



Financial Sector (Shareholdings) Act 1998

No. 55, 1998



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**An Act relating to shareholdings in certain
financial sector companies, and for related
purposes**

Contents

Part 1—Preliminary	1
1 Short title.....	1
2 Commencement.....	2
3 Definitions.....	2
4 Holding companies.....	3
5 Crown to be bound.....	3
6 External Territories.....	3
7 Extra-territorial operation.....	3
Part 2—Restrictions on shareholdings in financial sector companies	4
Division 1—Introduction	4
8 Simplified outline.....	4
9 Definitions in Schedule 1.....	5
Division 2—15% shareholding limit	6
10 Meaning of <i>unacceptable shareholding situation</i>	6
11 Acquisitions of shares.....	6
12 Remedial orders.....	7
Division 3—Approval to exceed 15% shareholding limit	9
13 Application for approval to exceed 15% shareholding limit.....	9
14 Approval of application.....	9
15 Duration of approval.....	10
16 Conditions of approval.....	11
17 Varying percentage stake approved.....	12
18 Revoking an approval.....	13
19 Flow-on approvals.....	14
20 Further information about applications.....	15
21 Electronic lodgment of applications.....	15
Division 4—Practical control where 15% shareholding limit not exceeded	17
22 Meaning of <i>control</i>	17
23 Treasurer may declare person to have practical control of a financial sector company.....	17
24 Requirement to relinquish practical control or reduce stake.....	18
25 Remedial orders.....	19

Division 5—Record-keeping and giving of information	21
26 Record-keeping and giving of information.....	21
Division 6—Ancillary matters	23
27 Provision to attract the corporations power, the banking power and the insurance power	23
28 Concurrent operation of State/Territory laws	24
29 Validity of acts done in contravention of this Part	24
30 Acquisition of property	24
Part 3—Anti-avoidance	25
31 Anti-avoidance	25
Part 4—Injunctions	27
32 Injunctions	27
33 Interim injunctions	28
34 Discharge etc. of injunctions	29
35 Certain limits on granting injunctions not to apply	29
36 Other powers of the court unaffected	30
Part 5—Offences	31
37 False or misleading statements	31
38 Incorrect records.....	31
39 Indictable offences	32
40 Application of <i>Criminal Code</i>	32
41 Service of summons or process on foreign corporations— criminal proceedings	32
Part 6—Civil liability	33
42 Civil liability of corporations	33
43 Civil liability of persons other than corporations	34
Part 7—Miscellaneous	36
44 Delegation by Treasurer	36
45 <i>Foreign Acquisitions and Takeovers Act 1975</i> and this Act to operate independently of each other.....	36
46 Regulations.....	36
47 Transitional—pre-commencement stakes in financial sector companies.....	37
Schedule 1—Ownership definitions	38
1 Object	38

2	Definitions.....	38
3	Entering into an agreement or arrangement.....	40
4	Associates.....	41
5	Power to appoint director	42
6	Meaning of <i>entitled to acquire</i>	43
7	Meaning of <i>interest in a share</i>	43
8	Certain interests in shares to be disregarded.....	44
9	Voting power.....	45
10	Stake in a company.....	46
11	Direct control interests in a company	46



Financial Sector (Shareholdings) Act 1998

No. 55, 1998

An Act relating to shareholdings in certain financial sector companies, and for related purposes

[Assented to 29 June 1998]

The Parliament of Australia enacts:

Part 1—Preliminary

1 Short title

This Act may be cited as the *Financial Sector (Shareholdings) Act 1998*.

Section 2

2 Commencement

This Act commences on the commencement of the *Australian Prudential Regulation Authority Act 1998*.

3 Definitions

In this Act, unless the contrary intention appears:

100% subsidiary has the same meaning as in the *Income Tax Assessment Act 1997*.

agreement means any agreement, whether formal or informal and whether express or implied.

Australia, when used in a geographical sense, includes the external Territories.

authorised deposit-taking institution has the same meaning as in the *Banking Act 1959*.

authorised insurance company means:

- (a) a company authorised under the *Insurance Act 1973* to carry on insurance business; or
- (b) a company registered under the *Life Insurance Act 1995*.

company means a body corporate.

Federal Court means the Federal Court of Australia.

financial sector company means:

- (a) an authorised deposit-taking institution; or
- (b) an authorised insurance company; or
- (c) a holding company of a company covered by paragraph (a) or (b).

holding company has the meaning given by section 4.

scheme means:

- (a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings; and
- (b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

unacceptable shareholding situation has the meaning given by section 10.

Note: Schedule 1 sets out definitions of expressions used in Part 2 (which deals with restrictions on shareholdings).

4 Holding companies

For the purposes of this Act, a company (the *first company*) is the *holding company* of another company if the other company is a 100% subsidiary of the first company.

5 Crown to be bound

- (1) This Act binds the Crown in right of the Commonwealth, of each of the States, of the Australian Capital Territory, of the Northern Territory and of Norfolk Island.
- (2) This Act does not make the Crown liable to be prosecuted for an offence.

6 External Territories

This Act extends to all the external Territories.

7 Extra-territorial operation

This Act extends to acts, omissions, matters and things outside Australia.

Part 2—Restrictions on shareholdings in financial sector companies

Division 1—Introduction

8 Simplified outline

The following is a simplified outline of this Part:

- Financial sector companies are subject to a 15% shareholding limit. The Treasurer may approve a higher percentage limit on national interest grounds.
- Those limits relate to a person's *stake* in a company.
- A person's *stake* is the aggregate of the person's voting power and the voting power of the person's associates.
- A person whose stake in a financial sector company does not exceed 15% may be declared by the Treasurer to have *practical control* of the company.
- The person covered by the declaration must take steps to ensure that the person does not have:
 - (a) a stake that exceeds 15%; or
 - (b) practical control.
- The regulations may require records to be kept, and information to be given, for purposes relating to the restrictions on shareholdings.

