



Corporations and Other Legislation Amendment (Trustee Companies and Other Measures) Act 2011

No. 24, 2011

**An Act to amend legislation in relation to trustee
companies and other matters, and for related
purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

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**An Act to amend legislation in relation to trustee
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[Assented to 12 April 2011]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Corporations and Other Legislation
Amendment (Trustee Companies and Other Measures) Act 2011*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

| Commencement information | | |
|---|--|---------------------|
| Column 1 | Column 2 | Column 3 |
| Provision(s) | Commencement | Date/Details |
| 1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table | The day this Act receives the Royal Assent. | 12 April 2011 |
| 2. Schedule 1, items 1 to 7 | The day after this Act receives the Royal Assent. | 13 April 2011 |
| 3. Schedule 1, item 8 | The 28th day after this Act receives the Royal Assent. | 10 May 2011 |
| 4. Schedule 1, items 9 to 11 | The day after this Act receives the Royal Assent. | 13 April 2011 |
| 5. Schedule 1, item 12 | At the same time as Schedule 2 to the <i>Corporations Legislation Amendment (Financial Services Modernisation) Act 2009</i> commenced. | 6 May 2010 |
| 6. Schedule 1, items 13 to 36 | The 28th day after this Act receives the Royal Assent. | 10 May 2011 |
| 7. Schedule 2 | The day after this Act receives the Royal Assent. | 13 April 2011 |

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Trustee companies

Corporations (Aboriginal and Torres Strait Islander) Act 2006

1 Section 700-1 (paragraph (h) of the definition of *affairs*)

Omit “an authorised trustee corporation”, substitute “a licensed trustee company within the meaning of Chapter 5D of the Corporations Act or the Public Trustee of a State or Territory”.

2 Section 700-1 (definition of *authorised trustee corporation*)

Repeal the definition.

Corporations Act 2001

3 Section 9 (definition of *authorised trustee corporation*)

Repeal the definition.

4 Paragraph 53(b)

Omit “an authorised trustee corporation”, substitute “a licensed trustee company within the meaning of Chapter 5D or the Public Trustee of a State or Territory”.

5 After subsection 601RAB(2)

Insert:

- (2A) Before the Governor-General makes a regulation that includes a company in a list set out for the purposes of paragraph (2)(a), the company must satisfy the Minister of the following:
- (a) that it is a corporation to which paragraph 51(xx) of the Constitution applies;
 - (b) that its purposes include:
 - (i) providing services of the kind referred to in paragraph 601RAC(1)(c); and
 - (ii) performing functions of a kind referred to in paragraph 601RAC(2)(b) and at least one other estate management function;

- (c) that it is, and will continue to be, capable of providing the services, and performing the functions, referred to in paragraph (b) of this subsection;
- (d) that it is a fit and proper person;
- (e) that an unacceptable control situation (as defined in section 601VAA) does not exist in relation to it in relation to any person;
- (f) any other matter the Minister specifies by written notice to the company.

Note: Under Division 137 of the *Criminal Code* it may be an offence for a company to provide false or misleading information or documents to the Minister in purported compliance with this requirement.

6 Subsection 601SCA(2) (at the end of the note)

Add “but see also section 601SCAA, which deals with any inconsistencies in regulation between the Chapters”.

7 After section 601SCA

Insert:

601SCAA Common funds that are also registered schemes

If, in relation to a common fund that is also a registered scheme, a provision of this Chapter or a regulation or other instrument made for the purposes of this Chapter is inconsistent with any of the following (a **registered scheme provision**):

- (a) a provision of Chapter 5C or a regulation or other instrument made for the purposes of that Chapter;
- (b) a provision of Part 7.9 of Chapter 7 or a regulation or other instrument made for the purposes of that Part;

the registered scheme provision prevails to the extent of the inconsistency.

8 At the end of Division 3 of Part 5D.2 of Chapter 5D

Add:

601SCD Arm's length transactions

- (1) A licensed trustee company that operates a common fund that is not a registered scheme must not give a financial benefit in relation to the common fund to a related party.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) Subsection (1) does not apply if the financial benefit is given on terms that:
- (a) would be reasonable in the circumstances if the trustee company and the related party were dealing at arm's length; or
 - (b) are less favourable to the related party than the terms referred to in paragraph (a).

- (3) In this section:

financial benefit has a meaning that is affected by section 229.

related party has the meaning given by section 228, as if references in that section to a public company were references to a licensed trustee company.

9 Subsection 601TAB(1) (after note 1)

Insert:

Note 1A: Other provisions in this Part and in the regulations limit the ability of licensed trustee companies to increase fees.

10 Subsection 601TBE(3)

Omit "However", substitute "Unless ASIC approves it under subsection (4)".

11 At the end of section 601TBE

Add:

- (4) ASIC may, on application in writing by a licensed trustee company, approve payment of a proposed fee that, if paid without the approval, would contravene subsection (3), if ASIC is satisfied that:
- (a) the payment of the fee will not significantly affect the capital of the relevant estate or charitable trust concerned; and

- (b) the fee is a fair reflection of the work and expertise required to perform the estate management function.

12 At the end of Division 3 of Part 5D.3 of Chapter 5D

Add:

601TCB Additional amount for preparation of returns etc.

A licensed trustee company may charge a reasonable fee for work involved in the preparation and lodging of returns for the purpose of, or in connection with, assessments of any duties or taxes (other than probate, death, succession or estate duties) related to an estate that is administered or managed by the trustee company.

