
FINANCIAL SECTOR (SHAREHOLDINGS) AMENDMENT (RELAXING
OWNERSHIP RESTRICTIONS) BILL 2018

EXPOSURE DRAFT EXPLANATORY MATERIALS

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
ADIs	Authorised Deposit-taking Institutions
APRA	Australian Prudential Regulation Authority
FSSA	<i>Financial Sector (Shareholdings) Act 1998</i>

Chapter 1

Reducing restrictions on shareholdings in financial sector companies

Outline of chapter

1.1 To support new entrants to the financial services market, while maintaining appropriate safeguards to protect consumers and financial system stability against risks associated with concentrated ownership of financial sector companies, the 15 per cent ownership restriction applying to insurance companies (life insurance and general insurance companies), Authorised Deposit-taking Institutions (ADIs) - broadly banks, credit unions and building societies, and relevant holding companies under the *Financial Sector (Shareholdings) Act 1998* (FSSA) will be increased to 20 per cent.

1.2 This Schedule also introduces a streamlined FSSA approval path for owners of domestically incorporated companies applying to become a new financial sector company (or those proposing to acquire shares in entities licensed by the Australian Prudential Regulation Authority (APRA) for fewer than five years). These owners may be eligible to receive streamlined approval to hold a stake of more than 20 per cent where certain criteria are met.

1.3 These criteria include a fit and proper assessment of the prospective owners and maximum asset holdings of the entity sought to be acquired.

1.4 Removing perceived barriers to entry in the sector should encourage greater start-up activity with the intention of increasing competition and offering consumers more choice in this critical part of the Australian economy.

Context of amendments

1.5 The FSSA operates independently to the *Foreign Acquisitions and Takeovers Act 1975* to provide an upper limit restricting the allowable shareholdings of an ADI or an authorised insurance company (as authorised under the *Insurance Act 1973* and registered under section 21 of the *Life Insurance Act 1995*, respectively).

1.6 Currently, the FSSA outlines that an unacceptable shareholding situation will exist for a financial sector company (defined in the FSSA as an ADI, an authorised insurance company or a 100 per cent holding

company) if a person has shareholdings exceeding the legislated percentage amount or shareholdings which exceed the higher approved percentage made in accordance with Division 3 of the FSSA.

1.7 A higher percentage approval is required to exceed the minimum acceptable shareholding amount. To receive this, a person must apply to the Treasurer for approval to hold more than the legislated shareholding limit in a financial sector company (either at the time of market entry or following a change of ownership). Approval can be granted if the Minister determines it to be in the ‘national interest’.

Summary of new law

1.8 To encourage more participation and greater competition in the financial sector market, the shareholding rules are amended to increase the minimum shareholding amount requiring approval from 15 to 20 per cent.

1.9 In addition, the Schedule creates a streamlined path for owners of domestically incorporated companies with assets less than the relevant threshold applying to become a financial sector company. This will enable owners who are found to be fit and proper persons to hold a stake of more than 20 per cent in a qualifying new or recently established financial sector company.

1.10 All references in this explanatory memorandum are to the *Financial Sector (Shareholdings) Act 1998* unless otherwise specified.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
The new threshold for an unacceptable shareholding situation will occur when a person has shareholdings in excess of 20 per cent or an amount in excess of a higher approved amount.	Section 10 of the FSSA provides that an unacceptable shareholding situation will exist for a financial sector company if a person holds more than 15 per cent or an amount in excess of a higher approval percentage made in accordance with Division 3 of the FSSA.
Section 14A will provide a streamlined FSSA approval path for owners of domestically incorporated companies that are applying to become a financial sector company or those recently registered or authorised.	Section 13 of the FSSA currently requires a person to apply to the Treasurer for approval to hold a stake of more than 15 per cent in a financial sector company (either at the time of market entry or following a change of ownership), with approval granted if

