

1998-99

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

Presented and read a first time

**Financial Sector (Transfers of Business)
Bill 1999**

No. , 1999

(Treasury)

**A Bill for an Act to provide for transfers of
business between some kinds of financial
institutions**

ISBN: 0642 390908

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1 **A Bill for an Act to provide for transfers of**
2 **business between some kinds of financial**
3 **institutions**

4 The Parliament of Australia enacts:

5 **Part 1—Preliminary**
6

7 **1 Short title**

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

Section 2

1 **2 Commencement**

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

5 **3 Additional operation of Act**

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

10 **4 Definitions**

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

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

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

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

21 **APRA** means the Australian Prudential Regulation Authority.

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

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

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

- 1 (a) any legal or equitable estate or interest (whether present or
2 future, vested or contingent, tangible or intangible, in real or
3 personal property) of any kind; and
4 (b) any chose in action; and
5 (c) any right, interest or claim of any kind including rights,
6 interests or claims in or in relation to property (whether
7 arising under an instrument or otherwise, and whether
8 liquidated or unliquidated, certain or contingent, accrued or
9 accruing); and
10 (d) any asset within the meaning of Part IIIA of the *Income Tax*
11 *Assessment Act 1936*.

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

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

18 **certificate of transfer**:

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

23 **compulsory transfer determination** means a determination made
24 under section 25.

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

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

30 **instrument** includes a document and an oral agreement.

31 **interest**, in relation to land, includes:

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

Section 4

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

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

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

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

9 **regulated body** means a body corporate that is:

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

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

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

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

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

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

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

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

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

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

6 ***transfer rules*** means rules in force under section 46.

7 ***voluntary transfer approval*** means an instrument of approval
8 under section 11.

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

13 **5 Act binds the Crown**

14 (1) This Act binds the Crown in each of its capacities.

15 (2) This Act does not make the Crown liable to be prosecuted for an
16 offence.

17 **6 External Territories**

18 This Act extends to every external Territory.

19 **7 Application of *Criminal Code***

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

1

2

Part 2—Overview of Act

3

4

8 Overview of Act

5

(1) This Act provides for 2 kinds of transfers of business of regulated bodies:

6

7

(a) *voluntary transfers* (these are transfers under Part 3); and

8

(b) *compulsory transfers* (these are transfers under Part 4).

9

Either kind of transfer may be a partial transfer or a total transfer.

10

(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.

11

12

13

14

(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).

15

16

17

(4) For a voluntary transfer of business to take effect, APRA must:

18

19

20

(a) receive an application for the transfer from the regulated bodies concerned (the *transferring body* and the *receiving body*); and

21

22

(b) approve the application in writing (the *voluntary transfer approval*); and

23

24

(c) issue a certificate (the *certificate of transfer*) stating that the transfer is to take effect.

25

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

26

27

(5) For a compulsory transfer of business to take effect, APRA must:

28

29

30

31

(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

32

33

(b) issue a certificate (the *certificate of transfer*) stating that the transfer is to take effect.

Section 8

- 1 The transfer of business takes effect when the certificate of transfer
2 comes into force.
- 3 (6) Business of regulated bodies may also be transferred otherwise
4 than under this Act, for example in accordance with section 63 of
5 the *Banking Act 1959* or Part 9 of the *Life Insurance Act 1995*.

1

2 **Part 3—Voluntary transfers**

3 **Division 1—Outline of Part**

4 **9 Outline of Part**

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

1

2 **Division 2—Approval of voluntary transfers**

3 **10 Application for approval of voluntary transfer**

4 (1) 2 regulated bodies of the same kind may apply in writing to APRA
5 for approval of a transfer of business from one of the bodies to the
6 other body. The transfer cannot relate only to business of the
7 transferring body that is not regulated business.

8 (2) The application must be in the form prescribed by the transfer rules
9 and must contain or be accompanied by the information required
10 by the transfer rules.

11 Note: APRA may impose a charge in respect of the application—see section
12 51 of the *Australian Prudential Regulation Authority Act 1998*.

