

1999

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FINANCIAL SECTOR (TRANSFERS OF BUSINESS) BILL 1999

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Financial Services and Regulation,
the Honourable J.B. Hockey, MP)

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Outline

1.1 This Bill forms a part of the second stage of legislation to implement the Government's response to the recommendations of the Financial System Inquiry as announced by the Treasurer, the Hon. Peter Costello, M.P., in the House of Representatives on 2 September 1997.

1.2 The Final Report of the Inquiry and the Government's response to it are directed to the fundamental goals of the Government, to increase competition and improve efficiency, while preserving the integrity, security and fairness of the financial system.

1.3 The performance of the financial system, and the cost effectiveness of its regulation, are critical to the efficient functioning of the Australian economy.

1.4 The first stage of the reforms introduced a new organisational framework for the regulation of the financial system from 1 July 1998, and a variety of measures to improve efficiency and contestability in financial markets and the payments system.

1.5 This second stage of reforms aims to:

- transfer regulatory responsibility for building societies, credit unions and friendly societies from the States and Territories to the Commonwealth; and
- bring the regulation of building societies and credit unions into line with the regulation of other authorised deposit-taking institutions (including banks) and establish a single regulatory framework for life insurance companies and friendly societies while recognising the special features of friendly societies.

1.6 The second stage is designed to:

- provide a new regulatory system that is less cumbersome and duplicative than the State and Territory financial institutions system;
- enable the non-bank deposit-taking sector to provide a more effective source of competition for the banks in the retail market by operating under the same regulatory structure as banks; and
- maintain commercial flexibility by retaining different corporate structures, including mutuality, and the terms 'building society', 'credit union' and 'friendly society'.

1.7 To effect the transfer, the Commonwealth is introducing a package of three bills, including this Bill. The other two bills are the Financial Sector Reform (Amendments and Transitional Provisions) Bill (No.1) 1999 and the Income Tax Rates Amendment (RSAs Provided by Registered Organizations) Bill 1999.

- In addition, the Commonwealth will sign with the States and Territories a Financial Sector Regulation Transfer Agreement. In turn, the States and Territories will introduce legislation to facilitate the transfer.

1.8 The Financial Sector (Transfers of Business) Bill 1999 introduces new powers to allow the Australian Prudential Regulation Authority to:

- approve an application for the transfer of part or all of the business of one prudentially regulated entity to another (a voluntary transfer); or
- to require, in limited circumstances, a prudentially regulated entity to transfer part or all of its business to another entity (a compulsory transfer).

1.9 These provisions provide an effective prudential regulation tool to facilitate a quick and efficient transfer of business in the case of financial distress, with the aim of preventing further losses, and maintaining investor confidence in the financial services industry.

Financial impact statement

1.10 It is not envisaged that the Bill will have a financial impact on the operations of the Government. All costs incurred in the administration of this Bill may be recovered through fees charged for voluntary transfer applications. For compulsory transfers, the costs incurred would have otherwise been incurred through other actions necessary under the *Life Insurance Act 1995* or the *Banking Act 1959*. The Australian Prudential Regulation Authority is fully funded by industry levies, and therefore the net cost to the budget is expected to be nil.

1.11 The Office of Regulation Review has advised that a Regulation Impact Statement is not required for this Bill as it is of a minor or government machinery nature and does not substantially alter existing arrangements.

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Abbreviations

2.1 The following abbreviations are used in this explanatory memorandum.

ADI	—	Authorised Deposit-taking Institution
APRA	—	Australian Prudential Regulation Authority
ASIC	—	Australian Securities and Investments Commission
Banking Act	—	<i>Banking Act 1959</i>
Life Insurance Act	—	<i>Life Insurance Act 1995</i>
ToB	—	Transfer of Business

3**Summary of key provisions proposed by the Bill**

3.1 The key feature of the ToB provisions is the supply of a method to facilitate the transfer of business between regulated entities. A transfer of business must include some prudentially regulated business, because ToB is viewed as a prudential tool. There are two types of ToB:

