in this Act limits the operation of any of the provisions of the *Privacy Act 1988*.
- (6) Nothing in this Act limits the operation of any of the provisions of the *Trade Practices Act 1974*.
- (7) Nothing in this Act limits the operation of any of the provisions of the *Workplace Relations Act 1996*.
- (8) Nothing in this Act limits the operation of section 63 of the *Banking Act 1959*.
- (9) For the purposes of section 50 and related provisions of the *Trade Practices Act 1974* a transfer of business (whether voluntary or compulsory) that takes effect under this Act is taken to be:
 - (a) to the extent that the transfer is of shares in the capital of a body corporate—an acquisition of the shares by the receiving body; and
 - (b) to the extent that the transfer is of other assets—an acquisition of those assets by the receiving body.
- (10) The provisions of this Act and the provisions:
 - (a) prescribed for the purposes of subsection (4); or
 - (b) referred to in subsection (5), (6), (7) or (8);operate independently of each other. In particular, a decision under one of those provisions has effect only for the purpose of that provision, unless express provision is made to the contrary.

44 Compensation for acquisition of property

- (1) If:
 - (a) apart from this section, the operation of this Act in relation to a particular receiving body would result in the acquisition of property from a person otherwise than on just terms; and
 - (b) the acquisition would be invalid because of paragraph 51(xxxi) of the Constitution;the receiving body is liable to pay to the person compensation of a reasonable amount as agreed on between the receiving body and the person. If the receiving body and the person do not agree on the amount of the compensation, the person may institute proceedings

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in the Federal Court of Australia for the recovery from the receiving body of such reasonable amount of compensation as the Court determines.

- (2) Any damages or compensation recovered or other remedy given in a proceeding that is commenced otherwise than under this section is to be taken into account in assessing compensation payable in a proceeding that is commenced under this section and that arises out of the same event or transaction.
- (3) In this section:

acquisition of property and *just terms* have the same respective meanings as in paragraph 51(xxxi) of the Constitution.

45 Review of decisions

An application may be made to the Administrative Appeals Tribunal for the review of any of the following decisions:

- (a) a decision under section 11 to refuse to approve an application;
- (b) a decision under subsection 16(1) to impose conditions;
- (c) a decision under subsection 16(3) to refuse to vary or revoke conditions;
- (d) a decision under section 18 to refuse to issue a certificate of transfer;
- (e) a decision under subsection 20(2) to refuse to approve a statement provided under subsection 20(1);
- (f) a decision under subsection 27(2) to refuse to agree to a consent being withdrawn;
- (g) a decision under subsection 31(3) to refuse to vary or revoke conditions;
- (h) a decision under section 33 to refuse to issue a certificate of transfer.

46 Transfer rules

- (1) APRA may, in writing, make rules prescribing all matters required or permitted by this Act to be prescribed by transfer rules.

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- (2) Rules made by APRA under subsection (1) are a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

47 Regulations

The Governor-General may make regulations prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
 - (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.
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*[Minister's second reading speech made in—
House of Representatives on 11 March 1999
Senate on 30 March 1999]*

(30/99)