13 (3) For the purposes of this section, 2 regulated bodies are of the same
14 kind if:

- 15 (a) they are both ADIs; or
16 (b) they are both life insurance companies.

17 **11 Approval of applications**

18 (1) Subject to subsection (2), APRA must, in writing (the *voluntary*
19 *transfer approval*), approve a transfer of business if APRA
20 considers that:

- 21 (a) application for approval of the transfer has been made in
22 accordance with section 10; and
23 (b) the transfer has been adequately adopted (see section 13) by:
24 (i) the transferring body; and
25 (ii) the receiving body; and
26 (c) the transfer should be approved, having regard to:
27 (i) the interests of the depositors or policy owners of the
28 transferring body when viewed as a group; and
29 (ii) the interests of the depositors or policy owners of the
30 receiving body when viewed as a group; and
31 (iii) the interests of the financial sector as a whole; and
32 (iv) any other matters that APRA considers relevant; and

Part 3 Voluntary transfers

Division 2 Approval of voluntary transfers

Section 12

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

15 **12 Consultation about approving the application**

- 16 In deciding whether to approve the transfer of business, APRA
17 may consult with any or all of the following:
18 (a) officers or employees of the States and Territories;
19 (b) the Australian Competition and Consumer Commission;
20 (c) the Australian Securities and Investments Commission;
21 (d) the Reserve Bank of Australia;
22 (e) any other person or body that APRA considers should be
23 consulted.

24 **13 Adequate adoption**

- 25 For the purposes of paragraph 11(1)(b), the transfer of business has
26 been *adequately adopted* by a body if:
27 (a) the transfer has been adopted by or on behalf of the body, or
28 by or on behalf of the members or a class of the members of
29 the body, in a way prescribed by the transfer rules; and
30 (b) APRA considers that adoption of the transfer in that way
31 adequately takes into account the interests of members of the
32 body.

1 **14 Complementary State or Territory legislation**

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

- 7 (a) assets of the transferring body vest in the receiving body, to
8 the extent of the transfer; and
9 (b) liabilities of the transferring body become liabilities of the
10 receiving body, to the extent of the transfer; and
11 (c) the duties, obligations, immunities, rights and privileges
12 applying to the transferring body apply to the receiving body,
13 to the extent of the transfer; and
14 (d) if there is an approved section 20 statement in relation to the
15 transfer that specifies:
16 (i) that particular things are to happen or are taken to be the
17 case—those things are taken to happen, or to be the
18 case, in accordance with the statement; or
19 (ii) a mechanism for determining things that are to happen
20 or are taken to be the case—things determined in
21 accordance with that mechanism are taken to happen, or
22 to be the case, as determined in accordance with that
23 mechanism.

24 **15 Minister's power to decide that his or her consent is not required**

25 The Minister's consent to the transfer of business (see paragraph
26 11(1)(e)) is not required if the Minister has, in writing, determined
27 that his or her consent is not required in relation to:

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

30 **16 Approval may impose conditions**

- 31 (1) The voluntary transfer approval may impose conditions of either or
32 both of the following kinds:

Part 3 Voluntary transfers

Division 2 Approval of voluntary transfers

Section 16

1 (a) conditions to be complied with by the transferring body or
2 the receiving body before a certificate of transfer is issued in
3 relation to the transfer of business;

4 (b) conditions to be complied with by the transferring body or
5 the receiving body after a certificate of transfer has been
6 issued or has come into force in relation to the transfer of
7 business.

8 Note 1: Failure to comply with a condition referred to in paragraph (a) will
9 mean that a certificate of transfer cannot be issued (see subsection
10 18(1)).

11 Note 2: Failure to comply with a condition referred to in paragraph (b) will not
12 prevent the issue of a certificate of transfer, but will be an offence
13 under subsection (4).

14 (2) The transferring body or the receiving body may apply in writing
15 to APRA to have a condition that applies to it varied or revoked.