<p>If the owners meet a fit and proper test and comply with ongoing conditions then they will be able to exceed the 20 per cent shareholding limit.</p>	<p>the relevant Minister determines it to be in the 'national interest'.</p>
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Detailed explanation of new law

1.11 This Schedule puts in place a higher shareholding threshold under the FSSA, increasing the percentage of permitted ownership from 15 per cent to 20 per cent. This applies in relation to a financial sector company or a holding company of a financial sector company where the financial sector company is a 100 per cent subsidiary of the holding company. This increase balances the desire for increased competition in the financial sector market with the need to maintain appropriate checks and best ensuring financial system stability. *[Schedule 1, items 2 to 8 and item 12, Part 2, Division 2, Division 3, sections 10 and 13]*

1.12 The increase to a 20 per cent shareholding removes a misalignment between the 15 per cent ownership cap under the FSSA before Ministerial approval is required, and the 20 per cent foreign ownership threshold that exists under the *Foreign Acquisitions and Takeover Act 1975* (FATA). There is limited policy rationale for this discrepancy and consistency between the thresholds in each Act will simplify investment in Australia's financial system and further signal the Government's commitment to encouraging new entrants to the sector.

1.13 The Bill gives the Treasurer the power to approve an unacceptable shareholding arrangement if the applicant is able to satisfy the Treasurer that holding a stake of more than 20 per cent is in the national interest.

1.14 In addition to amending the threshold for approvals from 15 per cent to 20 per cent, this Schedule also puts in place a new streamlined path for owners of qualifying domestically incorporated companies that are seeking to become a financial sector company. It is expected that only a minority of FSSA applications will be eligible to access this path.

1.15 If a company is incorporated in Australia and is not yet a 'financial sector company' but is seeking authority under:

- (i) the *Banking Act 1959* to carry on banking business;
- (ii) authorisation under the *Insurance Act 1973* to carry on an insurance business; or

(iii) registration under the *Life Insurance Act 1995* to undertake a life insurance business (any of which, if granted, would make the company a financial sector company),

or has been licensed as a financial sector company for fewer than five years [*Schedule 1, item 16, subsections 14A(3) and 14A(4)*], and the company meets the asset threshold test described below, the owners may apply to the Treasurer, using the streamlined FSSA approval path, for authority to hold a stake in excess of 20 per cent.

New or recently established financial sector company

Asset threshold

1.16 There is an asset threshold that must be met before an owner will be able to seek authorisation under the streamlined path for new entrants.

1.17 In relation to an ADI or a company registered under section 21 of the *Life Insurance Act*, the value of the total resident assets of that company must be less than the assets threshold of \$200 million or any amount prescribed by the Treasurer in a legislative instrument. [*Schedule 1, item 16, subsections 14A(6) and 14A(8)*]

1.18 If the relevant company is authorised under the *Insurance Act*, the asset threshold applying in relation to the streamlined path is total resident assets of \$50 million, or another amount as prescribed by the Treasurer in a legislative instrument. [*Schedule 1, item 16, subsections 14A(7) and 14A(8)*]

1.19 Enabling the Minister to prescribe different amounts in the rules builds into the regime a flexibility to ensure that the scheme, and thresholds, remain relevant into the future. This is consistent with the overarching theme of encouraging new entrants into the financial sector.

1.20 Rules must be made by APRA which set out the meaning of total resident assets [*Schedule 1, items 16 and 45, subsection 14A(5) and section 45A*]. It is expected that these rules will refer to the approach to determine total assets as reported by financial sector companies in compliance with Reporting Standard ARS 320.0, made under section 13 of the *Financial Sector (Collection of Data) Act 2001*.

