



# INSTRUCTION GUIDE

## Approval to own or control an RSE licensee

12 October 2020

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## Introduction

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This Instruction Guide provides general information on making an application for approval to hold a stake of more than 15 percent in an RSE licensee under *the Superannuation Industry (Supervision) Act 1993* (the SIS Act) using the *Application Form – Approval to own or control an RSE licensee (Form RSELCC)*. It does not constitute legal advice.

For further information, visit APRA website at [www.apra.gov.au](http://www.apra.gov.au) or contact 1300 55 88 49 or by email at [licensing@apra.gov.au](mailto:licensing@apra.gov.au).

## Why apply to APRA?

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The controlling stake provisions in Division 8 of Part 2A of the SIS Act commenced on 5 July 2019.

A person is required to apply to APRA for approval to hold a controlling stake in an RSE Licensee *prior to* commencing to hold the controlling stake in an RSE Licensee.

It is an offence under s. 29JCB of the SIS Act to hold a controlling stake in an RSE licensee without APRA's approval.

## Criteria for approval

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In order for APRA to make a decision on the controlling stake application under s. 29HD of the SIS Act, the following criteria must be met:

- the application must be made in the approved form;
- any requested information under s. 29HB has been provided or the request has otherwise been disposed of; and
- APRA has no reason to believe that, because of the person's controlling stake in the RSE licensee, or the way in which that controlling stake is likely to be used, the RSE licensee may be unable to satisfy one or more of the trustee's obligations contained in a covenant set out in sections 52 to 53, or prescribed under section 54A.

Applicants need to ensure that all relevant supporting documentation is provided with their application.

## What is the application process?

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APRA's application process, as with its approach to supervision, is consultative. Each application is assigned a responsible supervisor who is the main contact for all matters related to the application.

Applicants must apply to APRA using *Form RSELCC*. Form RSELCC is available on the APRA website. Applicants will be able to submit a draft application by providing an electronic version to enable consultation with APRA prior to making an application for the purposes of s. 29HA of the SIS Act. While there is no legal obligation for APRA to comment on draft applications, APRA will endeavour to provide comments as soon as practicable.

Applicants are strongly encouraged to submit a draft application and to discuss their proposal with APRA before making an application for the purposes of s. 29HA of the SIS Act.

Applicants should be aware that APRA may request any additional information it considers necessary to assess the application under s. 29HA of the SIS Act post lodgement of Form RSELCC.

Applications will be processed within the period permitted under s. 29HC of the SIS Act.

Applicants will be notified in writing of APRA's decision.

Should APRA be inclined to decline an application, APRA will advise the Applicant of its preliminary view and the reasons for it. The Applicant will have the opportunity to provide reasons why the proposed decision should be reconsidered and this submission will be taken into account in APRA's final decision.

## Is there a prescribed fee?

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There is no application fee to apply for approval to own or control an RSE licensee.

## Penalties for false information

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Applicants should note that giving false or misleading information is a serious offence (see s. 136.1, s. 137.1 and s. 137.2 of the Criminal Code Act 1995). Where information is disclosed to APRA as part of this application, APRA may in turn disclose that information in any of the circumstances permitted by s. 56 of the *Australian Prudential Regulation Authority Act 1998*.

## Guidance on who needs to apply for approval

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This section provides guidance on the considerations to determine who will be the Applicant/s for the controlling stake application.

### Circumstances where a controlling stake approval may be required

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A controlling stake approval is required where a person will hold a stake of more than 15 per cent in the RSE licensee. The need for a controlling stake approval may arise in a number of circumstances including:

- a change of director of the RSE licensee where the director holds shares with voting power in an RSE Licensee (irrespective of whether the share/s is held beneficially or non-beneficially);
- a restructure of the share ownership structure within an RSE licensee;
- an acquisition of a corporate group (e.g. an acquisition of an RSE licensee/s as part of larger acquisition of a superannuation / wealth business group);
- changes to the shareholders of an ultimate holding company &/or holding company of an RSE licensee;
- the interposition of a new holding company between the RSE licensee and the ultimate holding company;
- a successor fund transfer that results in the issue or transfer of shares with voting power to a director, employer organisation or employee organisation; or
- ownership of a newly licensed RSE licensee.