16 (3) APRA may, by notice in writing given to the body that made the
17 application, approve the variation or revocation if it is satisfied that
18 the variation or revocation is appropriate. A variation or revocation
19 that is approved by APRA has effect accordingly.

20 (4) The transferring body or the receiving body is guilty of an offence
21 if:

22 (a) a condition of a kind referred to in paragraph (1)(b) applies to
23 that body; and

24 (b) that body fails to comply with the condition.

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

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

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

1 **17 Notice of decision**

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

Section 18

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2 **Division 3—Process by which voluntary transfers take**
3 **effect**

4 **18 Certificate of transfer**

5 (1) If APRA:

- 6 (a) has made a voluntary transfer approval; and
7 (b) considers that all conditions of a kind referred to in paragraph
8 16(1)(a) that are imposed by the approval have been
9 complied with; and
10 (c) if the transfer is a partial transfer—has been given a
11 statement of detail in relation to the partial transfer (see
12 section 19); and
13 (d) is not aware of any reason why the transfer should not go
14 ahead;

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

17 (2) The certificate must:

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

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

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

3 **19 Partial transfer—statement of detail to be provided**

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

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

11 **20 Agreements about matters connected with the transfer**

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

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

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

25 **21 Notice of decision**

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

Section 22

1 **22 Time and effect of voluntary transfer**

- 2 (1) When the certificate of transfer comes into force, the receiving
3 body becomes the successor in law of the transferring body, to the
4 extent of the transfer. In particular:
- 5 (a) if the transfer is a total transfer—all the assets and liabilities
6 of the transferring body, wherever those assets and liabilities
7 are located, become (respectively) assets and liabilities of the
8 receiving body without any transfer, conveyance or
9 assignment; and
- 10 (b) if the transfer is a partial transfer—all the assets and
11 liabilities of the transferring body that are included in the list
12 of assets and liabilities specified in the statement of detail,
13 wherever those assets and liabilities are located, become
14 (respectively) assets and liabilities of the receiving body
15 without any transfer conveyance or assignment; and
- 16 (c) to the extent of the transfer, the duties, obligations,
17 immunities, rights and privileges applying to the transferring
18 body apply to the receiving body.
- 19 (2) If there is an approved section 20 statement in relation to the
20 transfer, then:
- 21 (a) if the statement specifies that particular things are to happen
22 or are taken to be the case—those things are, by force of this
23 section, taken to happen, or to be the case, in accordance with
24 the statement; and
- 25 (b) if the statement specifies a mechanism for determining things
26 that are to happen or are taken to be the case—things
27 determined in accordance with that mechanism are, by force
28 of this section, taken to happen, or to be the case, as
29 determined in accordance with that mechanism.
- 30 (3) Subject to subsection (2), if:
- 31 (a) the transfer is a total transfer; and
- 32 (b) immediately before the certificate comes into force,
33 proceedings (including arbitration proceedings) to which the
34 transferring body was a party were pending or existing in any
35 court or tribunal;

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

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

8 (4) Subject to subsection (2), if:

- 9 (a) the transfer is a total transfer; and
10 (b) on the day when the certificate comes into force,
11 documentary or other evidence would (disregarding the
12 transfer) have been admissible for or against the interests of
13 the transferring body;

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

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

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

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

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

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

Part 3 Voluntary transfers

Division 3 Process by which voluntary transfers take effect

Section 23

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

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

8 **23 Employment unaffected**

- 9 (1) This section applies to every person who, immediately before the
10 day when the certificate of transfer comes into force, was
11 performing duty in the transferring body.

- 12 (2) The terms and conditions of employment (including any accrued
13 entitlement to employment benefits) of each person to whom this
14 section applies are not affected by the operation or effect of this
15 Part or of any State or Territory legislation referred to in paragraph
16 11(1)(d).