9 Definitions in Schedule 1

Schedule 1 sets out definitions of expressions used in this Part.

Division 2—15% shareholding limit

10 Meaning of *unacceptable shareholding situation*

For the purposes of this Act, an *unacceptable shareholding situation* exists in relation to a particular financial sector company and in relation to a particular person if the person holds a stake in the company of more than:

- (a) 15%; or
- (b) if an approval of a higher percentage is in force under Division 3 in relation to the company and in relation to the person—that higher percentage.

Note: A person's *stake* includes the interests of the person's associates—see Schedule 1.

11 Acquisitions of shares

If:

- (a) a person, or 2 or more persons under an arrangement, acquire shares in a company; and
- (b) the acquisition has the result, in relation to a financial sector company, that:
 - (i) an unacceptable shareholding situation comes into existence in relation to the company and in relation to a person; or
 - (ii) if an unacceptable shareholding situation already exists in relation to the company and in relation to a person—there is an increase in the stake held by the person in the company; and
- (c) the person or persons mentioned in paragraph (a) were reckless as to whether the acquisition would have that result; the person or persons mentioned in paragraph (a) are guilty of an offence punishable on conviction by a fine not exceeding 400 penalty units.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

12 Remedial orders

- (1) If an unacceptable shareholding situation exists in relation to a financial sector company, the Federal Court may, on application by the Treasurer or the company, make such orders as the court considers appropriate for the purpose of ensuring that that situation ceases to exist.
- (2) If an unacceptable shareholding situation has existed in relation to a financial sector company, the Federal Court may, on application by the Treasurer or the company, make such orders as the court considers appropriate.
- (3) The Federal Court's orders include:
 - (a) an order directing the disposal of shares; or
 - (b) an order restraining the exercise of any rights attached to shares; or
 - (c) an order prohibiting or deferring the payment of any sums due to a person in respect of shares held by the person; or
 - (d) an order that any exercise of rights attached to shares be disregarded.
- (4) Subsection (3) does not, by implication, limit subsection (1) or (2).
- (5) In addition to the Federal Court's powers under subsections (1), (2) and (3), the court:
 - (a) has power, for the purpose of securing compliance with any other order made under this section, to make an order directing any person to do or refrain from doing a specified act; and
 - (b) has power to make an order containing such ancillary or consequential provisions as the court thinks just.
- (6) The Federal Court may, before making an order under this section, direct that notice of the application be given to such persons as it thinks fit or be published in such manner as it thinks fit, or both.

Part 2 Restrictions on shareholdings in financial sector companies

Division 2 15% shareholding limit

Section 12

- (7) The Federal Court may, by order, rescind, vary or discharge an order made by it under this section or suspend the operation of such an order.

Division 3—Approval to exceed 15% shareholding limit

13 Application for approval to exceed 15% shareholding limit

- (1) A person may apply to the Treasurer for approval to hold a stake in a particular financial sector company of more than 15%.
- (2) The application must:
 - (a) specify the percentage of the stake (if any) the person currently holds in the financial sector company; and
 - (b) specify the percentage of the stake the person is seeking approval to hold in the company; and
 - (c) set out the person's reasons for making the application; and
 - (d) be accompanied by the prescribed fee.

14 Approval of application

- (1) If the applicant satisfies the Treasurer that it is in the national interest to approve the applicant holding a stake in the company of more than 15%, the Treasurer may grant the application.

Grant of application

- (2) If the Treasurer grants the application, the Treasurer must:
 - (a) give written notice of the approval to the applicant; and
 - (b) specify the percentage of the stake the Treasurer approves the applicant holding in the company (which may not be the percentage the applicant applied for); and
 - (c) either:
 - (i) specify the period during which the approval remains in force; or
 - (ii) specify that the approval remains in force indefinitely.

Section 15

Refusal of application

- (3) If the Treasurer refuses the application, the Treasurer must give written notice of the refusal to the applicant.

Notification of approval

- (4) The Treasurer must arrange for a copy of a notice of approval under this section to be:
- (a) published in the *Gazette*; and
 - (b) given to the company concerned.

15 Duration of approval

- (1) An approval under section 14 remains in force:
- (a) if the notice of approval specifies a period during which the approval remains in force—until the end of that period, or if the Treasurer extends that period, until the end of that extended period; or
 - (b) otherwise—indefinitely.

Extension of approval

- (2) A person who holds an approval under section 14 that is in force for a specified period may apply to the Treasurer to extend that period.
- (3) The application must:
- (a) set out the person's reasons for making the application; and
 - (b) be accompanied by the prescribed fee.
- (4) If the applicant satisfies the Treasurer that it is in the national interest to grant the extension, the Treasurer may grant the application.
- (5) If the Treasurer grants the application, the Treasurer must:
- (a) give written notice of the extension to the applicant; and

- (b) specify the extended period during which the approval remains in force (which may not be the period the applicant applied for).
- (6) If the Treasurer refuses the application, the Treasurer must give written notice of the refusal to the applicant.

Notification of extension

- (7) The Treasurer must arrange for a copy of a notice of extension under this section to be:
 - (a) published in the *Gazette*; and
 - (b) given to the financial sector company concerned.

16 Conditions of approval

- (1) An approval under section 14 is subject to such conditions (if any) as are specified in the notice of approval.
- (2) The Treasurer may, by written notice given to a person who holds an approval under section 14:
 - (a) impose one or more conditions or further conditions to which the approval is subject; or
 - (b) revoke or vary any condition:
 - (i) imposed under paragraph (a); or
 - (ii) specified in the notice of approval.

