



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 237

# Trustee companies: Transfer determinations by ASIC

June 2012

### About this guide

This guide is for licensed trustee companies providing traditional trustee company services that are seeking to transfer the administration of estate assets and liabilities to other trustee companies under the transfer determination provisions of Ch 5D of the *Corporations Act 2001* (Corporations Act).

The guide explains how we make transfer determinations and what information licensed trustee companies need to provide to ASIC when applying for a transfer determination.

Note: From 27 July 2020, applications for relief should be submitted through the [ASIC Regulatory Portal](#). For more information, see [how you apply for relief](#).

### About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

### Document history

This guide was issued in June 2012 and is based on legislation and regulations as at the date of issue. The note on the front page was inserted on 27 July 2020.

### Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

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## A Overview

### Key points

Traditional services provided by licensed trustee companies are regulated by ASIC as a financial service under Ch 7 of the *Corporations Act 2001* (Corporations Act). Trustee companies that provide traditional services must hold an Australian financial services (AFS) licence covering those services.

Under Pt 5D.6 of the Corporations Act, trustee companies can transfer their estate management business to another licensed trustee company and, in certain circumstances, the state or territory Public Trustee. Transfers may be voluntary or compulsory.

For ASIC to approve the transfer, we must be satisfied that any transfer is in the interests of both the clients of the transferring company and those of the receiving company (when viewed as a group).

This guide sets out the information we require from trustee companies:

- with an application for a voluntary transfer determination; and
- when we make a compulsory transfer determination.

## Regulation of trustee companies providing traditional services

RG 237.1 From 6 May 2010, traditional services provided by trustee companies have been regulated as a financial service under Ch 7 of the Corporations Act and the *Australian Securities and Investments Commission Act 2001* (ASIC Act). The Corporations Act also includes Ch 5D which deals with further aspects of trustee company regulation, including regulation of common funds, fees, duties of officers and employees, limits on control of trustee companies and transfers of estate assets and liabilities.

RG 237.2 Section 601RAB(1) of the Corporations Act provides that a trustee company is an entity that is prescribed by the regulations as a trustee company.

Note: The Corporations Regulations 2001 (Corporations Regulations) list the names of trustee companies providing traditional services for the purposes of s601RAB(1): see reg 5D.1.01(1) and Sch 8AA.

RG 237.3 Traditional services provided by a trustee company are specifically included as a financial service under s766A(1A). This means that a trustee company providing traditional services must obtain an AFS licence and be subject to the conduct, disclosure, compensation and dispute resolution obligations in Ch 7 of the Corporations Act.

RG 237.4 A trustee company must comply with the general obligations of an AFS licensee, including the obligation to have adequate resources (including

financial, technological and human resources) to provide the financial services covered by its licence. A licensed trustee company must also have adequate risk management systems in place and arrangements for managing conflicts of interest.

Note: See Regulatory Guide 104 *Licensing: Meeting the general obligations* (RG 104), Regulatory Guide 166 *Licensing: Financial requirements* (RG 166) and Regulatory Guide 181 *Licensing: Managing conflicts of interest* (RG 181).

- RG 237.5 The trustee company obligations under the Corporations Act do not alter the laws in states and territories that apply generally to trustees, executors, administrators and guardians (including trustee companies when they perform those roles) and the inherent power or jurisdiction of the courts regarding the supervision of those roles
- RG 237.6 State and territory legislation and the rules of common law and equity continue to govern the functions and powers of trustee companies.
- RG 237.7 For trustee companies listed in Sch 8AA of the Corporations Regulations that did not hold an AFS licence at the commencement of the legislation on 6 May 2010, transitional arrangements apply to the operation of Ch 7 of the Corporations Act. These trustee companies are deemed to hold an AFS licence with an authorisation to provide traditional services until the end of the transitional period. We refer to these entities as ‘deemed licensees’. The transitional period currently expires 31 December 2012.

### **Trustee companies regulated by APRA**

- RG 237.8 The Australian Prudential Regulation Authority (APRA) regulates some licensed trustee companies. For example, a licensed trustee company may also be regulated by APRA as a registrable superannuation entity (RSE) licensee under the *Superannuation Industry (Supervision) Act 1993* (Cth).
- RG 237.9 Entities regulated by APRA are exempt from some of the general obligations of an AFS licensee, including the obligation to have adequate resources and adequate risk management systems: s912A(1)(d)