1

2 **Part 4—Compulsory transfers**

3 **Division 1—Outline of Part**

4 **24 Outline of Part**

- 5 (1) For a compulsory transfer of business to take effect, APRA must:
- 6 (a) make a determination (the *compulsory transfer*
- 7 *determination*) that there is to be a transfer of business
- 8 between the regulated bodies concerned (the *transferring*
- 9 *body* and the *receiving body*) (see section 25); and
- 10 (b) issue a certificate (the *certificate of transfer*) stating that the
- 11 transfer is to take effect (see section 33).
- 12 (2) APRA may only make the compulsory transfer determination if
- 13 specified criteria are met (including that APRA is satisfied that the
- 14 board of directors of the receiving body has consented to the
- 15 transfer) (see section 25).
- 16 (3) The compulsory transfer determination may impose conditions to
- 17 be complied with by the transferring body or the receiving body
- 18 either before or after the certificate of transfer is issued (see section
- 19 31).
- 20 (4) APRA may only issue the certificate of transfer if specified criteria
- 21 are met. The certificate must specify when it comes into force (see
- 22 section 33).
- 23 (5) The transfer of business takes effect when the certificate of transfer
- 24 comes into force (see section 35).

Section 25

1

2 **Division 2—Compulsory transfer determinations**

3 **25 Compulsory transfer determinations**

4

(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.

5

6

(2) APRA may only make the determination if:

7

(a) APRA is satisfied that one or more of the following applies:

8

(i) the transferring body has contravened a provision of its regulatory legislation;

9

(ii) the transfer is in the interests of depositors or policy owners of the transferring body when viewed as a group; and

10

(b) APRA is satisfied that the transferring body and the receiving body are regulated bodies of the same kind; and

11

(c) APRA is satisfied that the board of directors of the receiving body has consented to the transfer; and

12

(d) APRA is satisfied that the transfer is appropriate, having regard to:

13

(i) the interests of depositors or policy owners of the receiving body when viewed as a group; and

14

(ii) the interests of the financial sector as a whole; and

15

(iii) any other matters that APRA considers relevant; and

16

(e) 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

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(f) either:

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(i) the Minister has consented to the transfer; or

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(ii) the Minister's consent to the transfer is not required (see section 29).

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- 1 (3) The determination must include particulars of the transfer,
2 including:
3 (a) the names of the transferring body and the receiving body;
4 and
5 (b) whether it will be a total transfer or a partial transfer; and
6 (c) if it will be a partial transfer—an identification of the part of
7 the transferring body's business that is to be transferred.
- 8 (4) The determination must include a statement of the reasons why the
9 determination has been made.
- 10 (5) The determination must be signed by an authorised APRA officer.
- 11 (6) For the purposes of this section, 2 regulated bodies are of the same
12 kind if:
13 (a) they are both ADIs; or
14 (b) they are both life insurance companies.

15 **26 Consultation about making the determination**

16 In deciding whether to make the compulsory transfer
17 determination, APRA may consult with any or all of the following:

- 18 (a) officers or employees of the States and Territories;
19 (b) the Australian Competition and Consumer Commission;
20 (c) the Australian Securities and Investments Commission;
21 (d) the Reserve Bank of Australia;
22 (e) any other person or body that APRA considers should be
23 consulted.

24 **27 When consent of receiving body is in force**

- 25 (1) The consent referred to in paragraph 25(2)(c) remains in force until
26 it is withdrawn by the receiving body's board of directors with the
27 agreement of APRA.
- 28 (2) APRA may agree to the consent being withdrawn if APRA
29 considers it appropriate to allow the consent to be withdrawn
30 having regard to:

Part 4 Compulsory transfers

Division 2 Compulsory transfer determinations

Section 28

- 1 (a) circumstances that have arisen since the consent was given;
2 or
3 (b) circumstances that were in existence at or before the time
4 when the consent was given but which were not known to the
5 receiving body's board when it gave its consent; or
6 (c) any other relevant matter.