Procedures

- (3) The Treasurer's power under subsection (2) may be exercised:
 - (a) on the Treasurer's own initiative; or
 - (b) on application made to the Treasurer by the person who holds the approval.
- (4) An application made by a person under paragraph (3)(b) must:
 - (a) set out the person's reasons for making the application; and
 - (b) be accompanied by the prescribed fee.

Section 17

- (5) If the Treasurer refuses an application under paragraph (3)(b), the Treasurer must give written notice of the refusal to the applicant.

Notification

- (6) The Treasurer must arrange for a copy of a notice under subsection (2) to be:
- (a) published in the *Gazette*; and
 - (b) given to the financial sector company concerned.

17 Varying percentage stake approved

Application by holder of approval

- (1) A person who holds an approval under section 14 may apply to the Treasurer to vary the percentage specified in the approval.
- (2) The application must:
- (a) specify the percentage of the stake the person currently holds in the financial sector company concerned; and
 - (b) specify the percentage of the stake the person is seeking approval to hold in the company; and
 - (c) set out the person's reasons for making the application; and
 - (d) be accompanied by the prescribed fee.
- (3) If the applicant satisfies the Treasurer that it is in the national interest to vary the percentage, the Treasurer may grant the application.
- (4) If the Treasurer grants the application, the Treasurer must:
- (a) give written notice of the variation to the applicant; and
 - (b) specify the variation granted (which may not be the variation the applicant applied for).
- (5) If the Treasurer refuses an application, the Treasurer must give written notice of the refusal to the applicant.

Treasurer's own initiative

- (6) The Treasurer may, by written notice given to a person who holds an approval under section 14, vary the percentage specified in the approval if the Treasurer is satisfied that it is in the national interest to do so.

Percentage varied upwards

- (7) If the Treasurer varies a percentage upwards, the variation takes effect on the day the notice of variation is given.

Percentage varied downwards

- (8) If the Treasurer varies a percentage downwards, the variation takes effect on the day specified in the notice of variation. The specified day must be a day at least 90 days after the day on which the notice is given.

Notification of variation

- (9) The Treasurer must arrange for a copy of a notice of variation under this section to be:
- (a) published in the *Gazette*; and
 - (b) given to the financial sector company concerned.

18 Revoking an approval

Revocation on specified grounds

- (1) The Treasurer may, by written notice given to a person who holds an approval under section 14 in relation to a financial sector company, revoke the approval if the Treasurer is satisfied that:
- (a) it is in the national interest to do so; or
 - (b) an unacceptable shareholding situation exists in relation to the financial sector company and in relation to the person; or
 - (c) there has been a contravention of a condition to which the approval is subject.

Section 19

- (2) The revocation takes effect on the day specified in the notice of revocation. The specified day must be a day at least 90 days after the day on which the notice is given.

Revocation on request

- (3) If a person who holds an approval under section 14 requests the Treasurer to revoke the approval, the Treasurer must, by written notice given to the person, revoke the approval. The revocation takes effect on the day specified in the notice of revocation.

Notification of revocation

- (4) The Treasurer must arrange for a copy of a notice of revocation under this section to be:
- (a) published in the *Gazette*; and
 - (b) given to the financial sector company concerned.

19 Flow-on approvals

100% subsidiaries of holding company

- (1) If:
- (a) at a particular time, a person holds an approval under section 14 to hold a stake in a financial sector company of more than 15%; and
 - (b) the financial sector company is a holding company of an authorised deposit-taking institution or an authorised insurance company;
- there are taken to be in force at that time approvals of the Treasurer, under section 14, for the person to hold the same percentage stake in each financial sector company that is a 100% subsidiary of the holding company.
- (2) If, on a particular day, a financial sector company that is a 100% subsidiary of the holding company ceases to be a 100% subsidiary of the holding company, the approval that is taken to be in force,

because of subsection (1), in relation to that financial sector company continues in force until:

- (a) the end of 90 days after that day; or
- (b) if, during that period of 90 days, the person becomes the holder of another approval under section 14 in relation to the financial sector company—that other approval comes into force.

Officers of company

- (3) If, at a particular time, a company (the *approval company*) holds an approval under section 14 to hold a stake in a financial sector company of more than 15%, there is taken to be in force at that time an approval of the Treasurer, under section 14, for each officer of the approval company to hold the same percentage stake in the financial sector company.

20 Further information about applications

- (1) This section applies to an application under this Division.
- (2) The Treasurer may, by written notice given to the applicant, require the applicant to give the Treasurer, within a specified period, further information about the application.
- (3) The Treasurer may refuse to consider the application until the applicant gives the Treasurer the information.

21 Electronic lodgment of applications

- (1) The Treasurer may require or permit an application under this Division to be given, in accordance with specified software requirements and specified authentication requirements:
 - (a) on a specified kind of data storage device; or
 - (b) by way of a specified kind of electronic transmission.
- (2) If an application is given by way of electronic transmission, the application is taken to be accompanied by a fee if the fee is paid within 7 days after the transmission.

Part 2 **Restrictions on shareholdings in financial sector companies**

Division 3 Approval to exceed 15% shareholding limit

Section 21

(3) In this section:

data storage device means any article or material (for example, a disk) from which information is capable of being reproduced with or without the aid of any other article or device.

Division 4—Practical control where 15% shareholding limit not exceeded

22 Meaning of *control*

In this Division:

control includes control as a result of, or by means of, trusts, agreements, arrangements, understandings and practices, whether or not having legal or equitable force and whether or not based on legal or equitable rights.

23 Treasurer may declare person to have practical control of a financial sector company

Declaration

- (1) If:
- (a) the Treasurer is satisfied that:
 - (i) the directors of a financial sector company are accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of a person (either alone or together with associates); or
 - (ii) a person (either alone or together with associates) is in a position to exercise control over a financial sector company; and
 - (b) the Treasurer is satisfied that:
 - (i) the person does not have any stake in the company; or
 - (ii) if the person has a stake in the company—that stake is not more than 15%; and
 - (c) the Treasurer is satisfied that it is in the national interest to declare that the person has practical control of the company for the purposes of this Act;

Section 24

the Treasurer may declare that the person has *practical control* of the company for the purposes of this Act.