### **ASIC-approved transfers of estate assets and liabilities**

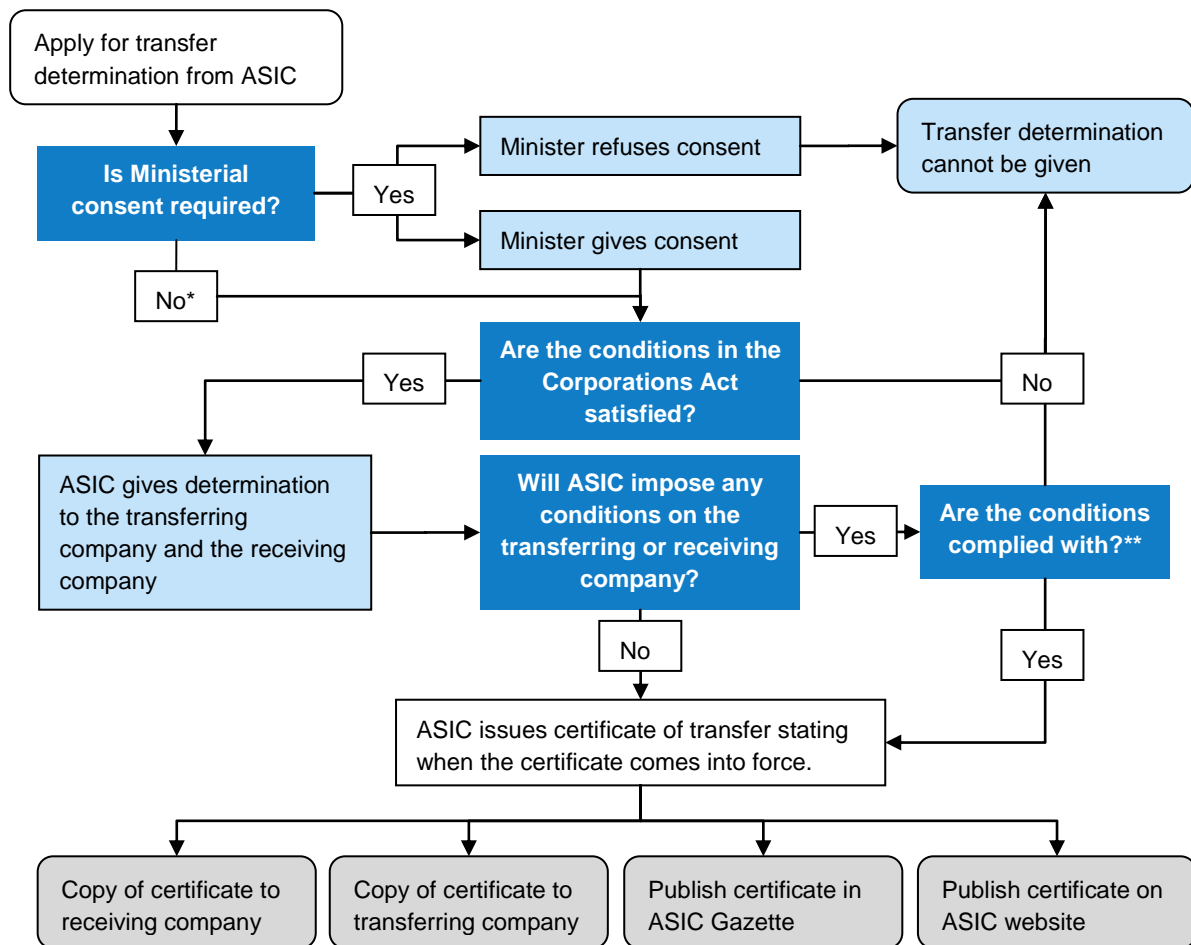
- RG 237.10 Part 5D.6 of the Corporations Act provides for the transfer of estate assets and liabilities associated with the performance of an estate management function from one trustee company to another licensed trustee company and, in particular circumstances, to a state or territory Public Trustee
- RG 237.11 ‘Estate assets and liabilities’ is defined to mean only those assets or liabilities that were vested or otherwise belonged to the company because of the performance of the estate management function immediately before an

AFS licence cancellation or a relevant certificate of transfer comes into force: see s601WAA(1).

RG 237.12 Transfers are divided into two types, voluntary and compulsory. Voluntary transfers must involve a total transfer of the transferring company’s estate assets and liabilities. Compulsory transfers may be a partial transfer of estate assets or liabilities, or a total transfer of them.

RG 237.13 Figure 1 details the transfer determination process.

**Figure 1: Transfer determination process**



\* The Minister may determine in writing that their consent is not required for the transfer, or a class of transfers that includes the transfer: s601WBD.

\*\* Conditions may need to be complied with before or after the certificate of transfer comes into force: s601WBE.

RG 237.14 When ASIC issues a certificate it is required to state when the certificate comes into force, either by specifying the date or stating that it comes into force on a date worked out in accordance with the provisions of the certificate: s601WBH (1)(d).