### How to identify the relevant applicant/s

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To determine who is required to apply for controlling stake approval, APRA strongly recommends obtaining appropriate professional advice in order to identify all relevant applicants. It is not uncommon to have multiple individual and corporate applicants for a controlling stake application. Applicants must carefully consider all relevant definitions contained in Schedule 1 of the *Financial Sector (Shareholdings) Act 1998* (FSSA).

Applicants need to consider the following:

- (a) an applicant will hold a “controlling stake” in an RSE licensee that is a body corporate if they hold a “stake” of more than 15 per cent in the RSE licensee;<sup>1</sup>

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<sup>1</sup> See definition of “controlling stake” and “stake” in s. 10(1) of the SIS Act.

- (b) the SIS Act incorporates the definition of “stake” in the FSSA;<sup>2</sup>
- (c) a person’s “stake” in an RSE licensee is the aggregate of the “direct control interest” held by that person and the direct control interests held by “associates” of that person;<sup>3</sup>
- (d) a person holds a “direct control interest” in an RSE licensee equal to the percentage of the “voting power” in the RSE licensee that the person is in a position to control at that time;
- (e) the control of “voting power” relates to voting as a shareholder or otherwise participating in any decision-making concerning any of the following:
  - the making of distributions of capital or profits to the RSE licensee’s shareholders;
  - the constituent document of the RSE licensee;
  - any variation of the share capital of the RSE licensee;
  - any appointment of a director of the RSE licensee;<sup>4</sup> and
- (f) a person is taken to control the voting power in the RSE licensee which the person controls directly or indirectly.<sup>5</sup>

Particular attention needs to be given to the definition of “associates” in the FSSA as “associates” is widely defined.<sup>6</sup>

## Transitional provisions

Under the transitional provisions in the *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Act 2019*, if a person holds a controlling stake in an RSE licensee before 5 July 2019 (i.e. the commencement date) and continues to hold a controlling stake on or after that day, the person is deemed to have approval from APRA to hold a controlling stake in the RSE licensee. This approval is deemed for the period from the commencement day until when the person no longer holds a controlling stake.

Applicants need to consider the impact of the transitional provisions on any proposed restructure of the ownership arrangements of an RSE Licensee to see whether they still apply.

<sup>2</sup> See clause 10 of Schedule 1 of the FSSA.

<sup>3</sup> See clauses 4 and 11 of Schedule 1 of the FSSA.

<sup>4</sup> See clause 9 of Schedule 1 of the FSSA.

<sup>5</sup> See clause 9(2) of Schedule 1 of the FSSA.

<sup>6</sup> See clause 4 of Schedule 1 of the FSSA. The associate of the person must have a direct control interest in the RSE licensee: see clause 10(1A) of Schedule 1 of the FSSA.

# Guidance on completing the approval to own or control an RSE licensee form

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Guidance is provided on selected sections of Form RSELCC together with relevant commentary on selected items within these sections.

## Part A – General information

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All questions in the FORM RSELCC must be completed where applicable

Part A of the Form RSELCC requests general information about the Applicant including:

- identifying the relevant Applicant/s
- key contact details for the Applicant; and
- details of the transaction.

### Application details

The Applicant must select whether the application is to be treated as an application for the purposes of s. 29HA of the SIS Act or whether it is intended only as a draft application for the purposes of commencing preliminary discussions with APRA on the controlling stake transaction.

### A.1, A.2, A.3 and A.4 – Details of the Applicant

#### Identifying the relevant Applicant/s

Identify any person (i.e. individual or body corporate) who will hold a “controlling stake” in an RSE licensee (i.e. a “stake” of more than 15 per cent in the RSE licensee), subject to the transitional provisions. When making this assessment, it should be noted that the SIS Act incorporates the definitions of “stake”, “voting rights”, “direct control interest” and “associates” in Schedule 1 of the FSSA.

#### Contact persons

The contact persons must be available and have appropriate knowledge of the application to assist with any queries that APRA may have.

#### Historical ASIC company search (where applicable)

Attach a copy of an historical ASIC company search result for the Applicant. The search result must not be more than seven days old when the Applicant lodges their application.



## A.5 – Regulated by foreign regulator/s

The Applicant is to provide details on any foreign regulator/s they are regulated by.

## A.6, A.7 and A.8 – Details of current and proposed controlling stake

The Applicant is to provide details on whether they currently hold an existing stake in the RSE licensee subject to the application and proposed controlling stake. A copy of the constitution and an ASIC Historical company search for each RSE licensee must also be provided.

