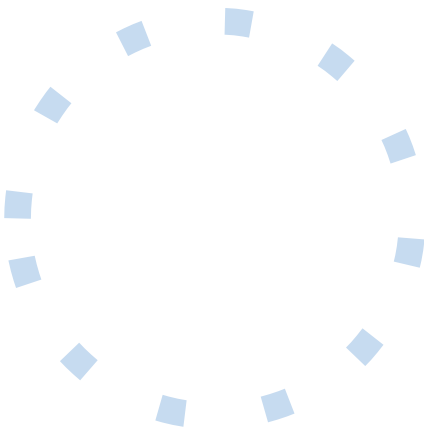
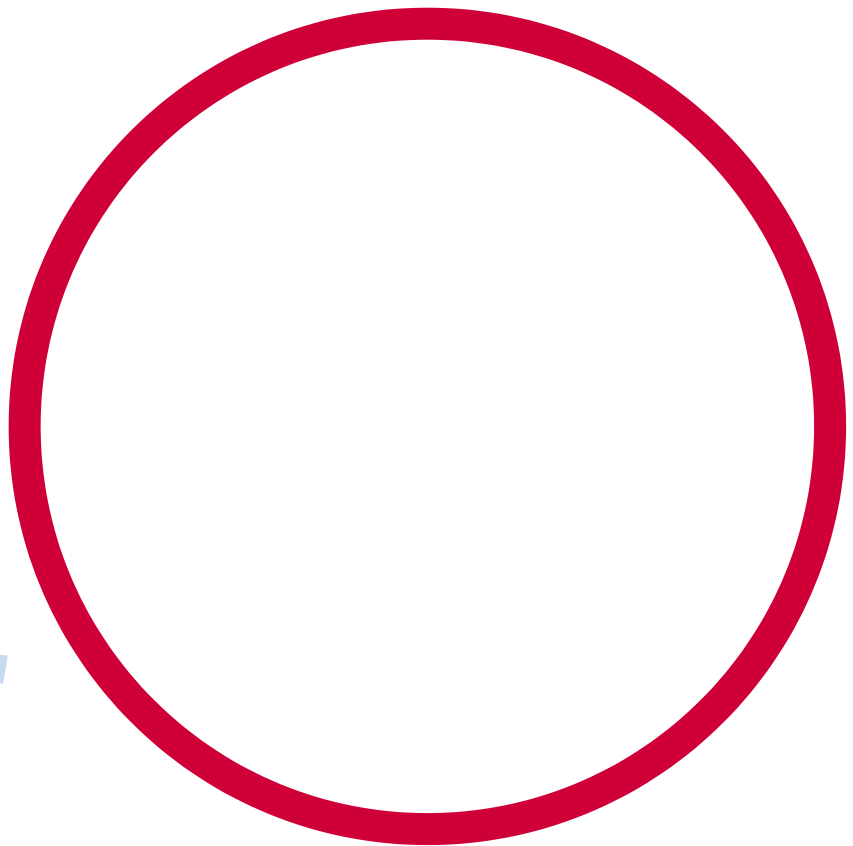
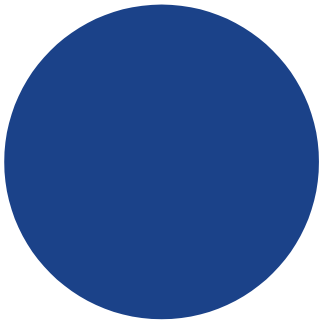


Service Transfers Policy

Early Childhood Education Quality Assurance
and Regulatory Services Directorate



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1. Purpose

This policy outlines how the Regulatory Authority exercises its function of considering notifications to transfer a service approval from one approved provider to another approved provider under Part 3, Division 3 ('Transfer of Service Approval') of the *Children (Education and Care Services) National Law (NSW) 2010* (National Law), and under the *Education and Care Services National Regulations (NSW)* (National Regulations).

The policy rationale for transferring a service approval is to ensure early childhood education and care services continue to be provided to children in circumstances where the existing approved provider decides to relinquish control of the service, usually in circumstances such as the sale of the business.

The National Law allows the Regulatory authority to intervene in an intended transfer and, after intervening, the Regulatory Authority may decide to consent to the proposed transfer or to refuse to consent to the proposed transfer.

Regulatory Authority intervention in a transfer of a service approval ensures that there are sufficient measures in place to protect the safety, health and wellbeing, and the developmental outcomes of children being educated and cared for at the service, despite a change of provider.

The information in this policy is intended to clarify:

- what constitutes a complete and valid application to transfer a service approval;
- the circumstances under which the Regulatory Authority will exercise its discretion to intervene in respect to a transfer of a service approval, and the considerations that it must and/or may take into account when exercising that discretion.