7 **28 Complementary State or Territory legislation**

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

- 13 (a) assets of the transferring body vest in the receiving body, to
14 the extent of the transfer; and
15 (b) liabilities of the transferring body become liabilities of the
16 receiving body, to the extent of the transfer; and
17 (c) the duties, obligations, immunities, rights and privileges
18 applying to the transferring body apply to the receiving body,
19 to the extent of the transfer; and
20 (d) if the certificate of transfer includes provisions of a kind
21 referred to in subsection 33(3) specifying:
22 (i) that particular things are to happen or are taken to be the
23 case—those things are taken to happen, or to be the
24 case, in accordance with those provisions; or
25 (ii) a mechanism for determining things that are to happen
26 or are taken to be the case—things determined in
27 accordance with that mechanism are taken to happen, or
28 to be the case, as determined in accordance with that
29 mechanism; and
30 (e) if there is an approved section 30 statement in relation to the
31 transfer that specifies:
32 (i) that particular things are to happen or are taken to be the
33 case—those things are taken to happen, or to be the
34 case, in accordance with the statement; or

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

6 **29 Minister's power to decide that his or her consent is not required**

7 The Minister's consent to the transfer of business (see paragraph
8 25(2)(f)) is not required if the Minister has, in writing, determined
9 that his or her consent is not required in relation to:

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

12 **30 Agreements about matters connected with the transfer**

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

19 (2) APRA may, in writing, approve the statement before issuing the
20 certificate of transfer if APRA is satisfied that:

- 21 (a) the statement has been agreed to by the transferring body and
22 the receiving body; and
23 (b) the matters specified in the statement are appropriate.

24 **31 Determination may impose conditions**

25 (1) The compulsory transfer determination may impose conditions of
26 either or both of the following kinds:

- 27 (a) conditions to be complied with by the transferring body or
28 the receiving body before a certificate of transfer is issued in
29 relation to the transfer of business;
30 (b) conditions to be complied with by the transferring body or
31 the receiving body after a certificate of transfer has been

Section 32

1 issued or has come into force in relation to the transfer of
2 business.

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

6 (2) The transferring body or the receiving body may apply in writing
7 to APRA to have a condition of a kind referred to in paragraph
8 (1)(b) that applies to it varied or revoked.

9 (3) APRA may, by notice in writing given to the body that made the
10 application, approve the variation or revocation if it is satisfied that
11 the variation or revocation is appropriate. A variation or revocation
12 that is approved by APRA has effect accordingly.

13 (4) The transferring body or the receiving body is guilty of an offence
14 if:

15 (a) a condition of a kind referred to in paragraph (1)(a) or (b)
16 applies to that body; and

17 (b) that body fails to comply with the condition.

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

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

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

25 **32 Notice of determination**

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

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2 **Division 3—Process by which compulsory transfers take**
3 **effect**

3

4 **33 Certificate of transfer**

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(1) If:

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(a) APRA has made a compulsory transfer determination; and

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(b) APRA considers that the transfer should go ahead; and

8

(c) the consent referred to in paragraph 25(2)(c) is still in force
(see section 27);

9

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

12

(2) The certificate must:

13

(a) include the names of the transferring body and the receiving
body; and

14

(b) state whether the transfer is a total transfer or a partial
transfer; and

15

16

(c) if it is a partial transfer—include, or have attached to it:

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18

(i) a list of the assets and liabilities of the transferring body
that are being transferred to the receiving body; and

19

(ii) any approved section 30 statement; and

20

(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

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(e) be signed by an authorised APRA officer.

26

(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.

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

32

Section 34

1 **34 Notice of certificate**

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

4 **35 Time and effect of compulsory transfer**

5 (1) When the certificate of transfer comes into force, the receiving
6 body becomes the successor in law of the transferring body, to the
7 extent of the transfer. In particular:

8 (a) if the transfer is a total transfer—all the assets and liabilities
9 of the transferring body, wherever those assets and liabilities
10 are located, become (respectively) assets and liabilities of the
11 receiving body without any transfer, conveyance or
12 assignment; and

13 (b) if the transfer is a partial transfer—all the assets and
14 liabilities of the transferring body that are included in the list
15 referred to in paragraph 33(2)(c), wherever those assets and
16 liabilities are located, become (respectively) assets and
17 liabilities of the receiving body without any transfer
18 conveyance or assignment; and

19 (c) to the extent of the transfer, the duties, obligations,
20 immunities, rights and privileges applying to the transferring
21 body apply to the receiving body.