- **Voluntary:** where two entities of the same type (i.e. the receiving entity must be appropriately licensed to undertake the prudentially regulated business being transferred) agree to a transfer of part or all of one entity's business to the other, and APRA, with the agreement of the Minister (if required), consents to the proposal; and
- **Compulsory:** where APRA requires, with the agreement of the Minister (if required), the transfer of part or all of the business of one entity to another entity of the same type. The use of compulsory transfer provisions will be restricted to those circumstances where a breach of the Banking Act or Life Insurance Act has occurred, and the transfer is in the interests of depositors/policy owners. A compulsory transfer can only take place with the consent of the receiving entity.

3.2 These provisions provide an effective prudential regulation tool to facilitate a quick and efficient transfer of business in the case of financial distress, with the aim of preventing further losses, and maintaining investor confidence in the industry.

3.3 ToB is not the only mechanism available to ADIs and life companies to give effect to a transfer. For example, life companies may make use of the Court-directed transfer powers under Part 9 of the Life Insurance Act. These other mechanisms, which differ from ToB in the way in which they achieve the transfer, will continue to be available options after the commencement of this Bill. The availability of other transfer mechanisms is specifically noted in subclause 8(6) of the Bill.

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Explanation of clauses

Part 1 — Preliminary

Part 1 contains the necessary formal clauses underpinning the Bill. This includes details on the commencement of the Bill, application of the Bill to external territories and the application of the Criminal Code to all offences against provisions of the Bill.

Clause 1 — Short title

4.1 Upon enactment, the Bill will be known as the *Financial Sector (Transfers of Business) Act 1999*.

Clause 2 — Commencement

4.2 The Bill, once enacted, will commence on the date that is the transfer date for the purposes of the Financial Sector Reform (Amendments and Transitional Provisions) Act (No. 1) 1999.

Clause 3 — Additional operation of Act

4.3 The intention of this clause is to ensure the validity of the provisions in the Bill affecting bodies corporate by allowing those provisions to be read down, if necessary, so that the scope of their operation is limited to bodies corporate to which paragraph 51(xx) of the Constitution applies.

Clause 4 — Definitions

4.4 This provides a definition of key terms used in the legislation. These are self-explanatory.

Clause 5 — Act binds the Crown

4.5 The Crown is bound in all its capacities, but the Bill does not make the Crown liable to be prosecuted for an offence.

Clause 6 — External Territories

4.6 The Bill extends to all external Territories of Australia.

Clause 7 — Application of the Criminal Code

4.7 The Criminal Code applies to all offences against this Bill. The Criminal Code sets out the general principles of criminal responsibility.

Part 2 — Overview of Act

Part 2 contains provisions which provide information on the purpose of a ToB and when the provisions may be used.

Clause 8 — Overview of the Act

4.8 This clause states that there are two kinds of ToB, voluntary and compulsory. Either of these kinds of transfer may be a partial transfer or a total transfer. In conducting a transfer of business using these provisions, the business to be transferred must include some prudentially regulated business.

4.9 Subclause 8(6) states that business of regulated bodies may be transferred otherwise than under this Bill.

Part 3 — Voluntary Transfers

Part 3 contains the framework for a voluntary ToB. A voluntary transfer requires application from the two parties to the transfer and approval by APRA and the Minister. The Minister may elect to waive the requirement for Ministerial approval. The transfer may be either partial or total. The approval may be subject to conditions. Before a transfer of business can take place, it is necessary to have complementary State or Territory legislation in place to ensure succession. Once specified criteria have been met, APRA may issue a certificate which certifies that the transfer is to take effect.

Clause 9 — Outline of Part

4.10 This clause provides a brief outline of the effect of the Part.

Clause 10 — Application for approval of voluntary transfer

4.11 In order to effect a voluntary ToB, two regulated bodies may apply to APRA for approval of the proposed transfer of business. The application must be provided in the specified form, and be accompanied by the required information.