2. Scope

This Policy applies to both in-scope and out-of-scope services in NSW.

In-scope services are regulated under the National Quality Framework (NQF), which consists of the National Law, Regulations and the National Quality Standards. In scope services include centre-based services, such as long day care, out of school hours care, preschools, and family day care services.

Out-of-scope services (or State regulated services) are regulated under the *Children (Education and Care Services) Supplementary Provisions Act 2011* (the State Law). Mobile and occasional care services are the only service types regulated under the State Law. Following changes to the State Law, the National Law provisions apply to out of

scope services, with certain modifications. Where the National Law applies, the provisions are referred to as the “National Law Alignment Provisions.”

3. Guiding principles

The Regulatory Authority’s over-arching principles for implementing its functions are set out in the Guiding Principles Policy. Specific principles that apply to transferring a service approval include the following:

- The safety, health and wellbeing of children is the paramount concern in determining whether to intervene, or to consent or refuse to consent to a transfer of a service approval.
- Decisions will be made using the Department’s risk based approach, which ensures transparent and defensible risk based assessments of each application while having regard to the key regulatory risks.
- The Regulatory Authority will only consider a notice to transfer a service approval where the receiving and transferring approved providers have supplied a complete and valid notification. A notification is complete and valid when it contains sufficient information that fulfils all legal requirements and enables the Regulatory Authority to make a decision.
- The Regulatory Authority may intervene in a service transfer where it has concerns as to the matters in section 62(1) of the National Law.
- The Regulatory Authority may impose conditions on its consent to the transfer of a service approval where it is reasonable to do so. The transfer must take place in accordance with any conditions imposed.

4. Policy

4.1 Notification Requirements

Both the transferring approved provider and the receiving approved provider must jointly notify the Regulatory Authority at least 42 days before the transfer is intended to take effect. The notification must be in writing, include the prescribed information, and include payment of the prescribed fee. (Section 59 of the National Law).

The prescribed information to be included in the notification of transfer of a centre-based service and family day care service is included at Appendix A. The prescribed fees are set out in Schedule 2 of the National Regulations. Fees are indexed each year according to

published indexation figures. They are available on the [ACECQA website](#) before the beginning of each financial year.

As soon as the receiving provider is aware of any adverse or serious matters they are obligated to disclose this during the application process. The Regulatory Authority will undertake inquiries in relation to these matters. The Regulatory Authority may ask the applicant to provide further information Under Section 64 of the National Law, and may suspend further consideration of the transfer until further information is received.

The Regulatory Authority will not grant a transfer unless it is satisfied as to the compliance history of the receiving approved provider that the receiving approved provider is capable of operating the education and care service and that granting the transfer will not be contrary to the objectives and guiding principles of the National Quality Framework. Where there is information outstanding relating to serious matters, such as a criminal investigation, the Regulatory Authority may not be able to make a determination on the application until an outcome is known or the matter is finalised.

The Regulatory Authority may consider a notification period of less than 42 days in exceptional circumstances. Further guidance on exceptional circumstances can be found in the [Guiding Principles policy](#). Exceptional circumstances may include, but are not limited to:

- the death, or serious or sudden illness of an approved provider;
- the transferring approved provider is no longer able to operate the service and adhering to the 42 day timeframe will result in the closure of the service and affect the continuity of education and care provided to children attending the service.

Where exceptional circumstances exist, these will always be subordinate to the safety, health and wellbeing of children attending the education and care service.

The outlaying of finances or any other financial commitments made by an Approved Provider will not influence the decision of the Regulatory Authority in assessing a notification of a transfer. Such factors are not considered exceptional circumstances, but business decisions made by the transferring and receiving Approved Providers. Despite any significant financial outlay, the Regulatory Authority may not consent to the transfer of a service approval if the requirements of the National Law and Regulations are not met.

Where a service has a waiver in place, the notification to the Regulatory Authority must include how the receiving approved provider will fulfil the obligations of the waiver, or state that a waiver is no longer required and the reasons why it is no longer required.

A person who holds a provider approval may transfer a service approval held by the provider even if the provider approval or service approval is suspended or is to be cancelled.

4.2 Assessing and Determining a Notification to transfer a service approval

Consent to Transfer of a Service Approval

A service approval cannot be transferred without the consent of the Regulatory Authority (Section 60 of the National Law). The Regulatory Authority is taken to have consented to the transfer of a service approval if the parties have given a valid notification and the Regulatory Authority has not notified the parties that it intends to intervene in the transfer at least 28 days prior to the intended transfer taking effect.