## A.9– Applicant background

A9.1 Indicate whether the Applicant:

- currently holds a controlling stake in any RSE licensee; and/or
- has previously held a controlling stake in any RSE licensee (including the RSE licensee which is the subject of this application),

and if so, provide details. If the Applicant is a body corporate, include any controlling stakes currently or previously held by directors of the Applicant. Include any controlling stakes held prior to the commencement of Division 8 of Part 2A of the SIS Act.

A9.2 Indicate whether the Applicant has any current or previous involvement in an RSE licensee. Involvement could include, but is not limited to, providing a service to an RSE licensee, appointment of individuals to Responsible Person positions within an RSE licensee or unsuccessful attempts to acquire a stake in an RSE licensee.

## A.10 – Change of RSE licensee details - Director

Where the proposal will result in a change of one or more directors on the Board of the RSE licensee at the time of acquiring the controlling stake, the Applicant must provide details of the change, including whether any current directors will be replaced.

### Position of Director

Indicate what position the director will occupy from the options below:

<b>Executive Director</b>	A director who is a member of the RSE licensee's management. Refer to SPS 510
<b>Non-Executive director</b>	A director who is not a member of RSE licensee's management. Refer to SPS 510
<b>Independent director</b>	An independent director within the meaning given in s. 10 of the SIS Act. Refer to sections 10 and 89 of the SIS Act.
<b>Employer representation</b>	A director nominated to represent the interests of an employer(s). Refer to sections 10 and 89 of the SIS Act.

<b>Executive Director</b>	A director who is a member of the RSE licensee's management. Refer to SPS 510
<b>Member representative</b>	A director nominated to represent the interests of members. Refer to sections 10 and 89 of the SIS Act.

### Chairperson of the Board

SPS 510 requires that the chairperson of the Board must be a director of the RSE licensee. Indicate whether the intention is that proposed director will also be the Chairperson of the Board of the RSE licensee.

### Fit and proper assessment

SPS 520 requires an RSE licensee's Fit and Proper Policy must require a fit and proper assessment to be completed before a person becomes the holder of a Responsible Person position. Please confirm that the fit and proper assessment for each proposed director has been completed. APRA may request evidence of the due diligence checks completed (if required).

A fit and proper assessment should include details of any civil or criminal proceedings or enforcement action (in Australia and/or overseas) against the proposed Responsible Person in relation to the management of an entity, or commercial or professional activities, which were determined adversely to the proposed Responsible Person.

This would also include any investigations by regulatory agencies, or where consent by the proposed Responsible Person to an order or direction or provision of an undertaking not to engage in certain conduct was given, and any other matters which reflect adversely on the person's competence, diligence, judgment, honesty or integrity.

Conduct and events that took place overseas may also be relevant to the assessment.

## A.11 – Change of RSE licensee details – Service Providers

Where the proposal includes a change to the service providers (who undertake a material business activity under SPS 231) to the RSE licensee at the time of acquiring the controlling stake, please specify details of these, including the type of service being provided and whether they will be an 'associate' of the RSE licensee (within the meaning of s. 12 of the SIS Act) if the application for the proposed controlling stake is approved. APRA may request a copy of the relevant outsourcing agreement if required.

## A.12 – Other business

Complete this section if the Applicant or any companies related to the Applicant are involved in a business other than relating to the proposed controlling stake in the RSE licensee.

### Description of business

Provide a description of the type of business, including information regarding the ownership and structure. The information provided should demonstrate the nature, size and complexity of the business.

## **Applicant's association with business**

Provide a description of the nature of the Applicant's association with the business. Include information regarding any contractual arrangements for services or other connection the Applicant may have with the business. Specify any shareholding the Applicant may have in the business or remuneration received from the business.

## **A.13 – Foreign Investment Review Board approval**

Indicate whether the Applicant/s is required to obtain FIRB approval for the acquisition of a controlling stake in the RSE licensee. Where FIRB approval is required, please note that Treasury consult with APRA when considering the FIRB approval.

## **Part B – Supporting Documentation**

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Part B requires additional documents to support the application and to demonstrate that, in the event APRA approves the change of control, there is no reason that the RSE licensee may be unable to satisfy one or more of the RSE licensee's obligations in the covenants set out in ss. 52 to 53 (or any prescribed under s. 54A).