- RG 237.15 When a certificate of transfer comes into force:
- (a) the receiving company becomes the successor in law of the transferring company for the estate assets and liabilities transferred that are the subject matter of the transfer certificate; and
  - (b) the duties, obligations, immunities, rights and privileges applying to the transferring company will apply to the receiving company: s601WBI(1)(c).

### **Prerequisites for a transfer determination**

- RG 237.16 ASIC may only make a transfer determination:
- (a) if the Minister has consented to the transfer (unless the Minister has determined that their consent is not required);
  - (b) for a compulsory transfer determination, if the receiving company is a licensed trustee company or the Public Trustee of a state or territory;
  - (c) for a voluntary determination, if the transferring company is a licensed trustee company or one that was previously authorised under state and territory law, and the receiving company is a licensed trustee company;
  - (d) if we are satisfied the transfer is in the interests of the clients of the transferring company and in the interests of the clients of the receiving company (both when viewed as a group);

Note: This test does not apply to the clients of a receiving company when the transfer is to the Public Trustee: s601WBA(2)(b)(ii).

- (e) if consent from the board of the receiving company has been received; and
- (f) if complementary state and territory legislation to facilitate the transfer is in place and has been enacted: see s601WBA of the Corporations Act.

Note: At the time of publication not all states and territories had enacted this legislation.

- RG 237.17 When we make a determination we must include a statement of reasons why the determination has been made.

## **Information required to make a transfer determination**

- RG 237.18 In this guide we deal separately with the three types of transfer applications we may receive:
- (a) voluntary transfers between companies within the same corporate group (an intra-group transfer);
  - (b) voluntary transfers between unrelated companies (an arm's length transfer); and
  - (c) compulsory transfers.

### **Intra-group voluntary transfer determinations**

- RG 237.19 Under the former state and territory regulatory regimes for trustee companies, many corporate groups operated subsidiaries in the states and territories that held the relevant trustee company authorisation in that jurisdiction. Following the introduction of the national regulatory framework for trustee companies, if a group has more than one entity holding an AFS licence they may choose to use the voluntary transfer provisions to reduce the number of licences maintained within the group. These transfers will also be intra-group transfers.
- RG 237.20 Section B describes the information you will need to provide to ASIC to allow us to make an intra-group voluntary transfer determination.

### **Arm's length voluntary transfer determinations**

- RG 237.21 The voluntary transfer provisions may also be used to facilitate the transfer of client estate assets and liabilities from one licensed trustee company to another in a situation where the transfer is between unrelated companies.
- RG 237.22 Section C describes the information you will need to provide to ASIC to allow us to make an arm's length voluntary transfer determination.

### **Compulsory transfer determinations**

- RG 237.23 A compulsory transfer determination is triggered when we cancel the AFS licence of the trustee company.
- RG 237.24 In this case, we may make a compulsory transfer determination (of either a partial or total transfer of estate assets and liabilities) to another licensed trustee company or to a state or territory Public Trustee.
- RG 237.25 Section D describes the information you will need to provide to ASIC to allow us to make a compulsory transfer determination.



## B Intra-group voluntary transfer determination

### Key points

Trustee companies applying to ASIC for an intra-group voluntary transfer determination will need to supply information about:

- the transferring and receiving entities (see RG 237.30);
- possible advantages and disadvantages of the transfer (see RG 237.31);
- information on the transfer (see RG 237.32); and
- AFS licence issues (see RG 237.33).

Licensed receiving trustee companies regulated by APRA will not have to provide information on the resources (including financial, technological and human resources) and risk management system that may be required because these are already monitored by APRA.

### Circumstances of intra-group voluntary transfer determinations

- RG 237.26 Under the former state and territory regulatory regimes for trustee companies, many corporate groups operated subsidiaries in the states and territories. The function of the subsidiaries was to hold the relevant trustee company authorisation in that jurisdiction. Following the introduction of the national regulatory framework for trustee companies, it is expected many corporate groups will wish to rationalise their traditional service business and transfer that business to a single AFS licensee with an authorisation to provide those services. Generally, corporate groups have an AFS licensee and one or more deemed licensees. A group may also have more than one AFS licensee.
- RG 237.27 Industry feedback indicates those groups who operate deemed licensees plan to transfer their traditional services business from the deemed licensees to the licensed entity within the group. The transfers will need to be completed before the expiration of the transitional period. These transfers will be intra-group voluntary transfers.
- RG 237.28 Where a group has more than one entity holding an AFS licence, they may choose to use the voluntary transfer provisions to reduce the number of licences maintained within the group. These transfers will also be intra-group transfers.

## Obligation to notify

RG 237.29 Under s601WDA(3), when a certificate for an intra-group voluntary transfer determination comes into force, the transferring company must publish a notice of the transfer of estate assets and liabilities.