Declaration has effect

- (2) A declaration under this section has effect accordingly.

Revocation of declaration

- (3) The Treasurer must revoke a declaration under this section if the Treasurer ceases to be satisfied of the matters referred to in paragraphs (1)(a), (b) and (c).

Notification of declaration

- (4) If a declaration under this section is made or revoked, the Treasurer must arrange for a copy of the declaration or revocation to be given to the financial sector company and the person concerned.

24 Requirement to relinquish practical control or reduce stake

- (1) If a person has practical control of a financial sector company, the person must take such steps as are necessary to ensure that:
- (a) the directors of the company are not accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the person (either alone or together with associates); and
 - (b) the person (either alone or together with associates) is not in a position to exercise control over the company; and
 - (c) either:
 - (i) the person does not have any stake in the company; or
 - (ii) if the person has a stake in the company—that stake is not more than 15%.

Note: *Practical control* has the meaning given by section 23.

- (2) The person must take those steps:

- (a) within 90 days after receiving the copy of the most recent declaration under section 23 relating to the practical control of the company; or
 - (b) if the Treasurer, by written notice given to the person, allows a longer period for compliance—before the end of that longer period.
- (3) A person is guilty of an offence if:
- (a) the person is subject to a requirement under this section; and
 - (b) the person recklessly contravenes the requirement.

Penalty: 400 penalty units.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

25 Remedial orders

- (1) If:
- (a) a declaration under section 23 is in force in relation to a person and in relation to a financial sector company; and
 - (b) the Federal Court is satisfied that:
 - (i) the directors of the company are accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the person (either alone or together with associates); or
 - (ii) the person (either alone or together with associates) is in a position to exercise control over the company; and
 - (c) the Federal Court is satisfied that:
 - (i) the person does not have any stake in the company; or
 - (ii) if the person has a stake in the company—that stake is not more than 15%;

the court may, on application by the Treasurer, make such orders as the court considers appropriate to ensure that:

- (d) the directors of the company are not accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the person (either alone or together with associates); and

Section 25

- (e) the person (either alone or together with associates) is not in a position to exercise control over the company; and
 - (f) either:
 - (i) the person does not have any stake in the company; or
 - (ii) if the person has a stake in the company—that stake is not more than 15%.
- (2) The Federal Court's orders include:
- (a) an order directing the disposal of shares; or
 - (b) an order restraining the exercise of any rights attached to shares; or
 - (c) an order prohibiting or deferring the payment of any sums due to a person in respect of shares held by the person; or
 - (d) an order that any exercise of rights attached to shares be disregarded.
- (3) Subsection (2) does not, by implication, limit subsection (1).
- (4) In addition to the Federal Court's powers under subsections (1) and (2), the court:
- (a) has power, for the purpose of securing compliance with any other order made under this section, to make an order directing any person to do or refrain from doing a specified act; and
 - (b) has power to make an order containing such ancillary or consequential provisions as the court thinks just.
- (5) The Federal Court may, before making an order under this section, direct that notice of the Treasurer's application be given to such persons as it thinks fit or be published in such manner as it thinks fit, or both.
- (6) The Federal Court may, by order, rescind, vary or discharge an order made by it under this section or suspend the operation of such an order.

Division 5—Record-keeping and giving of information

26 Record-keeping and giving of information

- (1) The regulations may make provision for and in relation to requiring a person:
 - (a) to keep and retain records, where the records are relevant to an ownership matter; and
 - (b) to give information to the Treasurer that is relevant to an ownership matter; or
 - (c) to give information to a financial sector company, where the information is relevant to an ownership matter that concerns the company.

Note: *Ownership matter* is defined by subsection (6).

Statutory declarations

- (2) The regulations may provide that information given in accordance with a requirement covered by paragraph (1)(b) or (c) must be verified by statutory declaration.

No self-incrimination

- (3) An individual is not required to give information in accordance with a requirement covered by paragraph (1)(b) or (c) if the information might tend to incriminate the individual or expose the individual to a penalty.

Offence

- (4) A person is guilty of an offence if:
 - (a) the person is subject to a requirement covered by paragraph (1)(a), (b) or (c); and
 - (b) the person recklessly contravenes the requirement.

Penalty: 50 penalty units.

Section 26

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Regulations may confer discretionary powers on the Treasurer

- (5) Regulations made for the purposes of this section may make provision for or in relation to a matter by conferring a power on the Treasurer. For example, the regulations could provide that the Treasurer may, by written notice given to a financial sector company, require the company to give the Treasurer, within the period and in the manner specified in the notice, specified information about an ownership matter relating to the company.

Definition

- (6) For the purposes of this section, each of the following matters is an **ownership matter**:
- (a) whether a person holds a stake in a financial sector company and, if so, the percentage of that stake;
 - (b) whether the directors of a financial sector company are accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of a person (either alone or together with associates);
 - (c) whether a person (either alone or together with associates) is in a position to exercise control over a financial sector company.

For this purpose, **control** has the same meaning as in section 22.

Division 6—Ancillary matters

27 Provision to attract the corporations power, the banking power and the insurance power

- (1) This Part does not apply in relation to a financial sector company unless the company is:
 - (a) a constitutional corporation (other than a corporation that carries on State banking, or State insurance, not extending beyond the limits of the State concerned); or
 - (b) a body corporate that carries on the business of banking; or
 - (c) a body corporate that carries on the business of insurance.