Clause 11 — Approval of applications

4.12 APRA must, in writing, approve a voluntary transfer of business if APRA considers that:

- application for approval of the transfer has been made in accordance with clause 10;
- the transferring body and receiving body are entities of the same kind;
- the transfer has been adequately adopted (see clause 13);
- the Minister has consented to the transfer (if required – see clause 15);
- necessary State or Territory legislation to facilitate the transfer is in place (see clause 14); and

- the transfer should be approved having regard to the interests of depositors or policy owners of the receiving and transferring bodies and the interests of the financial sector as a whole, as well as any other matter that APRA considers relevant.

4.13 To ensure that this legislation does not override requirements under other Commonwealth legislation applicable to a transfer, the provisions state that approval must not be given if APRA considers that the transfer should not be approved having regard to a law prescribed for the purposes of subclause 43(4).

Clause 12 — Consultation about approving the application

4.14 This clause allows APRA to consult with other organisations or individuals in considering whether to approve an application. In most cases, it is expected that APRA will consult with the relevant State or Territory agencies, in relation to whether the necessary complementary legislation is in place.

Clause 13 — Adequate adoption

4.15 In order to approve an application, APRA must be satisfied that a proposal has received adequate adoption. The transfer rules will set out what constitutes adequate adoption — in some cases this may require the entity to seek approval from members or shareholders, but in other cases the approval of the Board may suffice. APRA will determine what constitutes adequate adoption in consultation with ASIC but it is expected that APRA will consider the extent of information disclosed, especially for mutuals.

Clause 14 — Complementary State or Territory legislation

4.16 This clause provides that complementary State or Territory legislation necessary for the transfer must include a provision which ensures that the receiving body is taken to be the successor in law to the transferring body.

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

4.17 This clause permits the Minister to determine that the consent required under Clause 11 is not required in relation to a particular transfer or a particular class of transfers.

Clause — Approval may impose conditions

4.18 The approval granted by APRA may include conditions. There can be two types of conditions:

- conditions to be complied with before a certificate of transfer is issued; and
- conditions to be complied with after a certificate of transfer has been issued or has come into force.

4.19 In the case of the former, non-compliance will result in APRA refusing to issue the certificate of transfer. Non-compliance with the latter is an offence, subject to a maximum penalty of 200 penalty units.

4.20 Examples of conditions to be imposed might include a requirement:

- to comply with another Commonwealth law (eg, may require that an application under section 13 of the *Financial Sector (Shareholdings) Act 1998* be lodged and approved);

- that policy owners or depositors be notified of the occurrence of the transfer, and that ASIC be consulted in preparing the notice; or
- that after a total ToB, the transferring entity surrender its licence under the Life Insurance Act or Banking Act within a certain period.

4.21 APRA may, on application from the transferring or receiving body, approve a variation or revocation of a condition imposed under clause 16.

Clause 17 — Notice of decision

4.22 This provision requires that if APRA approves a ToB, then written notice must be given to the transferring body and receiving body. If the application is refused, then written notice must be given to the transferring and receiving body and must include a statement providing reasons why the application was not accepted.

Clause 18 — Certificate of transfer

4.23 If:

- (i) an approval has been granted for a voluntary transfer;
 - (ii) the conditions on the transfer have been complied with;
 - (iii) a statement of the assets and liabilities to be transferred has been received (if the transfer is a partial transfer – see clause 19); and
 - (iv) APRA is not aware of any reason why the transfer should not go ahead;
- then a certificate may be issued by APRA which states that the voluntary transfer is to take effect.

4.24 The certificate must include names of the entities involved, state whether the transfer is a partial or total transfer and, in the case of a partial transfer, must include or attach an agreed list of all the assets and liabilities to be transferred. The certificate must also state the date on which the transfer is to take place, which must be determined taking into account the wishes of the transferring and receiving bodies.

4.25 In order to allow for the transfer of other duties, rights and obligations (such as legal proceedings), the certificate may also include provisions which specify other things that are to happen or are taken to be the case in relation to the transfer of the assets and liabilities or the transfer of the affected business.