22 (2) If the certificate includes provisions of a kind referred to in
23 subsection 33(3):

24 (a) if the provisions specify that particular things are to happen
25 or are taken to be the case—those things are, by force of this
26 section, taken to happen, or to be the case, in accordance with
27 those provisions; and

28 (b) if the provisions specify a mechanism for determining things
29 that are to happen or are taken to be the case—things
30 determined in accordance with that mechanism are, by force
31 of this section, taken to happen, or to be the case, as
32 determined in accordance with that mechanism.

33 (3) If there is an approved section 30 statement in relation to the
34 transfer, then:

- 1 (a) if the statement specifies that particular things are to happen
2 or are taken to be the case—those things are, by force of this
3 section, taken to happen, or to be the case, in accordance with
4 the statement; and
5 (b) if the statement specifies a mechanism for determining things
6 that are to happen or are taken to be the case—things
7 determined in accordance with that mechanism are, by force
8 of this section, taken to happen, or to be the case, as
9 determined in accordance with that mechanism.

10 (4) Subject to subsections (2) and (3), if:

- 11 (a) the transfer is a total transfer; and
12 (b) immediately before the certificate comes into force,
13 proceedings (including arbitration proceedings) to which the
14 transferring body was a party were pending or existing in any
15 court or tribunal;

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

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

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

26 (5) Subject to subsections (2) and (3), if:

- 27 (a) the transfer is a total transfer; and
28 (b) on the day when the certificate comes into force,
29 documentary or other evidence would (disregarding the
30 transfer) have been admissible for or against the interests of
31 the transferring body;

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

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

Part 4 Compulsory transfers

Division 3 Process by which compulsory transfers take effect

Section 35

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

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

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

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

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

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

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

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

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

1 **36 Employment unaffected**

2 (1) This section applies to every person who, immediately before the
3 day when the certificate of transfer comes into force, was
4 performing duty in the transferring body.

5 (2) The terms and conditions of employment (including any accrued
6 entitlement to employment benefits) of each person to whom this
7 section applies are not affected by the operation or effect of this
8 Part or of any State or Territory legislation referred to in paragraph
9 25(2)(e).

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Part 5—Evidentiary certificates

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37 Certificates evidencing operation of Act etc.

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(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:

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(a) a specified matter or thing relevant to a receiving body is an aspect of the operation or effect of this Act; or

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(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

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(c) a specified asset of the transferring body has become a transferred asset of that receiving body; or

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(d) a specified liability of the transferring body has become a transferred liability of the receiving body.

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(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.

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38 Certificates in relation to land and interests in land

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If:

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(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

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(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:

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(i) is signed by an authorised APRA officer; and

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(ii) identifies the land or interest; and

30

(iii) states that the receiving body has, under this Act, become the owner of that land or interest;

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the officer with whom the certificate is lodged may:

Section 39

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

39 Certificates in relation to other assets

- 4
5 (1) If:
6 (a) an asset (other than land or an interest in land) becomes,
7 under this Act, an asset of a receiving body; and
8 (b) there is lodged with the person or authority who has, under a
9 law of the Commonwealth, a State or a Territory,
10 responsibility for keeping a register in respect of assets of
11 that kind a certificate that:
12 (i) is signed by an authorised APRA officer; and
13 (ii) identifies the asset; and
14 (iii) states that the asset has, under this Act, become an asset
15 of the receiving body;
16 that person or authority may:
17 (c) register the matter in the same manner as transactions in
18 relation to assets of that kind are registered; and
19 (d) deal with, and give effect to, the certificate.
20 (2) This section does not affect the operations of the Corporations
21 Law.

40 Documents purporting to be certificates

22
23 A document purporting to be a certificate given under this Part is,
24 unless the contrary is established, taken to be such a certificate and
25 to have been properly given.