Where the Regulatory Authority intervenes in the proposed transfer, it may decide to consent to the proposed transfer, or refuse to consent to the proposed transfer.

Where a valid notification has not been given to the Regulatory Authority under Section 59 of the National Law the Regulatory Authority will assess if there are exceptional circumstances. Where it is considered there are no exceptional circumstances the Regulatory Authority will advise the transferring provider to amend their proposed transfer date to comply with the requirements of Section 59.

If the Regulatory Authority deems exceptional circumstances exist they may process the application.

Intervening in a Transfer of a Service Approval

The Regulatory Authority may intervene in a transfer of a service approval where it has concerns as to any of the following matters:

- whether the receiving approved provider is capable of operating the service having regard to its financial capacity and management capability and any other matter the Regulatory Authority considers relevant 62(1)(a);
- the receiving approved provider's history of compliance with the National Law and National Regulations including in relation to any other services it operates 62(1)(b);
- any other matter the Regulatory Authority considers relevant to the service transfer 62(1)(c), such as:
 - any waivers that would be required in relation to the receiving approved provider's management of the service;
 - the receiving approved provider's knowledge and understanding of the National Law and Regulations;
 - whether a valid notice has been given under section 59 of the National Law.

The Regulatory Authority may request further information from either of the relevant approved providers to allow it to make a fully informed decision as to whether to consent to the transfer (Section 64 of the National Law).

Capability to operate a service and other matters

The Regulatory Authority may consider whether the receiving approved provider has the management and financial capability to operate an education and care service in accordance with the National Law. The Regulatory Authority may consider matters such as the receiving approved provider's:

- previous experience in operating an education and care service;
- previous experience in operating another business;
- qualifications in a leadership, governance or management role;
- financial sustainability;
- understanding of the role and responsibility of an approved provider;
- fitness and propriety, including the fitness and propriety of any persons with management or control (PMC). This may include a reassessment of the fitness and propriety of the approved provider and/or any persons with management or control (PMC);
- knowledge of the National Law and Regulations.

For the purposes of assessing a receiving approved provider's capability to operate an education and care service, the Regulatory Authority may ask a receiving approved provider to attend an information and assessment session, or participate in a telephone or face to face interview.

Compliance with the National Law

Compliance with the National Law and Regulations is an important aspect of assessing a notification of transfer of service approval as it provides an indication of potential risks to the safety, health and wellbeing of children, and to the quality of care that may be provided by the new provider. As such, the Regulatory Authority will generally have regard to the compliance history of the receiving approved provider, including the quality ratings of any existing education and care services, when assessing a transfer application. The Regulatory Authority will consider matters such as:

- The number of education and care services operated by the receiving approved provider.

- The volume and severity of any issues and how recently they occurred.
- The risks posed to the safety, health and wellbeing of children, including their developmental outcomes.
- Any pattern of non-compliance.
- The approved provider's willingness to comply, for example, whether escalation was required to resolve compliance issues.

Where the Regulatory Authority intervenes in a transfer of a service approval, the Regulatory Authority will notify both parties of the decision at least 28 days before the date the transfer is intended to take effect, unless notice of the transfer was not properly given. (Section 62(2)-(5) of the National Law). The written notification will include the following information:

- the name of the education and care service;
- the service approval number;
- the name of the transferring approved provider;
- the name of the receiving approved provider;
- the matters about which the Regulatory Authority is concerned.

In the event the Regulatory Authority intervenes in the transfer of a service approval, the transfer cannot proceed unless and until the Regulatory Authority has given written consent (Section 63 of the National Law).

Decision after intervention

If the Regulatory Authority has intervened in the proposed transfer under section 62, it may decide:

- to consent to the proposed transfer; or
- to refuse to consent to the proposed transfer.

The Regulatory Authority must, at least 7 days before the date on which the transfer is intended to take effect, give a notice to each party specifying that it:

- consents to the transfer; or
- refuses to consent to the transfer; or
- has suspended further consideration of the transfer until further information is received and that the transfer may not proceed until a further notice is given consenting to the transfer; or

- has not yet made a decision on the transfer, that the Regulatory Authority will make a decision on the transfer within 28 days and that the transfer may not proceed until a further notice is given consenting to the transfer.

Consent to transfer

If the Regulatory Authority consents to the transfer, it will give written notice specifying:

- the date on which the transfer is to take effect;
- any conditions on the consent to the transfer;
- notice of any condition that the Regulatory Authority has imposed on the provider approval or a service approval of the receiving approved provider because of the transfer.