Severability

- (2) Without prejudice to its effect apart from this subsection, subsection (1) also has the effect it would have if:
 - (a) the reference in paragraph (1)(b) to a body corporate that carries on the business of banking were, by express provision, confined to a body corporate that carries on as its sole or principal business the business of banking; and
 - (b) the reference in paragraph (1)(c) to a body corporate that carries on the business of insurance were, by express provision, confined to a body corporate that carries on as its sole or principal business the business of insurance.

Definitions

- (3) In this section:

business of banking does not include State banking not extending beyond the limits of the State concerned.

business of insurance does not include State insurance not extending beyond the limits of the State concerned.

Section 28

constitutional corporation means a corporation to which paragraph 51(xx) of the Constitution applies.

28 Concurrent operation of State/Territory laws

It is the intention of the Parliament that this Part is not to apply to the exclusion of a law of a State or Territory to the extent that that law is capable of operating concurrently with this Part.

29 Validity of acts done in contravention of this Part

An act is not invalidated by the fact that it constitutes an offence against this Part.

30 Acquisition of property

- (1) The Federal Court must not make an order under this Part if:
- (a) the order would result in the acquisition of property from a person otherwise than on just terms; and
 - (b) the order would be invalid because of paragraph 51(xxxi) of the Constitution.

- (2) In this section:

acquisition of property has the same meaning as in paragraph 51(xxxi) of the Constitution.

just terms has the same meaning as in paragraph 51(xxxi) of the Constitution.

Part 3—Anti-avoidance

31 Anti-avoidance

- (1) If:
- (a) one or more persons enter into, begin to carry out or carry out a scheme; and
 - (b) it would be concluded that the person, or any of the persons, who entered into, began to carry out or carried out the scheme or any part of the scheme did so for the sole or dominant purpose of avoiding the application of any provision of Part 2 in relation to any person or persons (whether or not mentioned in paragraph (a)); and
 - (c) as a result of the scheme or a part of the scheme, a person (the *stakeholder*) increases the stakeholder's stake in a financial sector company;

the Treasurer may give the stakeholder a written direction to cease holding that stake within a specified time.

Offence

- (2) A person is guilty of an offence if:
- (a) the person is subject to a direction under subsection (1); and
 - (b) the person intentionally contravenes the direction.

Penalty: 400 penalty units.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Definitions

- (3) In this section:

increase, in relation to a stake in a company, includes an increase from a starting point of nil.

Section 31

stake, in relation to a company, has the same meaning as in Schedule 1.

Part 4—Injunctions

32 Injunctions

Restraining injunctions

- (1) If a person has engaged, is engaging or is proposing to engage in any conduct in contravention of section 11, the Federal Court may, on the application of the Treasurer, grant an injunction:
 - (a) restraining the person from engaging in the conduct; and
 - (b) if, in the court's opinion, it is desirable to do so—requiring the person to do something.

- (2) If:
 - (a) a person has engaged, is engaging or is proposing to engage in any conduct in contravention of section 11; and
 - (b) the contravention relates to the existence of an unacceptable shareholding situation in relation to a financial sector company;the Federal Court may, on the application of the company, grant an injunction:
 - (c) restraining the person from engaging in the conduct; and
 - (d) if, in the court's opinion, it is desirable to do so—requiring the person to do something.

- (3) If a person has engaged, is engaging or is proposing to engage in any conduct in contravention of a condition to which an approval under section 14 is subject, the Federal Court may, on the application of the Treasurer, grant an injunction:
 - (a) restraining the person from engaging in the conduct; and
 - (b) if, in the court's opinion, it is desirable to do so—requiring the person to do something.

Section 33

Performance injunctions

- (4) If:
- (a) a person has refused or failed, or is refusing or failing, or is proposing to refuse or fail, to do an act or thing; and
 - (b) the refusal or failure was, is or would be a contravention of section 26 or 31;
- the Federal Court may, on the application of the Treasurer, grant an injunction requiring the person to do that act or thing.
- (5) If:
- (a) a person has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do an act or thing; and
 - (b) the refusal or failure was, is or would be a contravention of subsection 26(4) that relates to a requirement covered by paragraph 26(1)(c) to give information to a financial sector company;
- the Federal Court may, on the application of the company, grant an injunction requiring the person to do that act or thing.
- (6) If:
- (a) a person has refused or failed, or is refusing or failing, or is proposing to refuse or fail, to do an act or thing; and
 - (b) the refusal or failure was, is or would be a contravention of a condition to which an approval under section 14 is subject;
- the Federal Court may, on the application of the Treasurer, grant an injunction requiring the person to do that act or thing.

33 Interim injunctions

Grant of interim injunction

- (1) If an application is made to the court for an injunction under section 32, the court may, before considering the application, grant an interim injunction restraining a person from engaging in conduct of a kind referred to in that section.

No undertakings as to damages

- (2) The court is not to require an applicant for an injunction under section 32, as a condition of granting an interim injunction, to give any undertakings as to damages.

34 Discharge etc. of injunctions

The court may discharge or vary an injunction granted under this Part.

35 Certain limits on granting injunctions not to apply*Restraining injunctions*

- (1) The power of the court under this Part to grant an injunction restraining a person from engaging in conduct of a particular kind may be exercised:
- (a) if the court is satisfied that the person has engaged in conduct of that kind—whether or not it appears to the court that the person intends to engage again, or to continue to engage, in conduct of that kind; or
 - (b) if it appears to the court that, if an injunction is not granted, it is likely that the person will engage in conduct of that kind—whether or not the person has previously engaged in conduct of that kind and whether or not there is an imminent danger of substantial damage to any person if the person engages in conduct of that kind.

Performance injunctions

- (2) The power of the court under this Part to grant an injunction requiring a person to do an act or thing may be exercised:
- (a) if the court is satisfied that the person has refused or failed to do that act or thing—whether or not it appears to the court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing; or

Section 36

- (b) if it appears to the court that, if an injunction is not granted, it is likely that the person will refuse or fail to do that act or thing—whether or not the person has previously refused or failed to do that act or thing and whether or not there is an imminent danger of substantial damage to any person if the person refuses or fails to do that act or thing.