Section 41

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Part 6—Miscellaneous

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41 Information gathering powers

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(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.

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42 Compulsory transfer—APRA may provide information to receiving body

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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.

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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.

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- 2 (1) Subject to subsections (4), (5) and (6), this Act has effect in spite
3 of anything in any contract, deed, undertaking, agreement or other
4 instrument.
- 5 (2) Subject to subsections (4), (5) and (6), nothing done by or under
6 this Act:
- 7 (a) places a receiving body, a transferring body or another
8 person in breach of contract or confidence or otherwise
9 makes any of them guilty of a civil wrong; or
- 10 (b) places a receiving body, a transferring body or another
11 person in breach of:
- 12 (i) any law of the Commonwealth or of a State or Territory;
13 or
- 14 (ii) any contractual provision prohibiting, restricting or
15 regulating the assignment or transfer of any asset or
16 liability or the disclosure of any information; or
- 17 (c) releases any surety, wholly or partly, from all or any of the
18 surety's obligations.
- 19 (3) Without limiting subsection (1), but subject to subsections (4), (5)
20 and (6), if, apart from this section, the advice or consent of a
21 person would be necessary in a particular respect, the advice is
22 taken to have been obtained or the consent is taken to have been
23 given, as the case requires.
- 24 (4) Subject to subsection (6), if another Act prescribed by the
25 regulations for the purposes of this subsection:
- 26 (a) applies in relation to a transfer of business that takes effect or
27 may take effect under this Act; or
- 28 (b) would apply in relation to a transfer of business that takes
29 effect or may take effect under this Act if the same transfer
30 were made by a means otherwise than under this Act;
31 that other Act applies in relation to the transfer with the
32 modifications (if any) specified in the regulations.
- 33 (5) This Act and another Act prescribed for the purposes of subsection
34 (4) operate independently of each other. In particular, a decision

Section 44

1 under either Act has effect only for the purposes of the Act
2 concerned.

3 (6) Nothing in this section limits the operation of the *Privacy Act*
4 *1988*.

5 **44 Compensation for acquisition of property**

6 (1) If:

7 (a) apart from this section, the operation of this Act in relation to
8 a particular receiving body would result in the acquisition of
9 property from a person otherwise than on just terms; and

10 (b) the acquisition would be invalid because of paragraph
11 51(xxxi) of the Constitution;

12 the receiving body is liable to pay to the person compensation of a
13 reasonable amount as agreed on between the receiving body and
14 the person. If the receiving body and the person do not agree on the
15 amount of the compensation, the person may institute proceedings
16 in the Federal Court of Australia for the recovery from the
17 receiving body of such reasonable amount of compensation as the
18 Court determines.

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

24 (3) In this section:

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

27 **45 Review of decisions**

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

30 (a) a decision under section 11 to refuse to approve an
31 application;

32 (b) a decision under subsection 16(1) to impose conditions;

- 1 (c) a decision under subsection 16(3) to refuse to vary or revoke
2 conditions;
- 3 (d) a decision under section 18 to refuse to issue a certificate of
4 transfer;
- 5 (e) a decision under subsection 20(2) to refuse to approve a
6 statement provided under subsection 20(1);
- 7 (f) a decision under subsection 27(2) to refuse to agree to a
8 consent being withdrawn;
- 9 (g) a decision under subsection 31(3) to refuse to vary or revoke
10 conditions;
- 11 (h) a decision under section 33 to refuse to issue a certificate of
12 transfer.

13 **46 Transfer rules**

- 14 (1) APRA may, in writing, make rules prescribing all matters required
15 or permitted by this Act to be prescribed by transfer rules.
- 16 (2) Rules made by APRA under subsection (1) are a disallowable
17 instrument for the purposes of section 46A of the *Acts*
18 *Interpretation Act 1901*.

19 **47 Regulations**

- 20 The Governor-General may make regulations prescribing matters:
21 (a) required or permitted by this Act to be prescribed; or
22 (b) necessary or convenient to be prescribed for carrying out or
23 giving effect to this Act.