Note: The Corporations Regulations state that, for the purposes of s601WDA(1)(b) of the Corporations Act, 'publish' means publish in a national newspaper and on the transferring company's website: see reg 5D.1.01.

## Information required to make a transfer determination

### Entity information

RG 237.30 We require the following information about the entities:

- (a) the names and Australian Company Numbers (ACNs) of the transferring and receiving companies;
- (b) a copy of the consent of the board of the receiving company;
- (c) the proposed date of transfer;
- (d) a chart of the corporate group showing the group shareholders and the ultimate holding company of both companies; and
- (e) a diagram of the proposed management and organisational structure of the receiving company after the transfer.

### Possible advantages and disadvantages of the transfer

RG 237.31 We require information on:

- (a) the benefits to the clients of both companies if the transfer takes place (this may include savings on costs); and
- (b) any possible disadvantages to the clients of both companies should the transfer take place.

### Information about the transfer

RG 237.32 We require the following information about the transfer:

- (a) an overview of the type (e.g. deceased estates, estates managed under a power of attorney), dollar value and the asset class of the estate assets and liabilities being transferred, and a statement that this is a total transfer of estate assets and liabilities;
- (b) an outline of the internal and external communication strategies planned for the transfer (i.e. what clients and other external stakeholders will be told, along with internal communication to staff);

- (c) copies of any transfer agreement or service level agreements relevant to the transfer;
- (d) the particulars of the expected effects of the transfer, if any, on clients affected by the transfer, with regard to:
  - (i) client service and reporting levels;
  - (ii) fee levels;
  - (iii) staffing levels; and
  - (iv) the offices maintained in states and territories, including in regional Australia (as applicable); and
- (e) the particulars of the expected effects of the transfer, if any, on the risk and compliance program of the receiving company.

### **AFS licence issues**

- RG 237.33 AFS licensees have certain responsibilities: see RG 237.3–RG 237.4. We require:
- (a) information on how the receiving company will deal with client complaints and disputes lodged with the transferring company before the date of transfer;
  - (b) advice as to whether the compensation arrangements in relation to the transferred clients will be adequate; and
  - (c) for receiving companies that are not APRA regulated, written assurances from the board of that company that it will have management resources, financial resources in compliance with RG 166, risk management systems and controls, and the staff in place to manage the estate assets and liabilities transferred.

## **Why we have adopted this approach**

RG 237.34 The voluntary transfer provisions in Pt 5D.6 are designed to provide a cost-effective administrative process for the rationalisation of estate management operations.

RG 237.35 We are aware that the current business structures of the corporate groups operating deemed licensees or with more than one licensee in the group, operate on a ‘shared services’ operating model. This means that key functions in delivering estate management—such as custody, estate accounting and reporting, finance, technology and human resources, and risk and compliance—are not performed within each state-based entity, but are performed and managed centrally within the group. This suggests to us that intra-group transfers should result in minimal disruption to clients and to the

day-to-day operation of the estate management function within the relevant corporate group.

RG 237.36 When providing the information requested in RG 237.32(a), we require an asset breakdown in the following categories in relation to each class of estate management business:

- (a) commercial property;
- (b) residential property;
- (c) equities;
- (d) cash and fixed interest;
- (e) managed investment schemes and common funds; and
- (f) other.

### **Entities regulated by APRA**

RG 237.37 We do not require board assurances about capacity and resource requirements from APRA-regulated receiving companies involved in an intra-group voluntary transfer.

## C Arm's length voluntary transfer determination

### Key points

Trustee companies applying to ASIC for an arm's length voluntary transfer determination will need to supply information about:

- the transferring and receiving entities (see RG 237.41);
- other regulatory approvals (see RG 237.42);
- possible advantages and disadvantages of the transfer (see RG 237.43);
- information on the transfer (see RG 237.44); and
- AFS licence issues (see RG 237.45).

Licensed receiving trustee companies regulated by APRA will not have to provide information on the resources (including financial, technological and human resources) and risk management system that may be required because these are already monitored by APRA.

### Circumstances of arm's length voluntary transfer determinations

RG 237.38 The voluntary transfer provisions may be used to facilitate the transfer of client estate assets and liabilities from one licensed trustee company to another in a situation where the transfer is between unrelated companies.

RG 237.39 Before the introduction of Ch 5D, the transfer of an estate management business between trustee companies would, generally speaking, be a judicial one or achieved by the transfer of share ownership in the transferring trustee company. Under Pt 5D.6, the voluntary transfer provisions may be used to transfer an estate management business from one licensed trustee company to another.

### Obligation to notify

RG 237.40 As with intra-group transfers, when the certificate for the transfer determination comes into force, the transferring company must publish a notice of the transfer of estate assets and liabilities: s601WDA(3).