36 Other powers of the court unaffected

The powers conferred on the court under this Part are in addition to, and not instead of, any other powers of the court, whether conferred by this Act or otherwise.

Part 5—Offences

37 False or misleading statements

A person is guilty of an offence if:

- (a) the person makes a statement (whether orally, in a document or in any other way); and
- (b) the statement:
 - (i) is false or misleading in a material particular; or
 - (ii) omits any matter or thing without which the statement is misleading in a material particular; and
- (c) either:
 - (i) the statement is made to a person who is exercising powers or performing functions under, or in connection with, this Act; or
 - (ii) the statement is made in purported compliance with a requirement covered by paragraph 26(1)(c).

Penalty: Imprisonment for 6 months.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

38 Incorrect records

A person is guilty of an offence if:

- (a) the person is subject to a requirement covered by paragraph 26(1)(a); and
- (b) in purported compliance with that requirement, the person makes a record of any matter or thing; and
- (c) the person makes the record in such a way that it does not correctly record the matter or thing.

Penalty: Imprisonment for 6 months.

Section 39

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

39 Indictable offences

An offence against section 11, 24 or 31 is an indictable offence.

40 Application of *Criminal Code*

Chapter 2 of the *Criminal Code* applies to all offences against this Act.

41 Service of summons or process on foreign corporations— criminal proceedings

- (1) This section applies to a summons or process in any criminal proceedings under this Act, where:
 - (a) service of the summons or process is required to be served on a body corporate incorporated outside Australia; and
 - (b) the body corporate does not have a registered office or a principal office in Australia; and
 - (c) the body corporate has an agent in Australia.
- (2) Service of the summons or process may be effected by serving it on the agent.
- (3) Subsection (2) has effect in addition to section 28A of the *Acts Interpretation Act 1901*.

Note: Section 28A of the *Acts Interpretation Act 1901* deals with the service of documents.

- (4) In this section:

criminal proceeding includes a proceeding to determine whether a person should be tried for an offence.

Part 6—Civil liability

42 Civil liability of corporations

State of mind

- (1) If, in a civil proceeding under this Act in respect of conduct engaged in by a corporation, it is necessary to establish the state of mind of the corporation, it is sufficient to show that:
 - (a) a director, employee or agent of the corporation engaged in that conduct; and
 - (b) the director, employee or agent was, in engaging in that conduct, acting within the scope of his or her actual or apparent authority; and
 - (c) the director, employee or agent had that state of mind.

Conduct

- (2) If:
 - (a) conduct is engaged in on behalf of a corporation by a director, employee or agent of the corporation; and
 - (b) the conduct is within the scope of his or her actual or apparent authority;the conduct is taken, for the purposes of a civil proceeding under this Act, to have been engaged in by the corporation unless the corporation establishes that it took reasonable precautions and exercised due diligence to avoid the conduct.

*Extended meaning of **state of mind***

- (3) A reference in subsection (1) to the **state of mind** of a person includes a reference to:
 - (a) the knowledge, intention, opinion, belief or purpose of the person; and

Section 43

- (b) the person's reasons for the intention, opinion, belief or purpose.

*Extended meaning of **director***

- (4) A reference in this section to a **director** of a corporation includes a reference to a constituent member of a body corporate incorporated for a public purpose by a law of the Commonwealth, a State or a Territory.

*Extended meaning of **engaging in conduct***

- (5) A reference in this section to **engaging in conduct** includes a reference to failing or refusing to engage in conduct.

43 Civil liability of persons other than corporations

State of mind

- (1) If, in a civil proceeding under this Act in respect of conduct engaged in by a person other than a corporation, it is necessary to establish the state of mind of the person, it is sufficient to show that:
 - (a) the conduct was engaged in by an employee or agent of the person within the scope of his or her actual or apparent authority; and
 - (b) the employee or agent had that state of mind.

Conduct

- (2) If:
 - (a) conduct is engaged in on behalf of a person other than a corporation by an employee or agent of the person; and
 - (b) the conduct is within the employee's or agent's actual or apparent authority;the conduct is taken, for the purposes of a civil proceeding under this Act, to have been engaged in by the person unless the person

establishes that he or she took reasonable precautions and exercised due diligence to avoid the conduct.

Extended meaning of state of mind

- (3) A reference in this section to the *state of mind* of a person includes a reference to:
- (a) the knowledge, intention, opinion, belief or purpose of the person; and
 - (b) the person's reasons for the intention, opinion, belief or purpose.

Extended meaning of engaging in conduct

- (4) A reference in this section to *engaging in conduct* includes a reference to failing or refusing to engage in conduct.

Part 7—Miscellaneous

44 Delegation by Treasurer

- (1) The Treasurer may, by writing, delegate any or all of the Treasurer's powers under this Act to:
 - (a) the Chief Executive Officer of APRA (the Australian Prudential Regulation Authority); or
 - (b) a member of the board of management (including the Chair) of APRA; or
 - (c) an APRA staff member (within the meaning of the *Australian Prudential Regulation Authority Act 1998*).
- (2) The delegate is, in the exercise of any power delegated under subsection (1), subject to the directions of the Treasurer.

45 *Foreign Acquisitions and Takeovers Act 1975* and this Act to operate independently of each other

- (1) This Act and the *Foreign Acquisitions and Takeovers Act 1975* operate independently of each other.
- (2) In particular, a decision under either Act has effect only for the purposes of the Act concerned.