It is recognised that the type of information provided by the Applicant for some items will vary depending on the Applicant's particular circumstances.

Applicants can provide a combined document covering the Controlling Stake Proposal, Business Plan and/or Risk Assessment as opposed to separate documents. Where the controlling stake application only relates to a change of an RSE licensee director, who is a shareholder, the Controlling Stake Proposal and Risk Assessment can be a concise, executive summary of the change of director circumstances.

## **B.1 - Proposal**

### **B1.1 Controlling Stake Proposal**

Attach a description of the proposal including but not limited to:

- the terms of the arrangement;
- the reasons for seeking approval of a controlling stake in the RSE licensee, including a diagram of the proposed corporate structure of the Applicant if the controlling stake is approved (i.e. incorporating the RSE licensee);
- details of the Applicant's experience, exposure and/or knowledge of superannuation operations, legislative / prudential requirements and Australia's regulated environment for RSE licensees and RSEs.
- details of any changes to the roles and responsibilities of Responsible Persons of the RSE licensee;
- details of how the shares are to be held (i.e. beneficially or non-beneficially);

- details of any changes to the financial resources of the RSE licensee (including where the financial resources held to meet the ORFR target amount are held directly by the RSE licensee as operational risk trustee capital);
- details of the fitness and proprietary checks undertaken for each Applicant;
- details of the likely effect on member outcomes (having regard to SPS 515) if the acquisition / change of ownership occurs;
- details of the financial resources to be provided to support the Office of Trustee or equivalent (i.e. dedicated risk function);
- if applicable, commitments to address any prudential supervisory issues identified by APRA with the RSE licensee that is the subject of the controlling stake application (e.g. specific licence conditions imposed on an RSE licence, any directions issued by APRA or APRA initiated action plans); and
- any other significant changes proposed to be implemented in the event the controlling stake is approved.

## **B1.2 Risk Assessment**

The Applicant must provide a risk assessment outlining the impact, if any, that the controlling stake proposal is expected to have on the RSE licensee and its RSE(s), including the RSE licensee's ability to satisfy the obligations in the covenants set out in ss. 52 to 53 (or any prescribed under s. 54A). The assessment should include (but not be limited to) consideration of the impact of the controlling stake proposal on members' best interests and member outcomes (including any proposed fee changes), conflicts of interest, adequacy of resources, risk governance (including operational and IT risks) and investment strategies.

## **B1.3 Business Plan (if applicable)**

In limited circumstances, an Applicant may not be required to provide a business plan. For example, where the controlling stake application is only required as a result of a director of the RSE licensee retiring and the appointment of a replacement director. The Applicant should contact their responsible supervisor if the nature of the proposal suggests a business plan may not be warranted.

In all other circumstances, attach a copy of the Applicant's business plan and a description of how the plan relates to the proposed operation and control of the RSE licensee. At a minimum, the business plan would:

- detail any changes to be made to the Business Plan for the RSE licensees;
- demonstrate the adequacy of the Applicant's resources (financial, technical, human) to support the RSE licensee meeting its objectives under its business plan and any new strategic direction of the RSE licensee;
- specify any contemplated changes to the RSE licensee or its offerings; and
- outline the Applicant's projected financial performance for the next 3 – 5 years.

#### **B1.4 Share Sale Agreement or equivalent (if applicable)**

Attach relevant transaction documents (e.g. sale of business agreement, share sale agreement, debt facility agreement) and any document referred to within the relevant transaction documents.

## **B.2 - Applicant documentation**

### **B2.1 Analysis of Applicants**

Details of the analysis undertaken to determine the applicant/s for the controlling stake application. A copy of any legal advice obtained on this issue may be provided to satisfy this item.

### **B2.2 Applicant's constitution or equivalent (if applicable)**

For corporate applicants, attach a copy of the Applicant's constitution or equivalent (e.g. LLC Operating Agreement) and any shareholder agreement(s). In addition, please provide details of any proposed changes to the constitution and/or shareholder agreement as a result of the controlling stake proposal.

Where there are multiple applicants due to the complex ownership/investor structure of the proposed owner, the Applicant should contact their responsible supervisor to clarify the extent of documentation required.