### Information required to make a transfer determination

#### Entity information

RG 237.41 We require the following information about the entities:

- (a) the names and ACNs of the transferring and receiving companies;

- (b) a copy of the consent of the board of the receiving company;
- (c) the proposed date of transfer;
- (d) unless the companies are listed, an overview of the share ownership structure of both companies and information about the corporate group to which they belong (as applicable); and
- (e) a diagram of the proposed management and organisational structure of the receiving company after transfer and, where relevant, any changes to the board of the receiving company.

### **Other regulatory approvals**

RG 237.42 We require:

- (a) details of any other regulatory approvals that may be required for the transfer—for example, from the Australian Competition and Consumer Commission (ACCC); and
- (b) where relevant, a written assurance from the board of the receiving company that it will observe any prudential requirements imposed by, or agreed with, APRA in relation to the transfer.

### **Possible advantages and disadvantages of the transfer**

RG 237.43 We require information on:

- (a) the benefits to the clients of both companies if the transfer takes place (this may include savings on costs); and
- (b) any possible disadvantages to the clients of both companies should the transfer take place.

### **Information about the transfer**

RG 237.44 We require the following information about the transfer:

- (a) an overview of the type (e.g. deceased estates, estates managed under a power of attorney), dollar value and the asset class of the estates assets and liabilities being transferred, and a statement that this is a total transfer of estate assets and liabilities;

Note: When providing the information requested in RG 237.44(a), refer to RG 237.36 for the analysis required

- (b) an outline of the internal and external communication strategies planned for the transfer (i.e. what clients and other external stakeholders will be told, along with internal communication to staff) and a copy of draft communication(s) to clients affected by the transfer;
- (c) a copy of the transfer agreement between the companies;

- (d) an explanation of the due diligence undertaken by both companies, in particular by the receiving company on the capacity to handle the transferring company's clients and assets;
- (e) a copy of any report prepared by an independent expert in relation to the transfer;
- (f) a copy or outline of the project plan, and information on the timetable of the transfer for both companies, including integration plans of the receiving company;
- (g) a description of how the transfer value of the estate assets and liabilities will be arrived at and what procedures will be in place within the receiving company to meet its duty to ascertain the value of the assets and liabilities it receives as trustee;
- (h) particulars of the expected effects of the transfer, if any, on clients affected by the transfer, with regard to:
  - (i) client service and reporting levels;
  - (ii) fee levels;
  - (iii) staffing levels; and
  - (iv) the offices maintained in states and territories, including in regional Australia (as applicable); and
- (i) the particulars of the expected effects of the transfer, if any, on the risk and compliance program of the receiving company.

### **AFS licence issues**

RG 237.45 AFS licensees have certain responsibilities: see RG 237.3–RG 237.4. We require:

- (a) information on how the receiving company will deal with client complaints and disputes lodged with the transferring company before the date of transfer;
- (b) particulars of any conflicts of interest (financial or otherwise) that an officer or employee of either company may have about the proposed transfer of estate assets and liabilities and, if a conflict has been identified, the details of how it will be managed and disclosed to affected parties;
- (c) advice as to whether the compensation arrangements for the transferred clients will be adequate; and
- (d) for receiving companies that are not APRA regulated, written assurances from the board that it will have management resources, financial resources in compliance with RG 166, risk management systems and controls, and the staff in place to manage the estate assets and liabilities transferred.

## Why we have adopted this approach

- RG 237.46 We consider that voluntary transfers between arm's length entities will demand a higher level of qualitative information than that for an intra-group transfer determination. In assessing the information supplied and before approving the transfer, we must conclude that the transfer is in the interests of the clients of the transferring company and the receiving company (when viewed as a group).
- RG 237.47 We will use the particulars of each company's due diligence process and their project plans to help assess the general state of readiness and capacity of the receiving company. This is particularly important where the scale of operations of the receiving company is to change significantly. Correspondingly, these particulars may help us assess the likely accuracy of the estate and client information supplied to the receiving company by the transferring company.
- RG 237.48 Similarly, there will be matters that may not have previously been considered by the companies in the context of a potential transfer to an unrelated receiving company. These may include issues such as other regulatory approvals required, potential conflicts of interests and the transfer date valuations of the estate assets and liabilities. We also consider a greater scrutiny of proposed communication to the affected clients is required to ensure that accurate and timely information is provided to them. In certain circumstances, if it is not in existence, we may request the preparation of an independent expert's report on the transfer.

### Entities regulated by APRA

- RG 237.49 We do not require board assurances in relation to the capacity and resource requirements from APRA-regulated receiving companies involved in arm's length transfers.
- RG 237.50 We may consult with APRA on an arm's length voluntary transfer determination that involves any of the entities that are regulated by APRA.