13 Part 5D.6 of Chapter 5D (heading)

Repeal the heading, substitute:

Part 5D.6—ASIC-approved transfers of estate assets and liabilities

14 Subsection 601WAA(1) (definition of *estate assets and liabilities*)

Repeal the definition, substitute:

estate assets and liabilities, of a company, means assets (including assets in common funds) and liabilities of an estate, or incurred in relation to an estate, in relation to which the company was performing estate management functions, if the assets and liabilities were vested in or otherwise belonged to the company:

- (a) because of its performance of those functions; and
- (b) immediately before:
 - (i) if ASIC has cancelled the company's licence—the cancellation; or
 - (ii) otherwise—a relevant certificate of transfer comes into force.

Note: This Part does not apply to liabilities for breach of trust etc.: see section 601WBK.

15 Subsection 601WAA(1)

Insert:

transfer determination has the meaning given by subsection 601WBA(1).

16 Subsection 601WAA(1)

Insert:

voluntary transfer determination has the meaning given by subsection 601WBA(1).

17 Subsection 601WBA(1)

Repeal the subsection, substitute:

- (1) ASIC may, in writing, make a determination (a *transfer determination*) that there is to be a transfer of estate assets and liabilities from a specified company (the *transferring company*) to another specified company (the *receiving company*) if:
 - (a) ASIC has cancelled the licence of the transferring company (the determination is a *compulsory transfer determination*);
or
 - (b) the transferring company has applied in the prescribed form for a determination (the determination is a *voluntary transfer determination*).

Note: The heading to section 601WBA is altered by omitting “**Compulsory transfer**” and substituting “**Transfer**”.

18 Subsection 601WBA(2)

Omit “compulsory”.

19 Before paragraph 601WBA(2)(a)

Insert:

- (aa) for a compulsory transfer determination—the receiving company is a licensed trustee company or the Public Trustee of a State or Territory; and
- (ab) for a voluntary transfer determination:
 - (i) the transferring company is a licensed trustee company or a company that was previously authorised as a trustee company under a law of a State or Territory; and

- (ii) the receiving company is a licensed trustee company;
and

20 Subparagraph 601WBA(2)(b)(ii)

Before “the transfer”, insert “unless the receiving company is a Public Trustee—”.

21 At the end of subparagraph 601WBA(2)(b)(iv)

Add “or of which it is the Public Trustee”.

22 After subsection 601WBA(2)

Insert:

(2A) Even if the Public Trustee of a State or Territory is not a company:

- (a) the Public Trustee may still be specified as a receiving company for the purposes of a compulsory transfer determination; and
- (b) references in this Part (however expressed) to:
 - (i) a company; or
 - (ii) the board of a company;are taken to be references to that Public Trustee.

23 Paragraph 601WBA(3)(b)

Before “whether”, insert “for a compulsory transfer determination—”.

24 At the end of subsection 601WBA(3)

Add:

; and (d) for a voluntary transfer determination—that it will be a total transfer of the transferring company’s estate assets and liabilities.

25 Subsection 601WBE(1)

Omit “compulsory”.

26 Section 601WBF

Omit “compulsory”.

27 Paragraph 601WBG(1)(a)

Omit “compulsory”.

28 Paragraph 601WBG(2)(b)

Before “state”, insert “for a compulsory transfer determination—”.

29 After paragraph 601WBG(2)(c)

Insert:

- (ca) for a voluntary transfer determination—state that the transfer is a total transfer; and

Note: The heading to section 601WBI is altered by omitting “**compulsory**”.

30 Subsection 601WDA(2)

Omit “comes into force, the trustee company”, substitute “for a compulsory transfer determination comes into force, the transferring company”.

Note 1: The following heading to subsection 601WDA(1) is inserted “*Notice of cancellation of licence*”.

Note 2: The following heading to subsection 601WDA(2) is inserted “*Notice of compulsory transfer determination*”.

31 At the end of section 601WDA

Add:

Notice of voluntary transfer determination

- (3) If a certificate of transfer for a voluntary transfer determination comes into force, the transferring company must, as soon as practicable, publish notice of the transfer of estate assets and liabilities.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

32 Part 5D.7 of Chapter 5D (heading)

Repeal the heading, substitute:

Part 5D.7—Contraventions and holding out

33 At the end of Part 5D.7 of Chapter 5D

Add:

601XAB Prohibition on holding out

A person must not hold out that the person is a licensed trustee company if that is not the case.

Note: Failure to comply with this section is an offence (see subsection 1311(1)).

34 At the end of subsection 1364(2)

Add:

Note: Because of section 1312, if a body corporate is convicted of an offence against the regulations a court may impose a penalty of up to 5 times the penalty specified for the offence.

35 Schedule 3 (after table item 173E)

Insert:

| | | |
|-------|----------------------|---|
| 173EA | Subsection 601SCD(1) | 2,000 penalty units or imprisonment for 5 years, or both. |
|-------|----------------------|---|

36 Schedule 3 (after table item 173T)

Insert:

| | | |
|------|-------------------------|--|
| 173U | Subsection 601WDA(3) | 120 penalty units or imprisonment for 2 years, or both. |
| 173V | Section 601XAB | 50 penalty units or imprisonment for 12 months, or both. |

Schedule 2—Payment systems

Payment Systems (Regulation) Act 1998

1 At the end of Subdivision A of Division 3 of Part 3

Add:

15A Authorisation of conduct under access regime for the purposes of the *Competition and Consumer Act 2010*

For the purposes of subparagraph 51(1)(a)(i) of the *Competition and Consumer Act 2010*, anything that is done:

- (a) by a participant in a designated payment system under an access regime; and
- (b) in accordance with that access regime;

is taken to be specified in, and specifically authorised by, this Act.

[*Minister's second reading speech made in—
House of Representatives on 23 February 2011
Senate on 3 March 2011*]

(27/11)