

Financial Sector (Shareholdings) determination No. 1 of 2019

EXPLANATORY STATEMENT

Prepared by the Australian Prudential Regulation Authority (APRA)

Financial Sector (Shareholdings) Act 1998, section 45A

Under paragraph 45A(1)(a) of the *Financial Sector (Shareholdings) Act 1998* (the Act), APRA has the power to make Rules prescribing matters required or permitted by the Act.

On 18 August 2019, APRA made Financial Sector (Shareholdings) determination No. 1 of 2019 (the instrument) which makes *Financial Sector (Shareholdings) Rules 2019* (FSSA Rules).

The instrument commences on the day it is registered on the Federal Register of Legislation.

1. Background

The Act regulates the ownership and acquisitions of prudentially regulated financial institutions to minimise risks associated with a concentration of ownership and thereby enhance the overall stability of the Australian financial system. Under section 13 of the Act, a person applying for approval to hold a stake of more than 20 per cent in a financial sector company may apply for approval under a ‘national interest’ test or by satisfying the decision maker that the applicant is a fit and proper person. Applicants can include individual persons, and corporate entities. Corporate entities in demonstrating their fitness and propriety must also demonstrate that their directors, chief executive or equivalent persons are fit and proper. Applicants are expected to provide sufficient information (which may include personal information about themselves or their directors, chief executives or equivalent) to satisfy the decision maker under the relevant test.

Applications based solely on fitness and propriety were introduced into the Act by the *Treasury Laws Amendment (Financial Sector Regulation) Act 2018* (the amending Act) from 1 April 2019. This is a streamlined approval path that is limited to the holding of a stake in a new or recently established domestically-incorporated authorised deposit-taking institution, general insurer or life company with assets below the relevant threshold, or a 100 per cent holding company of such an entity.

Under the streamlined approval path, applicants are not assessed against the national interest framework. Approvals granted under the streamlined path will require the holder of the approval to provide relevant information to APRA annually.

Purpose and operation of the instrument

The amending Act introduced paragraph 45A(1)(a) of the Act, which provides APRA with the power to make rules by legislative instrument prescribing matters required or permitted by the FSSA. To this end, the purpose of the instrument is to make the FSSA Rules, which prescribe:

- matters that must be considered in determining whether a person is fit and proper for the purposes of the Act (subsection 14A(2) of the Act);
- the meaning of ‘total resident assets’ used to determine whether a financial sector company’s assets are less than the relevant assets threshold (subsection 14A(5) of the Act); and
- the information to be provided to APRA annually, as a condition of approval under subsection 14(1)(b) (paragraph 16A(5)(b) of the Act).

Where the FSSA Rules refers to an Act or reporting standard, this is a reference to the document as it exists from time to time, and which is available on the Federal Register of Legislation at www.legislation.gov.au.

2. Consultation

APRA undertook a public consultation on the proposed FSSA Rules between March 2019 and May 2019. A single submission was received.

The submission proposed that amendments be made to the Act or, in the alternative, that approvals or exemptions be granted, in relation to an ADI which is also a charity registered with the Australian Charities and Not-for-Profits Commission. This proposal falls outside of the power to make rules under the Act.

4. Regulation Impact Statement

The Office of Best Practice Regulation has advised that a Regulation Impact Statement is not required for this legislative instrument.

5. Statement of compatibility prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

A Statement of compatibility prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is provided at Attachment A to this Explanatory Statement.

ATTACHMENT A

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Financial Sector (Shareholdings) determination No. 1 of 2019

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (HRPS Act)

Overview of the Legislative Instrument

The purpose of making this legislative instrument is to make the *Financial Sector (Shareholdings) Rules 2019* (FSSA Rules), which prescribe:

- matters that the Treasurer or the Treasurer’s delegate must consider in determining whether a person is fit and proper for the purposes of holding a stake of more than 20 per cent in qualifying financial sector companies under the *Financial Sector (Shareholdings) Act 1998* (the Act);¹
- the meaning of ‘total resident assets’ used to determine whether a financial sector company’s assets are less than the relevant assets threshold; and
- the information to be provided to APRA annually, as a condition of an approval to hold a stake of more than 20 per cent in a qualifying financial sector company.

The FSSA Rules apply to applicants for approval to hold a stake of more than 20 per cent in a new or recently established domestically-incorporated authorised deposit-taking institution, general insurer or life company with assets below the relevant threshold, or a 100 per cent holding company of such an entity.

Human rights implications

APRA has assessed the instrument against the international instruments listed in section 3 of the HRPS Act and determined that only Article 17 of the International Covenant on Civil and Political Rights (ICCPR) is potentially of relevance to the instrument.

¹ A ‘financial sector company’ is an authorised deposit-taking institution (such as a bank, credit union or building society), general insurer or life company, or a 100 per cent holding company of any of these entities. The Treasurer’s power to approve an application to hold a stake of more than 20 per cent in a financial sector company that is below a specified asset limit has been delegated to certain APRA staff members.

Article 17 of the ICCPR prohibits the arbitrary or unlawful interference with a person's privacy, family, home and correspondence, and attacks on reputation. Article 17 is exclusively concerned with prohibiting interference with the privacy and/or reputation of individual persons. It does not extend to the privacy and/or reputation of corporate entities.

The Act regulates the ownership and acquisitions of prudentially regulated financial institutions to minimise risks associated with a concentration of ownership and thereby enhance the overall stability of the Australian financial system. Under section 13 of the Act, a person applying for approval to hold a stake of more than 20 per cent in a financial sector company may apply for approval under a 'national interest' test or by satisfying the decision maker that the applicant is a fit and proper person. Applicants can include individual persons, and corporate entities. Corporate entities in demonstrating their fitness and propriety must also demonstrate that their directors, chief executive or equivalent persons are fit and proper. Applicants are expected to provide sufficient information (which may include personal information about themselves or their directors, chief executives or equivalent) to satisfy the decision maker under the relevant test.

The FSSA Rules prescribe matters that must be considered in determining whether a person is a fit and proper person, such as the honesty, integrity, reputation, competence, capability and financial soundness of the person. However, the Rules do not limit the matters that may be considered.

The personal information that applicants provide to the decision maker for the purposes of demonstrating the matters prescribed under the FSSA Rules is essential to the effective operation of the Act to ensure that only persons with appropriate reputation, competence and financial soundness are able to control financial sector companies. This information ultimately supports the objects of the *Banking Act 1959*, *Insurance Act 1973* and *Life Insurance Act 1995* to protect the interests of depositors, policyholders and owners of life insurance policies, and to promote financial system stability in Australia.

Information and documents provided to the Treasurer or the Treasurer's delegate are protected information and protected documents for the purposes of section 56 of the *Australian Prudential Regulation Authority Act 1998* and cannot be disclosed except under a limited range of circumstances provided for under that section.

Conclusion

Financial Sector (Shareholdings) determination No. 1 of 2019 is compatible with human rights because to the extent that this determination limits human rights, those limitations are reasonable, necessary and proportionate.