1.21 Approval under the streamlined path is subject to a ‘fit and proper’ test.

Fit and proper test

1.22 First, the owners must be able to demonstrate that they meet a fit and proper person test.

1.23 This test will be set out by APRA in a legislative instrument. The Government expects that APRA will consult with industry prior to finalising the fit and proper rule. Ministerial consent is also required prior to APRA making a rule under the FSSA. *[Schedule 1, items 16 and 45, subsection 14A(2) and section 45A]*

Time limit

1.24 If the owners are able to meet the fit and proper test, then the relevant company must be either a company that has applied to be a financial sector company or a company that has been a financial sector company for less than 5 years. *[Schedule 1, item 16, subsections 14A(3) and (4)]*

1.25 If a financial sector company is able to meet the threshold tests, outlined below, but has been a financial sector company for greater than 5 years, then these changes will not apply to it. The amendments are designed to assist new entrants to the financial sector.

Additional conditions applying to FSSA approvals for newly established financial sector companies

1.26 Approvals granted under the streamlined path are also subject to any conditions that may be applied by the Treasurer in granting the approval. *[Schedule 1, item 25, subsection 16A(1)]*

1.27 In addition, the following conditions apply to all streamlined approvals granted under paragraph 14(1)(b):

- notifying the Treasurer in writing if the assets threshold is breached;
- five yearly review of the ownership structure of the relevant financial sector company; and
- yearly reporting of information to APRA.

Notification if the assets threshold is exceeded

1.28 Owners of domestically incorporated companies approved under the streamlined path will remain bound by the assets thresholds noted above (at paragraphs 1.16 to 1.20) with approval conditional on the entity holding assets of lesser value than prescribed. When a financial sector company breaches these asset thresholds, and the company has a shareholder who is an owner with a streamlined FSSA approval (granted under paragraph 14(1)(b)), the financial sector company is obliged to provide the owner with a notice advising that the company has breached the asset threshold. *[Schedule 1, item 35, section 21A]*

1.29 Once the owner is made aware that the company has exceeded the assets threshold, the owner must give a written notice of this to the

Treasurer within 30 days and that notice should specify whether the owner intends to reduce their stake in the financial sector company or if they intend to apply for an approval under paragraph 14(1)(a), subject to the national interest test. *[Schedule 1, item 25, subsection 16A(2)]*

Five yearly review of ownership structure

1.30 Where an approval is granted under the streamlined path provided by paragraph 14(1)(b), APRA will review the ownership structure of the financial sector company that is the subject of the FSSA approval.

1.31 This review will occur at the end of each 5 year period following the initial approval being granted. The intention behind these reviews is to ensure that the ownership structure remains appropriate for the financial sector company and gives APRA an insight into any issues that may be arising within the company relating to the ownership. *[Schedule 1, item 25, subsection 16A(3)]*

Yearly reporting of information to APRA

1.32 The final condition on all streamlined approvals is the provision of a yearly report to APRA to advise the regulator of any prudential information that is relevant to the ongoing operation of the approval. These reports must be submitted by the approval holder. *[Schedule 1, item 25, subsection 16A(4)]*

1.33 The report must be in the approved form and contain the information (if any) prescribed in rules made by APRA. The report must be provided to APRA within 30 days. *[Schedule 1, item 25, subsection 16A(5)]*

Duration of approval under the streamlined path

1.34 If an approval has been granted to owners under the path outlined above (see paragraphs 1.14 – 1.15) these approvals generally remain in place until the end of two years after the value of the total resident assets of the financial sector company first exceeded the assets threshold applying to a company of that type. After this time, without divestment, an unacceptable shareholding situation would exist. *[Schedule 1, item 22, section 15A]*

1.35 In practice this means that an approval holder will have two years to rectify the unacceptable shareholding situation by either divesting their shares or seeking approval to hold the higher stake.

1.36 If the approval holder is unable to divest their interest in order to have less than a 20 per cent ownership stake in the relevant company, the approval holder may seek to maintain their current shareholding (or an

amount higher than 20 per cent) via an application under paragraph 14(1)(a) which is subject to the national interest test.

1.37 If the approval holder applies for approval under paragraph 14(1)(a) within 90 days of the day that is two years after the value of the total resident assets of the financial sector company first exceeded the assets threshold, the streamlined approval originally given under the streamlined approach will remain in force for varying periods depending on the outcome of the application (see paragraphs 1.38 to 1.41).

