

# **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 bodies or bodies corporate related to regulated 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 the 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The *Legislation Act 2003* provides that all legislative instruments, other than exempt instruments, are automatically repealed according to the progressive timetable set out in section 50 of that Act. The 1999 Regulations will be automatically repealed on 1 April 2019.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 and references to the empowering Act. These changes do not alter the substantive meaning or operation of the provisions.

Draft Regulations were released for public consultation from 25 September 2018 to 23 October 2018. No submissions addressing the Regulations were received. Direct consultation with APRA took place at the same time, and no issues or changes were raised as a result.

Details of the Regulations are set out in the [Attachment](#).

The Act specifies no conditions that need to be met 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. Sections 6 to 9 of the Regulations rely on the power conferred under subsection 43(4) of 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

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 (ADI), 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 crisis 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.

The Banking Act regulates banking, protects the interest of depositors in ADIs, and promotes financial system stability in Australia. 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 1999 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 applying 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. The Shareholdings Act provides for an acceptable shareholding limit for banks and insurance companies, except where institutions seek the approval of the Treasurer to succeed this limit on national interest grounds.

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.

## Schedule 1 - Repeals

This schedule repeals the 1999 Regulations as the instrument is due to sunset on 1 April 2019.

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.

## **Finding table**

As a result of some of the changes described above, it was necessary to renumber provisions of the Regulations. Below is a finding table to assist in identifying which provision in the 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

## Statement of Compatibility with Human Rights

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

### Financial Sector (Transfer and Restructure) Regulations 2018

The Regulations are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Human Rights Act).

#### Overview of the Regulations

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 Regulations prescribe and / or modify the provisions of other Acts in relation to a transfer of business, transfer of shares or business restructure that may take effect under these Acts. The Regulations continue to apply the operation of the *Banking Act 1959* (the Banking Act), the *Financial Sector (Shareholdings) Act 1998*, the *Foreign Acquisitions and Takeovers Act 1975* (the Foreign Acquisitions Act), and the *Insurance Acquisitions and Takeovers Act 1991* in relation to the transfer of business and shares or a restructure.

The Banking Act and the Foreign Acquisition Act engage several of the human rights listed in the international instruments. Accordingly, a summary of the key provisions in those Acts that engage human rights are contained in this statement.

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.

#### Human rights implications

The impact of the Regulations on the following human rights has been considered, noting that the Regulations apply to business operations:

- the right to fair trial under Article 14 of the International Covenant on Civil and Political Rights (ICCPR);
- the imposition of strict liability offences (in relation to some criminal offences); and
- the right to protection from arbitrary or unlawful interference with privacy under Article 17 of the ICCPR.

#### *The right to fair trial*

The Regulations engage the right to a fair trial in Article 14 of the ICCPR. The *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) applies to administrative decisions made under the *Financial Sector (Transfer and Restructure) Act 1999* (Financial Sector Act). However, section 6 of the Regulations continues to modify the operation of the ADJR Act so that a person may not claim a breach of the rules of natural justice when applying to a Court for an order to review APRA’s decisions under the Financial Sector Act. All other grounds for seeking review remain available. Section 6 operates in the same way as the corresponding provisions in the 1999 Regulations.

This modification is required to support the stability of the financial system. Due to the nature of certain Authorised Deposit Institutions (ADI), 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 the institution. This could lead to decreased confidence in the financial system, further worsening any crisis event. This modification grants the assurance that transfers or restructures 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*.

Accordingly, to the extent that the Regulations engage the rights under Article 14 of the ICCPR, it is compatible with human rights as the limitations are appropriate and proportionate, and are consistent with the requirements of the Attorney-General's Department's *Australian Administrative Law Policy Guide* (2011).

#### *Strict liability offences in the Banking Act*

Section 7 of the Regulations replicates the corresponding provision in the 1999 Regulations and continues to apply the Banking Act to a transfer of business. It also expressly applies the Banking Act to a transfer of shares or a restructure. There is no change from the current policy or operation.

