

EXPOSURE DRAFT

EXPLANATORY STATEMENT

Issued by authority of the Assistant Treasurer

Financial Sector (Transfer and Restructure) Act 1999

Financial Sector (Transfer and Restructure) Regulations 2018

The *Financial Sector (Transfer and Restructure) Act 1999* (the Act) provides the Australian Prudential Regulation Authority (APRA) with directions governing how it treats voluntary and compulsory transfers of business, and compulsory transfers of shares, of regulated or related bodies.

Section 47 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Subsection 43(4) of the Act provides that provisions of another Act may be prescribed and modified by regulation with the effect that they apply, as modified, in relation to a transfer of business, transfer of shares or in relation to a restructure that takes effect or may take effect under the Act.

Subsection 11(2) of the Act states that APRA must not approve a voluntary transfer of business if, having regard to legislation that is prescribed for the purposes of subsection 43(4), it considers the transfer should not be approved.

For compulsory transfers, failure to comply with the prescribed legislation will not prevent a transfer from taking effect. However, parties to the transfer are still obliged to comply with the prescribed legislation (i.e. to have applied for and obtained the relevant approvals) and will be subject to any associated penalties or remedies if they fail to do so.

The purpose of the *Financial Sector (Transfer and Restructure) Regulations 2018* (the Regulations) is to remake the *Financial Sector (Transfers of Business) Regulations 1999* (the 1999 Regulations) prior to ‘sunsetting’. The *Legislation Act 2003* provides that all legislative instruments, other than exempt instruments, are automatically repealed on or after the tenth anniversary of registration. The 1999 Regulations will be automatically repealed on 1 April 2019. Legislative instruments generally cease to have effect after a specific date unless further legislative action is taken to extend their operation, such as remaking the instrument.

The Regulations remake the 1999 Regulations by restructuring provisions to align with current drafting practices. References to the empowering Act are also updated. These changes do not alter the substantive meaning or operation of the provisions.

Details of the Regulations are set out in the Attachment.

The Act specifies no conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003* and commence on the day after registration on the Federal Register of Legislation.

Details of the *Financial Sector (Transfer and Restructure) Regulations 2018*

This Attachment sets out further details of the *Financial Sector (Transfer and Restructure) Regulations 2018* (the Regulations). All references are to the Regulations unless otherwise stated. References to a ‘corresponding provision’ are to the corresponding provision in the *Financial Sector (Transfers of Business) Regulations 1999* (the 1999 Regulations).

Changes of a minor or machinery nature, such as references to section rather than regulation in accordance with modern drafting practices, are generally not specifically identified in this Attachment. Where the Regulations make changes that require further explanation, these are identified and explained in this Attachment.

Section 1- Name of Regulations

This section provides that the title of the Regulations is the *Financial Sector (Transfer and Restructure) Regulations 2018*.

The name of the Regulations has been updated to reflect the name of the empowering Act.

Section 2 - Commencement

This section provides that the Regulations commence the day after registration.

Section 3 - Authority

This section provides that the Regulations are made under the *Financial Sector (Transfer and Restructure) Act 1999* (the Act).

Section 4 - Schedules

This section provides that each instrument that is specified in a Schedule to the Regulations is amended or repealed as set out in the applicable items in the Schedule concerned, and any other items in a Schedule to this instrument has effect according to its terms.

Section 5 - Definitions

This section defines terms used in the Regulations.

Sections 6 to 9

Subsection 43(4) of the Act provides that provisions of another Act may be prescribed and modified by regulation with the effect that they apply, as modified, in relation to a transfer of business, transfer of shares or in relation to a restructure that takes effect or may take effect under the Act.

Section 6 - Relationship of the Act with the *Administrative Decisions (Judicial Review) Act 1977*

Section 6 replicates the corresponding provision in the 1999 Regulations and continues to modify the operation of the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) to a transfer of business. It also expressly applies the ADJR Act to a transfer of shares or a restructure.

The ADJR Act applies to administrative decisions made under the Act. However, section 6 modifies its operation so that a person may not claim a breach of the rules of

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natural justice when applying to a Court for an order to review APRA's decisions relating to these regulations. All other grounds for seeking review remain available.