1.38 If the application is refused, then the approval holder will have two years from the date the application was refused in order to rectify the unacceptable shareholding arrangement. Within that period, the original approval granted under section 14(1)(b) will continue to apply. *[Schedule 1, item 22, paragraph 15A(2)(a)]*

1.39 When seeking an application under section 14, an applicant may be requested by the Treasurer to provide further information (under section 20 of the FSSA). If the applicant is unable to provide or does not provide the Treasurer with the additional requested information, then the application will be taken to have been withdrawn by the applicant. *[Schedule 1, item 34, subsection 20(4)]*

1.40 In these cases, the approval holder will have two years from the date the application is taken to have been withdrawn to rectify the unacceptable shareholding situation. *[Schedule 1, item 22, paragraph 15A(2)(b)]*

1.41 Where an approval holder's application under the national interest test is granted by the Treasurer, then the existing application that applied before the assets threshold was exceeded and the shareholding situation became unacceptable, will apply until the new approval comes into effect. *[Schedule #, item 22, paragraph 15A(2)(c)]*

1.42 If the approval holder applies for approval under paragraph 14(1)(a) 90 days after the day that is two years after the value of the total resident assets of the financial sector company first exceeded the assets threshold, and the application is granted within two years, the original approval given under the streamlined process will remain in force until the new approval comes into force. *[Schedule 1, item 22, subsection 15A(3)]*

1.43 If an approval under the FSSA ceases to be in force, the Treasurer must notify the public via publication in the Gazette and notify the financial sector company concerned. *[Schedule 1, item 22, subsection 15A(5)]*

Flow-on approvals relating to new or recently established financial sector companies

1.44 If an owner has an approval to hold a stake greater than 20 per cent in a financial sector company under the streamlined path provided by paragraph 14(1)(b) and the financial sector company is the holding company of the relevant licensed company for the approval, the approval holder is considered to also have an approval in place in respect of the relevant licensed company and any financial sector company that is both a 100 per cent subsidiary of the holding company and a holding company of the relevant licensed company. *[Schedule 1, item 33, section 19A]*

1.45 These flow-on approvals ensure that owners are able to hold an interest in a financial sector company via a holding company, provided that the financial sector company remains a 100 per cent subsidiary of the relevant holding company.

1.46 However, if the relevant licensed company subject to the approval ceases to be a 100 per cent subsidiary of the holding company, then the approval that was in force will continue for 90 days after the day the ownership structure of the licensed company changes.

1.47 The owner may also seek approval under a new application to continue to hold an interest exceeding 20 percent in the relevant licensed company. If a further approval is obtained, then the existing approval (under the streamlined path) will continue in force until the new approval commences. *[Schedule 1, item 33, section 19A]*

Civil penalties

1.48 The *Regulatory Powers (Standard Provisions) Act 2014* provides the framework for enforcement of civil penalties under the FSSA. *[Schedule 1, items 40 and 41, sections 41A and 43A]*

1.49 Penalties can be sought by the Treasurer or APRA where a financial sector company has failed to report that it has breached the assets threshold applying to it. The relevant company will have seven days within which to provide APRA with a report which details their total resident assets and the report must specify the day on which the threshold was breached.

1.50 This is important as the first day the threshold was breached interacts with the duration of an approval granted under the FSSA. As outlined above, once an approval holder is notified by the financial sector company that the company has breached the relevant assets threshold, the approval holder must decide whether to divest their shareholdings or seek an approval under the national interest test (see paragraphs 1.34 to 1.43).