46 Regulations

The Governor-General may make regulations prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

47 Transitional—pre-commencement stakes in financial sector companies

- (1) This section applies if, immediately before the commencement of this section:
 - (a) a person held a stake in a particular financial sector company of more than 15%; and
 - (b) the holding of that stake did not, to any extent, involve a contravention of a provision of the *Banks (Shareholdings) Act 1972* or the *Insurance Acquisitions and Takeovers Act 1991*.
- (2) This Act has effect as if the Treasurer had, immediately after the commencement of this section, by written notice under section 14, approved the person holding the same percentage stake in the company.

Note: This approval can be varied or revoked in accordance with the provisions of Division 3 of Part 2.
- (3) For the purposes of this section, Part 1 and Schedule 1 are taken to have been in force immediately before the commencement of this section.
- (4) For the purposes of this section, a company that is an authorised deposit-taking institution immediately after the commencement of this section is taken to have been an authorised deposit-taking institution immediately before the commencement of this section.

Clause 1

Schedule 1—Ownership definitions

Note: See section 9.

1 Object

The object of this Schedule is to define terms used in Part 2 (which deals with restrictions on shareholdings).

2 Definitions

In Part 2 and this Schedule, unless the contrary intention appears:

acquisition includes an agreement to acquire, but does not include:

- (a) an acquisition by will or by devolution by operation of law;
or
- (b) an acquisition by way of enforcement of a loan security.

arrangement has a meaning affected by clause 3.

associate has the meaning given by clause 4.

constituent document, in relation to a company, means:

- (a) the memorandum and articles of association of the company;
or
- (b) any rules or other documents constituting the company or governing its activities.

direct control interest has the meaning given by clause 11.

director includes any person occupying the position of director of a company, by whatever name called.

discretionary trust means a trust where:

- (a) a person (who may include the trustee) is empowered (either unconditionally or on the fulfilment of a condition) to exercise any power of appointment or other discretion; and

Clause 2

- (b) the exercise of the power or discretion, or the failure to exercise the power or discretion, has the effect of determining, to any extent, either or both of the following:
 - (i) the identities of those who may benefit under the trust;
 - (ii) how beneficiaries are to benefit, as between themselves, under the trust.

increase, in relation to a stake in a company, includes an increase from a starting point of nil.

interest in a share has the meaning given by clause 7.

lender, in relation to a loan security, means the person who is entitled to enforce the security.

lending money includes providing non-equity finance where the provision of the finance may reasonably be regarded as equivalent to lending money.

loan security means a security held solely for the purposes of a moneylending agreement.

management employee, in relation to a company, means an employee of the company who is concerned in, or takes part in, the management of the company.

moneylending agreement means an agreement entered into in good faith in the ordinary course of carrying on a business of lending money, but does not include an agreement dealing with any matter unrelated to the carrying on of that business.

officer, in relation to a company, means:

- (a) a director, secretary or management employee of the company; or
- (b) a receiver and manager of any part of the undertaking of the company appointed under a power contained in any instrument; or
- (c) a liquidator of the company appointed in a voluntary winding-up.

Clause 3

ownership provisions means Part 2 and this Schedule.

power to appoint a director of a company has a meaning affected by clause 5.

practical control, in relation to a financial sector company, has the meaning given by section 23.

relative, in relation to a person, means:

- (a) the person's spouse; or
- (b) another person who, although not legally married to the person, lives with the person on a bona fide domestic basis as the husband or wife of the person; or
- (c) a parent or remoter lineal ancestor of the person; or
- (d) a son, daughter or remoter issue of the person; or
- (e) a brother or sister of the person.

share, in relation to a company, means a share in the share capital of the company, and includes:

- (a) stock into which any or all of the share capital of the company has been converted; or
- (b) an interest in such a share or in such stock.

stake, in relation to a company, has the meaning given by clause 10.

voting power has the meaning given by clause 9.

3 Entering into an agreement or arrangement

- (1) For the purposes of the ownership provisions, a person is taken to have proposed to enter into an agreement or arrangement if the person takes part in, or proposes to take part in, negotiations with a view to entering into the agreement or arrangement.
- (2) A reference in the ownership provisions to *entering into an agreement or arrangement* includes a reference to altering or varying an agreement or arrangement.

- (3) A reference in the ownership provisions to ***entering into an arrangement*** is a reference to entering into any formal or informal scheme, arrangement or understanding, whether expressly or by implication and, without limiting the generality of the foregoing, includes a reference to:
- (a) entering into an agreement; or
 - (b) creating a trust, whether express or implied; or
 - (c) entering into a transaction;
- and a reference in the ownership provisions to an arrangement is to be construed accordingly.
- (4) A reference in the ownership provisions to an ***arrangement*** does not include a reference to a moneylending agreement.

4 Associates

- (1) For the purposes of the ownership provisions, the following persons are ***associates*** of a person:
- (a) a relative of the person;
 - (b) a partner of the person;
 - (c) a company of which the person is an officer;
 - (d) if the person is a company—an officer of the company;
 - (e) an officer of a company of which the person is an officer;
 - (f) an employee of an individual of whom the person is an employee;
 - (g) the trustee of a discretionary trust where the person or another person who is an associate of the person by virtue of another paragraph of this subclause benefits, or is capable (whether by the exercise of a power of appointment or otherwise) of benefiting, under the trust, either directly or through any interposed companies, partnerships or trusts;
 - (h) a company whose directors are accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the person;

Clause 5

- (i) a company where the person is accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the company;
 - (j) a company in which the person has, apart from this paragraph, a stake of not less than 15%;
 - (k) if the person is a company—a person who holds, apart from this paragraph, a stake in the company of not less than 15%;
 - (l) a person who is, because of this subclause, an associate of any other person who is an associate of the person (including a person who is an associate of the person by any other application or applications of this paragraph).
- (2) If a person (the **first person**) enters, or proposes to enter, into an arrangement with another person (the **second person**) that relates to any of the following matters:
- (a) the first person and the second person being in a position, by acting together, to control any of the voting power in a company;
 - (b) the power of the first person and the second person, by acting together, to appoint or remove a director of a company;
 - (c) the situation where one or more of the directors of a company are accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the first person and the second person acting together;

then, the second person is taken to be an **associate** of the first person for the purposes of the application of a provision of the ownership provisions in relation to the matter concerned.