There are a number of strict liability offences which apply to individuals contained in the Banking Act, including:

- section 9AB - breach of authority conditions: banking business;
- section 11AB - breach of authority conditions: non-operating holding company (NOHC);
- section 16BA - requirement for auditors to give information about ADIs;
- section 19 - disqualified persons must not act for ADIs or authorised NOHCs;
- section 51B - reconsideration of decisions; and
- section 62B - involving APRA in proposed appointment of external administrators of ADIs and NOHCs.

These offences will continue to apply through the operation of the *Financial Sector (Transfer and Restructure) Act 1999*.

#### *Strict liability offences in the Foreign Acquisitions Act*

Section 9 replicates the corresponding provision in the 1999 Regulations and continues to apply the Foreign Acquisitions Act in relation to the transfer of business and shares or restructures. Part 7 of that Act provides that a person must make and keep a record for a prescribed period relating to significant actions, notifiable actions, and actions specified in exemption certificates; compliance with conditions in no objection notifications and exemption certificates; and certain disposals of interests in residential land. Section 119 of the Foreign Acquisitions Act imposes a strict liability offence punishable upon conviction by 30 penalty units for non-compliance.

#### *Appropriateness of strict liability offences*

Strict liability offences are appropriate in these circumstances as it is necessary to strongly deter misconduct that can have serious detriment for the banking community and the public. Non-compliance could result in a serious destabilisation of the banking sector, particularly if APRA is not notified of an insolvency event or disqualified persons continue to act for ADIs or authorised NOHCs.

Strict liability offences reduce non-compliance, which bolsters the integrity of the regulatory regime enforced by the APRA. Strict liability is particularly beneficial to



regulators as they need to deal with offences expeditiously to maintain public confidence in the regulatory regime. In these circumstances the strict liability offences will assist APRA to pursue offenders for breach of conditions where it would otherwise be difficult to show that a person's omission to notify was intentional. These provisions provide maximum incentive for such persons to ensure APRA is notified that a body corporate is insolvent or will become insolvent, or prior to an application for an external administrator to be appointed. It will also ensure that important records are kept and maintained for the prescribed period.

The strict liability offences meet the conditions listed in the Attorney-General's Department's *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (September 2011)* (the Guide). For example, the fines for the offences do not exceed 60 penalty units for persons. The application of strict liability, as opposed to absolute liability, preserves the defence of honest and reasonable mistake of fact to be proved by the accused on the balance of probabilities. This defence maintains adequate checks and balances for persons who may be accused of such offences.

#### *Privacy issues under the Banking Act*

By applying the Banking Act to transfers of business and shares or restructures the Regulations engage the right to protection from unlawful or arbitrary interference with privacy under Article 17 of the ICCPR because it provides APRA with the ability to disclose personal information.

The right in Article 17 may be subject to permissible limitations, where these limitations are authorised by law and are not arbitrary. In order for an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR and be reasonable in the particular circumstances. The United Nations Human Rights Committee has interpreted the requirement of 'reasonableness' to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

Under section 16AS of the Banking Act, APRA is able to provide personal information to a liquidator for the purpose of assessing claims and determining and paying remaining amounts owed to account-holders in the liquidation process. It is also able to provide personal information to a liquidator to enable it to decide whether a distribution it is to make is attributable to an account of a particular type that requires the distribution to be made to an account of the same type. The disclosure of personal information is necessary and proportionate in this instance to ensure that account-holders receive payments owing to them.

Any information that is shared between APRA and a liquidator will remain subject to strict confidential protections. APRA will remain subject to the requirement to take all reasonable measures to protect confidential information from any unauthorised disclosure. The ability to share information is consistent with Article 17 of the ICCPR because, to the extent the provision authorises the disclosure of confidential information by APRA to liquidators, this is already widely accepted practice and permitted by law. The amendment replicates existing information sharing arrangements that are due to expire because of the sunset of the 1999 Regulations.

## **Conclusion**

To the extent that the Regulations engage the rights under Articles 14 and 17 of the ICCPR, they are compatible with human rights as the limitations are appropriate and proportionate, and the strict liability offences are consistent with the requirements of the Guide.