

1999

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

FINANCIAL SECTOR (TRANSFERS OF BUSINESS) BILL 1999

SUPPLEMENTARY EXPLANATORY MEMORANDUM

(Amendments to be Moved on Behalf of the Government)

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

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Outline

1.1 The Financial Sector (Transfers of Business) Bill 1999 ('the Bill') was introduced into the House of Representatives by the Minister for Financial Services and Regulation, the Honourable J.B. Hockey, MP, on 11 March 1999. The 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 Honourable P.H. Costello, MP, in the House of Representatives on 2 September 1997.

1.2 The amendments to the Bill to be moved on behalf of the Government:

- ensure that the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC) must be consulted by the Australian Prudential Regulation Authority (APRA) in relation to all transfers – compulsory and voluntary – unless the ACCC or ASIC have, in writing, respectively notified APRA that they do not need to be consulted in relation to a particular transfer or a particular class of transfers;
- strengthen the criteria that APRA needs to apply before it can issue a compulsory transfer determination to include relevant financial distress triggers under the *Banking Act 1959* and the *Life Insurance Act 1995*; and
- clarify and strengthen clause 43 ('Relationship of Act with other laws etc') to ensure the independent operation of the *Trade Practices Act 1974* (TPA). This has the effect of ensuring that APRA is not able to – without appropriate clearance by the ACCC – approve a voluntary transfer of business if, having regard to section 50 of the TPA, the transfer would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

Financial impact statement

1.3 The amendments will not have any financial impact.

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Notes on Amendments to Clauses*Amendment (1) — Clause 11, page 10 (lines 10 to 12)*

2.1 With the restructuring of clause 43 – discussed at amendments (7) to (12) below – it is necessary to restructure subclause 11(2). The effect of the amendment is to ensure that APRA is unable to approve a voluntary transfer of business where a law is prescribed under subclause 43(4) or the transfer would otherwise contravene the *Privacy Act 1988* and/or the *Trade Practices Act 1974*.

Amendments (2) and (3) — Clause 12, page 10 (line 19 and after line 23)

2.2 These amendments require that APRA consult with both the ACCC and ASIC in relation to a voluntary transfer except if the respective regulator has, in writing, notified APRA that it does not need to be consulted in relation to a transfer or a class of transfers.

Amendment (4) — Clause 25, pages 20 (lines 10 to 15)

2.3 These amendments strengthen the test that APRA is required to apply before it is able to agree to a compulsory transfer of business. Specifically, the amendments ensure that APRA is only able to make a compulsory transfer of business where, at a minimum, the transferring body has contravened a provision of its regulatory legislation, or, where key provisions in the *Banking Act 1959* (if a deposit-taking institution) or the *Life Insurance Act 1995* (if a life insurance company) have been triggered.

2.4 New subclause 25(aa) was previously an alternative trigger to a determination by APRA that the transferring body had contravened a provision of its regulatory legislation. It is now a mandatory and separate consideration by APRA.

2.5 In addition, APRA is required to be satisfied that all of the other conditions outlined in subclauses 25(2)(b) to 25(2)(f) have been met.

Amendments (5) and (6) — Clause 26, page 21 (line 19 and after line 23)

2.6 These amendments require that APRA consult with both the ACCC and ASIC in relation to a compulsory transfer except if the respective regulator has, in writing, notified APRA that it does not need to be consulted in relation to a transfer or a class of transfers.

Amendments (7), (8), (9), (10), (11) and (12) — Clause 43, page 33

2.7 These amendments clarify and strengthen the effect of clause 43 ('relationship of Act with other laws etc'). An explanatory note is to be inserted after subclause (1) to give an example of the main effect of the Act – which is, effectively, to provide that the receiving body becomes successor in law of the transferring body (to the extent of the transfer). This means that the override contained in subclause 43(2) of the Bill only operates in during the transfer process. It does not serve to override the operation of any law, contract or promise before or after the transfer process.

Notes on Amendments to Clauses

2.8 In addition, the amendments deem that a transfer of business – whether voluntary or compulsory – is to be an acquisition of the shares and / or assets by the receiving body for the purposes of section 50 and related provisions of the TPA.

2.9 The ACCC therefore will maintain its independent powers to assess the effect of acquisitions on competition in a market and the remedies available to it and other persons in respect of any contraventions of the TPA will be preserved.