## D Compulsory transfer determination

### Key points

Trustee companies involved in a compulsory transfer determination will need to supply information about:

- the transferring and receiving entities (see RG 237.61);
- other regulatory approvals (see RG 237.62);
- possible advantages and disadvantages of the transfer (see RG 237.63);
- information on the transfer (see RG 237.64); and
- AFS licence issues (see RG 237.65).

Licensed receiving trustee companies regulated by APRA will not have to provide information on the resources (including financial, technological and human resources) and risk management system that may be required because these are already monitored by APRA.

If the receiving company is a state or territory Public Trustee, there is no requirement that the transfer be in the interests of the clients of the relevant Public Trustee.

### Circumstances of a compulsory transfer determination

- RG 237.51 A compulsory transfer determination is triggered when we cancel the AFS licence of the trustee company.
- RG 237.52 We may cancel the AFS licence of a body corporate with or without a hearing: s915B and 915C. If the trustee company, or its related body corporate, is a body regulated by APRA, we will consult with APRA before suspending or cancelling a licence: s915I.
- RG 237.53 A trustee company requires an AFS licence with an authorisation to provide traditional services. Traditional services include the provision of estate management functions. If we cancel its licence or remove the authorisation to provide traditional services then the company can no longer provide those services. This potentially leaves clients, some of whom may be vulnerable persons (such as minors or other persons who lack legal capacity) without a trustee to manage their interests.

Note: See s601WBA of the Corporations Act. These provisions are subject to s915H, which provides that when cancelling a licence, we may allow the licence to continue in a limited way for the purposes of specified provisions of the Corporations Act for specified matters, a specified period, or both.

- RG 237.54 In this case, we may make a compulsory transfer determination (of either a partial or total transfer of estate assets and liabilities) to another licensed trustee company with the consent of the board of the receiving company.
- RG 237.55 In the circumstances where a licensed trustee company is unavailable or unwilling to accept a transfer of an estate business, we may, with the consent of the relevant Public Trustee, make a compulsory transfer determination to a state or territory Public Trustee.
- RG 237.56 We would consult closely with APRA on a compulsory transfer determination if any of the entities involved are regulated by APRA.

### **Obligation to notify**

- RG 237.57 If the licence of a trustee company is cancelled by ASIC in connection with a compulsory transfer determination, the transferring company must contact certain persons as soon as practicable to advise them of the cancellation of the licence and must publish a notice of the cancellation of the licence: s601WDA(1).
- RG 237.58 All reasonable steps must be taken to contact and advise people who have signed instruments that have yet to come into effect but will potentially lead to estate assets and liabilities being held by the trustee company and people who the trustee company knows have appointed it as trustee or in some other capacity: s601WDA(1) and (2).
- RG 237.59 When a certificate of transfer for a compulsory transfer determination comes into force, the transferring company must, as soon as practicable, take all reasonable steps to contact the same persons and advise them of the transfer of estate assets and liabilities: s601WDA(2).
- RG 237.60 We take the view that what constitutes 'reasonable steps' in s601WDA(1)(a) and s601WDA(2) may involve more than advising by a notice mechanism, but we propose to address this issue with the transferring company on a case-by-case basis in the course of the compulsory transfer determination process.

## **Information required to make a transfer determination**

### **Entity information**

- RG 237.61 We require the following information about the entities:
- (a) the name and ACN of the receiving company;
  - (b) a copy of the consent of the board of the receiving company;
  - (c) the proposed date of transfer; and

- (d) unless the receiving company is a Public Trustee or listed, an overview of the share ownership of the receiving company and information about the corporate group to which it belongs (as applicable).

### Other regulatory approvals

RG 237.62 We require:

- (a) details of any other regulatory approvals that may be required for the transfer—for example, from the ACCC; and
- (b) where relevant, a written assurance from the board of the receiving company that it will observe any prudential requirements imposed by, or agreed with, APRA in relation to the transfer.

### Information about the transfer

RG 237.63 We require the following information about the transfer:

- (a) whether the transfer is partial or total;
- (b) in the case of a partial transfer, a detailed list of the estate assets and liabilities being transferred for attachment to the certificate of transfer;
- (c) an overview of the type (e.g. deceased estates, estates managed under a power of attorney), dollar value and the asset class of the estate assets and liabilities being transferred;

Note: When providing the information requested in RG 237.63(c), refer to RG 237.36 for the analysis required.