Clause 19 — Partial transfer — statement of detail to be provided

4.26 In the case of a partial transfer, before issuing a certificate, APRA must be provided with a detailed list, agreed between the transferring and receiving bodies, of the assets and liabilities of the transferring body to be transferred to the receiving body.

Clause 20 — Agreements about matters connected with the transfer

4.27 The transferring or receiving body, or both, may also provide a statement which specifies, or specifies a mechanism for determining, other things that are to happen in relation to the assets and liabilities that are to be transferred or the transfer of business. APRA may approve the statement if

the statement has been agreed to by the transferring and receiving bodies, and APRA is satisfied that the matters specified in the statement are appropriate.

4.28 Examples of matters which might be included in a statement of detail include (but are not limited to):

- treatment of members of the transferring body (if any) on transfer; or
- transfers of staff and equipment (etc) on transfer.

Clause 21 — Notice of decision

4.29 If a certificate is issued by APRA then a copy of the certificate must be given to the transferring and receiving bodies.

4.30 If a certificate is not issued by APRA then notice must be given to the transferring and receiving bodies and must include a statement as to the reasons for not issuing the certificate.

Clause 22 — Time and effect of voluntary transfer

4.31 This clause provides that when a certificate of transfer takes effect, all the assets and liabilities of the transferring body, to the extent of the transfer, become assets and liabilities of the receiving body. Further, to the extent of the transfer, all the duties, obligations, immunities, rights and privileges applying to the transferring body apply to the receiving body, and instruments transferred continue to have effect as if a reference to the transferring body is a reference to the receiving body. Where provision is made for particular things to happen, or a mechanism for determining things that are to happen, then these things are taken to happen as specified.

4.32 In the case of a total transfer, this clause also provides that where the transferring body was a party to proceedings immediately before the transfer takes effect, the receiving body is substituted for the transferring body on the day of the transfer. In the case of a partial transfer, where proceedings are also transferred, they will need to be specified in the certificate.

4.33 Also in the case of a total transfer, provision is made for the admissibility of documentary or other evidence both for and against the receiving body on the date of transfer, where such evidence would have been admissible for or against the transferring body. In the case of a partial transfer, this matter will need to be specifically mentioned in the certificate where admissibility is transferred.

4.34 Further, in the case of a total transfer, provision is made so that all instruments transferred continue to have effect as if a reference in the instrument to the transferring body becomes a reference to the receiving body.

Clause 23 — Employment unaffected

4.35 This clause provides for continuity of terms and conditions of employment for each person who, immediately before the transfer comes into effect, was performing duty in the transferring body where it happens as part of the ToB. This clause does not actually transfer staff to the receiving body.

Part 4 – Compulsory Transfers

Part 4 contains the framework for a compulsory transfer of business. In certain specified circumstances, APRA may, with the consent of the Minister, make a determination that there is to be a transfer of business between two regulated bodies. The Minister may elect to waive the requirement for Ministerial approval. The transfer may be either partial or total. Before a transfer of business can take place, it is necessary to have complementary State or Territory legislation in place to ensure succession. Once specified criteria have been met, APRA may issue a certificate which certifies that the transfer is to take effect.

Clause 24 — Outline of Part

4.36 This clause provides a brief outline of the effect of the Part.

Clause — Compulsory transfer determinations

4.37 This clause provides that APRA may make a determination that part or all of the business of one regulated body is to transfer to another regulated body. The determination may be made where:

- the transferring body has contravened a provision of its regulatory legislation and/or it is in the interests of policy owners or depositors;
- the transferring body and receiving body are entities of the same kind;
- the receiving body has consented to the transfer;
- APRA is satisfied that the transfer is appropriate having regard to the interests of depositors or policy owners of the receiving and transferring bodies and the interests of the financial sector as a whole, as well as any other matter that APRA considers relevant;
- the Minister has consented to the transfer (if required – see clause 29); and
- necessary State or Territory legislation to facilitate the transfer is in place (see clause 28).