Refusal to consent to transfer

If the Regulatory Authority refuses to consent to the transfer, it will give written notice including the reasons for the refusal.

A transfer of a service approval is void if:

- it is made without the consent of the Regulatory Authority; or
- it is made in contravention of the conditions imposed by the Regulatory Authority on the consent to the transfer; or
- it is made to a person who is not the approved provider who gave the notification under section 59 as the receiving approved provider.

Where a transfer is void, it is of no legal effect, i.e. the law will treat the transfer as though it never happened. Where this occurs, the Regulatory Authority will take appropriate action, depending on the circumstances of each case.

Conditions imposed on consent to transfer

Consent to a service transfer may be given subject to conditions where it is appropriate to do so. Conditions may be imposed on the consent, or the approval of the receiving approved provider, or the service approval of the receiving approved provider, as needed. This will include circumstances where conditions are required to ensure the objectives of the National Quality Framework are met.

A transfer of a service approval is void if it is made in contravention of the conditions imposed by the Regulatory Authority on the consent to transfer. Where this occurs, the

Regulatory Authority will take appropriate action, depending on the circumstances of each case.

For information about conditions, see the Regulatory Authority's [Conditions Policy](#).

Requirements after a Transfer of Service Approval has occurred

Within two days after a transfer of a service approval has taken effect, the transferring approved provider and the receiving approved provider must give written notice to the Regulatory Authority specifying the date of the transfer (Section [69 of the National Law](#)).

After receiving confirmation of the transfer date, the Regulatory Authority will amend the service approval and provide a copy of the approval to the receiving approved provider.

Transitional and Savings provisions

Savings and Transitional Provisions allow certain services to continue to operate under previous legislative requirements, or may provide that a service does not need to comply with certain requirements under the National Law. Transitional provisions were introduced as a means of supporting services in transitioning to the new requirements of the National Law and regulations, particularly for services where compliance with the new stricter requirements was more difficult.

A service may lose the benefit of transitional provisions when the service is transferred to a new provider.

Where a transitional provision for space requirements applies to a service, the receiving approved provider will be required to provide the Regulatory Authority with plans and calculations from a licenced building practitioner. These plans and calculations should confirm that the service can meet the space requirements (Regulation 107 & 108). Where the approved provider cannot meet these requirements, the Regulatory Authority will issue a service approval only for the number of children that can be accommodated at the service premises, having regard to the space requirements. The receiving approved provider can apply for a waiver for these requirements or other requirements under the National Regulations.

For information about waivers, see the Regulatory Authority's [Waivers Policy](#).

Notification to Parents

The receiving approved provider must give written notice to the parents of children enrolled at the education and care service of the transfer of the service approval at least two days prior to the transfer taking effect (Section [69 of the National Law](#))

The transferring approved provider must not transfer the enrolment records to the receiving approved provider without the consent of the child's parent (Regulation 184 of the National Regulations).

5. Review

A person affected by the Regulatory Authority's decision to refuse to consent to the transfer of a service approval may be able to challenge that decision by applying to have it reviewed. There are two types of review:

- Internal review – by the Regulatory Authority
- External review – by a relevant tribunal, court or the NSW Ombudsman.

For more information on rights of review, including application processes, the types of review available and the principles that apply to conducting reviews, see the Review of Decisions Policy.

6. Appendices

Appendix A

Regulation 36 of the *Education and Care Services National Regulations 2011* (National Regulations)

Checklist of information required for service transfer notification – centre-based services
<input type="checkbox"/> Name of education and care service
<input type="checkbox"/> Service approval number
<input type="checkbox"/> The transferring approved provider's name and contact details and provider approval number
<input type="checkbox"/> The receiving approved provider's name and contact details and provider approval number
<input type="checkbox"/> The date on which the service transfer is intended to take effect
<input type="checkbox"/> The details of any proposed changes in relation to the information required to be provided under Regulations 24 and 25 of the National Regulations

Regulation 37 of the *Education and Care Services National Regulations 2011* (National Regulations)

Checklist of information required for service transfer notification – family day care services

Name of family day care service

Service approval number

The transferring approved provider's name and contact details and provider approval number

The receiving approved provider's name and contact details and provider approval number

The date on which the service transfer is intended to take effect

The details of any proposed changes in relation to the information required to be provided under Regulation 26 of the National Regulations

7. Version Control

Policy Owner	Version	Approved by	Date last reviewed
Director, Regulatory Strategy and Performance	1.0	Executive Director, Quality Assurance and Regulatory Services	17 August 2020
Director, Regulatory Strategy, Policy and Practice	2.0	Executive Director, Quality Assurance and Regulatory Services	17 March 2021