5 Power to appoint director

- (1) A reference in the ownership provisions to a **power to appoint a director** includes a reference to such a power whether exercisable with or without the consent or concurrence of any other person.

- (2) For the purposes of the ownership provisions, a person is taken to have the power to appoint a director if:
- (a) the person has the power (whether exercisable with or without the consent or concurrence of any other person) to veto such an appointment; or
 - (b) a person's appointment as a director of the company follows necessarily from that person being a director or other officer of the first-mentioned person.

6 Meaning of *entitled to acquire*

For the purposes of the ownership provisions, a person is *entitled to acquire* anything if the person is absolutely or contingently entitled to acquire it, whether because of any constituent document of a company, the exercise of any right or option or for any other reason.

7 Meaning of *interest in a share*

- (1) Subject to this clause, a person holds an *interest in a share* if the person has any legal or equitable interest in the share.
- (2) A person is taken to hold an interest in a share if:
- (a) the person has entered into a contract to purchase the share; or
 - (b) the person has a right (otherwise than because of having an interest under a trust) to have the share transferred to the person or to the person's order (whether the right is exercisable presently or in the future and whether or not on the fulfilment of a condition); or
 - (c) the person has a right to acquire the share, or an interest in the share, under an option (whether the right is exercisable presently or in the future and whether or not on the fulfilment of a condition); or
 - (d) the person is otherwise entitled to acquire the share or an interest in the share; or

Clause 8

- (e) the person is entitled (otherwise than because of having been appointed as a proxy or representative to vote at a meeting of members of the company or of a class of its members) to exercise or control the exercise of a right attached to the share.
- (3) Subclause (2) does not, by implication, limit subclause (1).
- (4) A person is taken to hold an interest in a share even if the person holds the interest in the share jointly with another person.
- (5) For the purpose of determining whether a person holds an interest in a share, it is immaterial that the interest cannot be related to a particular share.
- (6) An interest in a share is not to be disregarded only because of:
 - (a) its remoteness; or
 - (b) the manner in which it arose; or
 - (c) the fact that the exercise of a right conferred by the interest is, or is capable of being made, subject to restraint or restriction.

8 Certain interests in shares to be disregarded

- (1) For the purposes of the ownership provisions, the following interests must be disregarded:
 - (a) an interest in a share held by a person whose ordinary business includes the lending of money if the person holds the interest as a loan security;
 - (b) an interest in a share held by a person, being an interest held by the person because the person holds a prescribed office;
 - (c) an interest of a prescribed kind in a share, being an interest held by such persons as are prescribed.
- (2) For the purposes of the ownership provisions, if:
 - (a) a person holds an interest in a share as a loan security; and
 - (b) the ordinary business of the person includes the lending of money; and

- (c) the loan security is enforced; and
- (d) as a result of the enforcement of the loan security, the person becomes the holder of the share; and
- (e) the person holds the share for a continuous period (the ***holding period***) beginning at the time when the security was enforced;

the person's interest in the share must be disregarded at all times during so much of the holding period as occurs during whichever of the following periods is applicable:

- (f) the period of 90 days beginning when the security was enforced;
- (g) if the Treasurer, by written notice given to the person, allows a longer period—the end of that longer period.

9 Voting power

- (1) A reference in the ownership provisions to the ***voting power*** in a company is a reference to the total rights of shareholders to vote, or participate in any decision-making, concerning any of the following:
 - (a) the making of distributions of capital or profits of the company to its shareholders;
 - (b) the constituent document of the company;
 - (c) any variation of the share capital of the company;
 - (d) any appointment of a director of the company.
- (2) A reference in the ownership provisions to ***control of the voting power*** in a company is a reference to control that is direct or indirect, including control that is exercisable as a result of or by means of arrangements or practices:
 - (a) whether or not having legal or equitable force; and
 - (b) whether or not based on legal or equitable rights.
- (3) If the percentage of total rights to vote or participate in decision-making differs as between different types of voting or decision-making, the highest of those percentages applies for the purposes of this clause.

Clause 10

- (4) If a company:
- (a) is limited both by shares and by guarantee; or
 - (b) does not have a share capital;
- this clause has effect as if the members or policy holders of the company were shareholders in the company.

10 Stake in a company

- (1) The *stake* that a person holds in a company at a particular time is the aggregate of:
- (a) the direct control interests in the company that the person holds at that time; and
 - (b) the direct control interests in the company held at that time by associates of the person.
- (2) In calculating the stake that a person holds in a company, a direct control interest held because of subclause 11(2) is not to be counted under paragraph (1)(a) to the extent to which it is calculated by reference to a direct control interest in the company that is taken into account under paragraph (1)(b).

11 Direct control interests in a company

- (1) A person holds a *direct control interest* in a company at a particular time equal to the percentage of the voting power in the company that the person is in a position to control at that time.
- (2) If:
- (a) a person holds a direct control interest (including a direct control interest that is taken to be held because of one or more previous applications of this subclause) in a company (the *first level company*); and
 - (b) the first level company holds a direct control interest in another company (the *second level company*);
- the person is taken to hold a direct control interest in the second level company equal to the percentage worked out using the formula:

Clause 11

First level percentage \times Second level percentage

where:

first level percentage means the percentage of the direct control interest held by the person in the first level company.

second level percentage means the percentage of the direct control interest held by the first level company in the second level company.

[*Minister's second reading speech made in—
House of Representatives on 26 March 1998
Senate on 13 May 1998*]

(31/98)