4.38 The determination by APRA must include particulars of the name of the transferring and receiving body and set out what part or parts of the business is to be transferred. The determination may relate to the entire business.

Clause 26 — Consultation about making determination

4.39 This clause provides that APRA may consult with other organisations in deciding whether to make a compulsory transfer determination. In most cases, it is expected that APRA will consult with the relevant State or Territory agencies, in relation to whether the necessary complementary legislation is in place.

Clause 27 — When consent of receiving body is in force

4.40 This clause provides that the consent of the receiving body to accept the transfer of business remains in force until it is withdrawn by the receiving body's board of directors with the agreement of APRA.

4.41 APRA may agree to the withdrawal of the consent if it considers it appropriate having regard to circumstances that have arisen since the consent was given, circumstances that were in existence

at or before the time of giving consent but which were not known by the receiving body's board when consent was given, or any other relevant matter.

Clause 28 — Complementary State or Territory legislation

4.42 This clause provides that complementary State or Territory legislation necessary for the transfer must include a provision which ensures that the receiving body is taken to be the successor in law to the transferring body.

Clause 29 — Minister's power to decide that his or her consent is not required

4.43 This clause permits the Minister to determine that the consent required under Clause 25 is not required in relation to a particular transfer or a particular class of transfers.

Clause 30 — Agreement about matters connected with the transfer

4.44 This clause allows the transferring or receiving bodies to give APRA a statement specifying, or specifying a mechanism for determining, things that are to happen or 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.

4.45 APRA may approve the statement if it is satisfied that the transferring and receiving bodies have agreed to the statement and the matters set out in the statement are appropriate.

Clause 31 — Determination may impose conditions

4.46 This clause allows for the imposition of conditions on a compulsory transfer determination. There can be two types of conditions:

- conditions to be complied with before a certificate of transfer is issued; and
- conditions to be complied with after the certificate of transfer has been issued or has come into force.

4.47 Non-compliance with any condition is an offence, subject to a maximum penalty of 200 penalty units. However, failure to comply with a condition will not prevent the issue of the certificate of transfer.

Clause 32 — Notice of determination

4.48 Notice of a determination must be given to the transferring and receiving bodies.

Clause 33 — Certificate of transfer

4.49 Where a compulsory transfer determination has been made and APRA considers that the transfer should go ahead, and the consent of the receiving body remains in force, then APRA may issue a certificate stating that the transfer is to take effect.

4.50 The certificate must include names of the entities involved, state whether the transfer is a partial or total transfer and, in the case of a partial transfer, must include an agreed list of all the assets and liabilities to be transferred. The certificate must also state the date on which the transfer is to come into force.

4.51 In order to allow for the transfer of other duties, rights and obligations (such as legal proceedings), the certificate may also include provisions which specify other things that are to happen, or are taken to be the case, in relation to the transfer of the assets and liabilities or the transfer of affected business.

Clause 34 — Notice of certificate

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

Clause 35 — Time and effect of compulsory transfer

4.53 This clause provides that when a certificate of transfer takes effect, the receiving body becomes successor in law to the transferring body, to the extent of the transfer. Specifically, all the assets and liabilities of the transferring body, to the extent of the transfer, become assets and liabilities of the receiving body. Further, to the extent of the transfer, all the duties, obligations, immunities, rights and privileges applying to the transferring body apply to the receiving body, and instruments transferred continue to have effect as if a reference to the transferring body is a reference to the receiving body.

4.54 In the case of a total transfer, this clause also provides that where the transferring body was a party to proceedings immediately before the transfer takes effect, the receiving body is substituted for the transferring body on the day of the transfer. In the case of a partial transfer, where proceedings are also transferred, they will need to be specified in the certificate.

4.55 Also in the case of a total transfer, provision is made for the admissibility of documentary or other evidence both for or against the receiving body on the date of transfer, where such evidence would have been admissible for or against the transferring body. In the case of a partial transfer, this matter will need to be specifically mentioned in the certificate where admissibility is transferred.