- (d) a copy of any transfer agreement;
- (e) an outline of the internal and external communication strategies planned for the transfer (i.e. what clients and other external stakeholders will be told, along with internal communication to staff) and a copy of draft communication(s) to clients the subject of the transfer;
- (f) unless the receiving company is a Public Trustee, an explanation of the due diligence undertaken by both companies, in particular by the receiving company on the capacity to provide traditional services to the transferring company's clients and assets;
- (g) a copy of any report prepared by an independent expert on the transfer;
- (h) a copy or outline of the receiving company's integration plan for the management of the transferred clients and their estate assets and liabilities;
- (i) unless the receiving company is the Public Trustee, particulars of the expected effects of the transfer in the receiving company, if any, on clients subject to the transfer, with regard to:
  - (i) client service and reporting levels;

- (ii) fee levels;
  - (iii) staffing levels; and
  - (iv) the offices maintained in states and territories, including in regional Australia (as applicable); and
- (j) the particulars of the expected effects of the transfer, if any, on the risk and compliance program of the receiving company.

### **AFS licence issues**

RG 237.64 AFS licensees have certain responsibilities: see RG 237.3–RG 237.4. We require:

- (a) information on how the receiving company will deal with client complaints and disputes lodged with the transferring company before the date of transfer;
- (b) unless the receiving company is a Public Trustee, advice as to whether the compensation arrangements for the transferred clients will be adequate;
- (c) unless the receiving company is a Public Trustee, particulars of any conflicts of interest (financial or otherwise) that an officer or employee of either company may have about the proposed transfer of estate assets and liabilities, and, if a conflict has been identified, the details of how it will be managed and disclosed to affected parties; and
- (d) unless the receiving company is a Public Trustee or regulated by APRA, written assurances from the board of that company that it will have management resources, financial resources in compliance with RG 166, risk management systems and controls, and the staff in place to manage the estate assets and liabilities transferred.

## **Why we have adopted this approach**

RG 237.65 If a trustee company has its AFS licence cancelled by ASIC, the circumstances that lead to the cancellation may make the information available from it to support a compulsory transfer determination application limited, incomplete or inaccurate.

RG 237.66 The particular demands of the situation may mean that it is important for any transfer of estate business to be completed as quickly as possible, so that clients are not left without an effective trustee to manage their affairs. These considerations have influenced the information we require, especially from the transferring company.

RG 237.67 Compulsory transfer determinations of estate assets and liabilities may be total or partial. However, if the transfer is partial, it will be very important to

have complete and accurate details of the assets and liabilities transferred because there are legal consequences flowing from the certificate issued following the determination. The certificate of transfer produced will, in the case of a partial transfer, have attached to it a list of the assets and liabilities being transferred. Generally, we would anticipate that this be prepared by the transferring trustee company in consultation with the receiving company.

Note: Div 3 of Pt 5D.6 of the Corporations Act sets out the evidentiary value of a certificate, and states that certificates are prima facie evidence of all matters certified. In the case of interests in land, they will be taken as evidence of title at the Registrar of Titles in the states and territories. Similar provisions apply to assets other than land.

- RG 237.68 In developing this guide, we have taken into account the nature of the role of the Office of the Public Trustee and the fact that they are a government-controlled body. Consequently, when we are considering a transfer determination to these entities, we are not seeking information on shareholdings, its due diligence processes, conflicts of interest issues and its operational capacity (including resources and risk management systems).
- RG 237.69 In certain circumstances, if it is not in existence, we may request the preparation of an independent expert's report on the transfer.

### **Entities regulated by APRA**

- RG 237.70 We do not require board assurances about the capacity and resource requirements from APRA-regulated receiving companies involved in compulsory transfers.
- RG 237.71 We will consult with APRA on a compulsory transfer determination that involves any of the entities that are regulated by APRA.

## E How to apply for a transfer determination

### Key points

Applications must:

- be in letter format;
- be prepared for each separate trustee company; and
- contain all the information required by this guide.

A cheque for the prescribed fee must be included in the paper copy mailed to ASIC. An electronic copy must also be emailed.

### Application and covering letter

RG 237.72 All applications for a transfer determination must be in letter format and prepared on behalf of each trustee company involved as a separate legal entity. They should not be lodged on a corporate group basis.

RG 237.73 The covering letter to the application should clearly have as a subject matter:

**Licensed Trustee Companies: Application for a transfer determination under Part 5D.6 of the Corporations Act.**

RG 237.74 It must contain all the information required by this guide and be accompanied by the prescribed fee.

Note: See item 27 of the Corporations (Fees) Regulations 2001.

### Lodgement

RG 237.75 The application should be emailed to [applications@asic.gov.au](mailto:applications@asic.gov.au) and a paper copy with a cheque for the fee attached should be mailed to:

FE Registration Team  
Australian Securities and Investments Commission  
GPO Box 9827  
in Perth, Sydney, Melbourne or Brisbane.