### **B2.3 Procedure for new investors and source of funds (if applicable)**

If the Applicant is not a publicly listed company on a stock exchange and has or will have multiple investors, a copy of the procedure (e.g. Fit and Proper procedure) relied upon for admitting new investors must be attached. Such a procedure should include details on:

- (a) the Fit and Proper probity checks undertaken for both individual and corporate applicants that meet the controlling stake requirements including:
  - ID check;
  - Bankruptcy insolvency check;
  - Australian criminal history check (Australians only);
  - International criminal history check (for the applicant's country of residence);
  - US Patriots Act or equivalents in other foreign jurisdictions;
  - AML/CTF check (includes global sanctions watch list and politically exposed persons, OFAC and DFAT);
  - APRA disqualified register;
  - ASIC Banned & Disqualified Persons check;
  - General media check (to see if there is any adverse publicity)
- (b) the process in place for assessing new investors and understanding the source of funds; including the risk-based assessment process and details of who will be responsible for implementing, managing and reviewing this process going forward; and

(c) the process in place to ensure the controlling stake requirements will be complied with.

#### **B2.4 Governing rules (if applicable)**

If the proposal includes a change to the governing rules for any RSE under trusteeship of the RSE licensee, attach a copy of the proposed changes.

### **Part C – Attestations**

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The Attestation in Part C must be completed by:

- (a) the Applicant, if the Applicant is a natural person;
- (b) two directors or a director and a company secretary, if the Applicant is a body corporate;  
or
- (c) an authorised representative of the Applicant.

In the case of multiple applicants submitting a joint application, an attestation from one Applicant or an authorised representative of the Applicants will be sufficient.

If the Applicant has indicated in Part A that the documentation is a draft application, the attestation in Part C is not required to be completed.

# Glossary

<b>ABN</b>	Australian Business Number
<b>AML/CTF</b>	The Anti-Money Laundering and Counter-Terrorism Financing Act 2006
<b>Applicant</b>	The person applying for the controlling stake in the RSE licensee.
<b>APRA</b>	Australian Prudential Regulation Authority
<b>associate</b>	As defined in Schedule 1 of FSSA Act
<b>proposal</b>	For the purposes of this application, the proposal is the document articulating the details of the proposed change of control or ownership of the RSE licensee which results in a controlling stake
<b>ASIC</b>	Australian Securities and Investments Commission
<b>beneficial owner</b>	For the purposes of this application, a 'beneficial owner' receives the benefit of shares held non-beneficially (e.g. a nominating member or employer association / organisation, or an employer-sponsor)
<b>controlling stake</b>	As defined in subsection 10(1) of the SIS Act
<b>DFAT</b>	Department of Foreign Affairs and Trade
<b>direct control interest</b>	As defined in Schedule 1 of FSSA Act
<b>FIRB</b>	Foreign Investment Review Board
<b>FSSA Act</b>	<i>Financial Sector (Shareholdings) Act 1998</i>
<b>material business activity</b>	<i>As defined in SPS 231</i>
<b>OFAC</b>	Office of Foreign Assets Control
<b>ORFR</b>	<i>Operational Risk Financial Requirement as defined in SPS 114.</i>
<b>Responsible Person</b>	As defined in SPS 520.

<b>RSE</b>	Registrable superannuation entity as defined under section 10 of the SIS Act
<b>RSE licence</b>	Registrable superannuation entity licence granted under section 29D of the SIS Act
<b>RSE licensee</b>	A constitutional corporation or body corporate that holds an RSE licence granted under section 29D of the SIS Act and who is the subject of the proposal
<b>SIS Act</b>	<i>Superannuation Industry (Supervision) Act 1993</i>
<b>SPS 114</b>	<i>Prudential Standard SPS 114 Operational Risk Financial Requirement.</i>
<b>SPS 231</b>	<i>Prudential Standard SPS 231 Outsourcing</i>
<b>SPS 510</b>	<i>Prudential Standard SPS 510 Governance</i>
<b>SPS 515</b>	<i>Prudential Standard SPS 515 Strategic Planning and Member Outcomes</i>
<b>SPS 520</b>	<i>Prudential Standard SPS 520 Fit and Proper</i>
<b>SPS 521</b>	<i>Prudential Standard SPS 521 Conflicts of Interest</i>
<b>Stake</b>	As defined in subsection 10(1) of the SIS Act and Schedule 1 of FSSA Act
<b>superannuation entity</b>	As defined in subsection 10(1) of the SIS Act
<b>voting rights</b>	As defined in Schedule 1 of FSSA Act





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