Clause 36 — Employment unaffected

4.56 This clause provides for continuity of terms and conditions of employment for each person who, immediately before the transfer comes into effect, was performing duty in the transferring body where it happens as part of the ToB. This clause does not actually transfer staff to the receiving body.

Part 5 — Evidentiary certificates

Part 5 provides for the issue by APRA of certificates which certify that specified matters or things have been done in relation to the operation of the Bill.

Clause 37 — Certificates evidencing operation of the Bill etc

4.57 This clause allows APRA to issue a certificate that certifies any matter in relation to the operation or effect of the Bill.

Clause — Certificates in relation to land and interests in land

4.58 This clause permits the use by the receiving body of a certificate issued by APRA for the registration of land or interests in land by the Registrar of Titles in the relevant State or Territory.

Clause 39 — Certificates in relation to other assets

4.59 This clause permits the use by the receiving body of a certificate issued by APRA for the registration of particular assets (other than land – which is covered under clause 38) under a law of the Commonwealth, a State or a Territory.

Clause 40 — Documents purporting to be certificates

4.60 This clause ensures the effect of a certificate issued under the Bill.

Part 6 — Miscellaneous

Part 6 deals with miscellaneous provisions necessary for the orderly operation of the Bill.

Clause 41 — Information gathering powers

4.61 This clause allows APRA to employ information gathering powers conferred on it by other Acts (primarily the Banking Act and the Life Insurance Act) for the purposes of the Bill.

Clause 42 — Compulsory transfer — APRA may provide information to a receiving body

4.62 This provision allows APRA to provide information, including personal or confidential commercial information, to a receiving body or a possible or proposed receiving body about the business that is to be, or is proposed to be, transferred by compulsory transfer.

Clause 43 — Relationship of Bill with other laws etc

4.63 This clause provides that the Bill has effect in spite of anything in any contract, deed, undertaking, agreement or other instrument.

4.64 Subclause 43(2) states that, subject to subclauses 43(4), 43(5) and 43(6), nothing done by or under this Bill places a receiving body, a transferring body or another person in breach of contract or confidence or any law of the Commonwealth or of a State or Territory or any contractual provision prohibiting, restricting or regulating the assignment or transfer of any asset or liability or the disclosure of any information.

4.65 Subclause 43(4) provides that, where specified in the regulations, another Act would apply in relation to a transfer of business, that Act has effect subject to any modifications contained in the regulations.

4.66 Subclause 43(5) provides that the Bill and another Act specified in the regulations for the purposes of subclause 43(4) operate independently of each other.

4.67 Subclause 43(6) ensures the operation of the Privacy Act 1988.

Clause — Compensation for acquisition of property

4.68 This clause makes the receiving body liable to pay compensation to the transferring body where the acquisition of property from the transferring body is made otherwise than on just terms.

Clause 45 — Review of decisions

4.69 This clause lists those decisions under the Bill for which an application may be made to the Administrative Appeals Tribunal for a review of a decision.

4.70 In general terms, decisions are reviewable, except where the decision is made as a matter of urgency, or where delays or reversal of decisions would be of serious detriment to the policy owners or depositors of the transferring, and possibly the receiving, body.

4.71 The review of a decision not to issue a certificate of transfer (under clause 33) in the case of a compulsory transfer is to ensure that where a compulsory transfer determination is made and APRA later decides that the transfer should not proceed, the receiving company, who may have invested significant time and expense in facilitating the transfer, may ask for that decision to be reviewed.

Clause 46 — Transfer Rules

4.72 Clause 46 allows APRA to make rules prescribing all matters required or permitted by the Bill to be prescribed by transfer rules.

4.73 Transfer rules are disallowable instruments.

Clause 47 — Regulations

4.74 This clause provides that the Governor-General may make regulations prescribing matters required or permitted by this Bill to be prescribed or necessary or convenient in order to carry out or give effect to the Bill.