## Key terms

Term	Meaning in this document
ACCC	Australian Competition and Consumer Commission
ACN	Australian Company Number
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries out a financial services business to provide financial services  Note: This is a definition contained in s761A of the Corporations Act.
AFS licensee	A person who holds an Australian financial services licence under s913B of the Corporations Act  Note: This is a definition contained in s761A of the Corporations Act.
APRA	Australian Prudential Regulation Authority
arm's length transfer	A transfer between two companies that are not related bodies corporate by virtue of s50 of the Corporations Act
ASIC	Australian Securities and Investments Commission
cancel	In relation to an AFS licence, has the meaning given by s601WAA
Ch 5D (for example)	A chapter of the Corporations Act (in this example, numbered 5D)
client of a trustee company	Has the meaning given by s601RAB(3) of the Corporations Act and reg 7.1.28A of the Corporations Regulations
compulsory transfer	Has the meaning given in s601WBA of the Corporations Act
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
deemed licensee	Trustee companies that did not hold an AFS licence as at 6 May 2010
estate assets and liabilities	Has the meaning given in s601WAA of the Corporations Act

Term	Meaning in this document
estate management functions	<p>As defined in s601RAC(2) of the Corporations Act, the following functions:</p> <ul style="list-style-type: none"> <li>• acting as a trustee of any kind, or otherwise administering or managing a trust;</li> <li>• acting as an executor or administrator of a deceased estate;</li> <li>• acting as an agent, attorney or nominee;</li> <li>• acting as a receiver, controller or custodian of property;</li> <li>• otherwise acting as a manager or administrator (including in the capacity as guardian) of the estate of an individual; and</li> <li>• acting in any other capacity prescribed by the regulations for the purpose of this paragraph</li> </ul>
financial service	Has the meaning given in Div 4 of Pt 7.1 of the Corporations Act
intra-group transfer	A voluntary transfer of estate assets and liabilities between companies who are members of the same corporate group
Pt 5D.6	A part of the Corporations Act (in this example, numbered 5D.6)
receiving trustee company	The company that is receiving the transfer of estate assets and liabilities from the transferring company in a transfer determination
reg 5D.1.01	A regulation of the Corporations Regulations (in this example, numbered 5D.1.01)
RG 104	An ASIC regulatory guide (in this example, numbered 104)
RSE	Registrable superannuation entity
s9	A section of the Corporations Act (in this example, numbered 9), unless otherwise specified
traditional services	<p>Traditional trustee company services as defined in s601RAC(1) of the Corporations Act, which are:</p> <ul style="list-style-type: none"> <li>• performing estate management functions (as defined in s601RAC(2));</li> <li>• preparing a will, a trust instrument, a power of attorney or an agency arrangement;</li> <li>• applying for probate of a will, applying for grant of letters of administration, or electing to administer a deceased estate;</li> <li>• establishing and operating common funds; and</li> <li>• any other services prescribed by the regulations for the purpose of s601RAC(1)</li> </ul>



<b>Term</b>	<b>Meaning in this document</b>
transferring trustee company	The company that is transferring the estate assets and liabilities to the receiving company in a transfer determination
trustee company	Has the same meaning as in s601RAB of the Corporations Act
voluntary transfer	Has the meaning given in s601WBA of the Corporations Act

## Related information

### Headnotes

ASIC-approved transfer determinations, compulsory transfer determinations, estate assets and liabilities, estate management function, intra-group transfer determinations, licensed trustee companies, Public Trustee, receiving trustee company, transferring trustee company, trustee companies providing traditional services, voluntary transfer determinations,

### Regulatory guides

RG 104 *Licensing: Meeting the general obligations*

RG 166 *Licensing: Financial requirements*

RG 181 *Licensing: Managing conflicts of interest*

### Legislation

*Australian Securities and Investments Commission Act 2001 (Cth)*

*Companies (Trustees and Personal Representatives) Act 1981 (NT)*

Corporations Act, Ch 5D, 7, s601RAB(1), 601WAA(1), 601WBA, 601WBA(2)(v)(ii), 601WBD, 601WBE, 601WBI(1)(c), 601WDA(1), 601WDA(1)(a), 601WDA(1)(b), 601WDA(2), 601WDA(3), 766A(1A), 912A(1)(d), 915B, 915C, 915H, 915I; Corporations Regulations, Sch 8AA, reg 5D.1.01, 5D.1.01(1); Corporations (Fees) Regulations 2001, item 27

*Superannuation Industry (Supervision) Act 1993 (Cth)*

*Trustee Companies Act 1947 (ACT)*

*Trustee Companies Act 1964 (NSW)*

*Trustees Companies Act 1968 (Qld)*

*Trustees Companies Act 1984 (Vic)*

*Trustees Companies Act 1987 (WA)*

*Trustees Companies Act 1988 (SA)*