This modification is required to support the stability of the financial system. Due to the nature of certain Authorised Deposit Institutions (ADIs), such as banks, a delay or perceived delay in the transfer or restructure of an institution could adversely affect a large number of stakeholders, potentially preventing them from accessing their funds in this institution. This could lead to decreased confidence in the financial system, further worsening any stress event. This modification grants the assurance that transfers of business may be executed expediently under such circumstances, whilst still maintaining a balance with established rights of review. Preserving the stability of the financial sector is a critically important objective of APRA, as set out in section 8 of the *Australian Prudential Regulation Authority Act 1998*.

There is no change from the current policy or operation.

Section 7 - Relationship of the Act with the *Banking Act 1959*

Section 7 replicates the corresponding provision in the 1999 Regulations and continues to apply the *Banking Act 1959* (the Banking Act) to a transfer of business. It also expressly applies the Banking Act to a transfer of shares or a restructure.

Given that subsection 43(8) of the Act expressly provides that nothing may limit the operation of section 63 of the Banking Act, the carve out and note in the 1998 Regulations have not been replicated in section 7 of the Regulations.

There is no change from the current policy or operation.

Section 8 - Relationship of the Act with the *Financial Sector (Shareholdings) Act 1998*

Section 8 replicates the corresponding provision in the 1999 Regulations and continues to modify the operation of the *Financial Sector (Shareholdings) Act 1998* (the Shareholdings Act) by reading in section 13A to the Shareholdings Act in relation to the transfer of business. This prescribes an ownership restriction of 15 per cent before a business must seek the Treasurer's approval to hold the transferring business. It also expressly applies the Shareholdings Act to a transfer of shares or a restructure to ensure there is no doubt as to whether the Shareholdings Act applies.

There is no change from the current policy or operation.

Section 9 - Relationship of the Act with certain other laws

Section 9 replicates the corresponding provision in the 1999 Regulations and continues to apply the *Foreign Acquisitions and Takeovers Act 1975* and the *Insurance Acquisitions and Takeovers Act 1991* in relation to the transfer of business. It also expressly applies those Acts to a transfer of shares or a restructure to ensure there is no doubt as to whether those Acts apply.

Those Acts contain other requirements of an approvals and notification nature that generally apply to the financial sector.

There is no change from the current policy or operation.

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Schedule 1 - Repeals

This schedule provides for the repeal of the 1999 Regulations as the instrument is due to sunset on 1 April 2019 and is being remade by the proposed Regulations.

Under section 7 of the *Acts Interpretation Act 1901*, as applied to legislative instruments by subsection 13(1) of the *Legislation Act 2003*, the repeal of the 1999 Regulations does not affect its previous operation.

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Finding table

As a result of some of the changes described above, it became necessary to renumber provisions of the proposed Regulations. Below is a finding table to assist in identifying which provision in the proposed Regulations corresponds to a provision in the 1999 Regulations that has been rewritten.

References to the old law in the below table are to the 1999 Regulations. References to the new law are to the 2018 Regulations. Also, in the finding table, 'no equivalent' means that this is a new provision that has no equivalent in the old law, and vice versa.

<i>Old law</i>	<i>New Law</i>
<i>Financial Sector (Transfers of Business) Regulations 1999</i>	<i>Financial Sector (Transfer and Restructure) Regulations 2018</i>
1 – Name of Regulations	1 – Name
2 – Commencement	2 – Commencement
No equivalent	3 – Authority
No equivalent	4 – Schedules
3 – Definitions	5 – Definitions
4 – Relationship of Act with <i>Administrative Decisions (Judicial Review) Act 1977</i>	6 – Relationship of the Act with the <i>Administrative Decisions (Judicial Review) Act 1977</i>
5 – Relationship of Act with <i>Banking Act 1959</i>	7 – Relationship of the Act with the <i>Banking Act 1959</i>
6 – Relationship of Act with <i>Financial Sector (Shareholdings) Act 1998</i>	8 – Relationship of the Act with the <i>Financial Sector (Shareholdings) Act 1998</i>
7 – Relationship of Act with certain other laws	9 – Relationship of the Act with certain other laws
No equivalent	Schedule 1 – Repeals