APRA rules

1.51 APRA has been provided with the power to make rules with respect to matters that are required or permitted by the FSSA. These rules will include the information required in the yearly report that must be provided to APRA by the holder of an approval under the streamlined path. *[Schedule 1, items 25 and 45, subsection 16A(5) and section 45A]*

1.52 The rules must also prescribe the meaning of total resident assets in order to provide certainty to financial sector companies so they are able to meet their obligations to advise the holder of an FSSA approval that the company has breached the assets threshold applying to that type of company. *[Schedule 1, items 16 and 45, subsection 14A(5) and section 45A]*

1.53 The Schedule clarifies the scope of APRA's rule making power, including noting that it does not extend to creation of an offence or civil penalty. *[Schedule 1, item 45, subsection 45A(5)]*

1.54 Ministerial consent to the rules will be required so that the Minister retains oversight of the rule making process. The Minister is prevented from delegating his or her power to consent to the making of the rules. The rules are also legislative instruments, providing the Parliament with the ability to oversight and, if it views appropriate, disallow the rule. *[Schedule 1, items 44 and 45, subsection 44(1A) and section 45A]*

1.55 Further consequential amendments are made in order to ensure internal consistency within the FSSA. *[Schedule 1, item 2, items 9 to 11 and item 13, items 17 to 21, items 23 and 24, items 26 to 32, items 36 to 39, items 42 and 43, item 46 and 47]*

Application and transitional provisions

1.56 The amendments made by this Schedule apply the first 1 January, 1 April, 1 July or 1 October to occur after the end of the period of 2 months beginning on the day this Act receives the Royal Assent.

1.57 Transitional provisions are enacted to clarify the application of the changes to existing applications and approvals.

Existing approvals to hold a stake of more than 20 per cent

1.58 Item 48 of the Schedule provides that an application approving a shareholding exceeding 20 per cent that was made under section 14 of the FSSA and remains in force immediately before the commencement of these amendments, continues in force and is not affected by the amendments. *[Schedule 1, item 48]*

1.59 Similarly, if a shareholding exceeding 20 per cent has been approved under section 14 and the applicant has made an application:

- to obtain an extension of the period of approval under subsection 15(2); or
- in relation to the conditions to which the approval is subject under paragraph 16(3)(b) or
- to vary the percentage specified in the approval under subsection 17(1)

1.60 The shareholding approval remains in force and the application continues to be pending approval. *[Schedule 1, item 48]*

Existing approvals to hold a stake of more than 15 per cent but less than 20 per cent

1.61 Item 49 of the Schedule provides transitional guidance where an applicant has an existing approval to hold an ownership stake of more than 15 per cent but less than 20 per cent under the FSSA.

1.62 In this case, unless the applicant has sought to vary the shareholding amount above 20 per cent by application to the Treasurer, made before the commencement of these provisions, then the approval is no longer required and ceases to have effect. *[Schedule 1, item 49]*

1.63 If an approval holder is entitled to hold a shareholding between 15 per cent and 20 per cent prior to the commencement of this Schedule and the approval holder has applied under subsection 17(1) to vary the percentage of ownership above 20 per cent but a decision on this application is still pending, the application continues to have effect. *[Schedule 1, item 49]*

1.64 If the application to vary above 20 per cent is not approved, the original approval will cease to have effect as it applies to a shareholding below 20 per cent.

Pending application to approve more than 20 per cent shareholding

1.65 If an application has been made under section 13 of the FSSA before the commencement of this Schedule and the applicant is seeking approval to hold a stake of greater than 20 per cent in a financial sector company, the approval will be taken to have been made pursuant to the national interest test in paragraph 14(1)(a) of the FSSA. *[Schedule 1, item 50]*

Pending application for approval below 20 per cent but more than 15 per cent

1.66 If an applicant has sought approval under section 14 of the FSSA for a shareholding below 20 per cent and a decision on that approval is still pending on the commencement of this item, the

application is no longer required and the application is therefore taken never to have been made. *[Schedule 1, item 51]*

Notices requiring further information

1.67 Subsections 20(4) and (5) of the FSSA, as added by this Schedule, do not apply in relation to an application made under Division 3 of Part 2 of the FSSA before the commencement of this item. *[Schedule 1, item 52]*