EXPLANATORY STATEMENT

Select Legislative Instrument 2009 No. 53

Issued by authority of the Assistant Treasurer

Foreign Acquisitions and Takeovers Act 1975

Foreign Acquisitions and Takeovers Legislation Amendment Regulations 2009 (No. 1)

Section 39 of the *Foreign Acquisitions and Takeovers Act 1975* (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.

The Act provides the legislative underpinning for the Australian Government's foreign investment screening regime to ensure that foreign investment in Australia is consistent with the 'national interest'. It provides that the Treasurer may prohibit certain acquisitions of Australian companies, real estate and/or other assets by foreign persons, where such acquisitions would be contrary to the national interest. Alternatively, section 25 provides that the Treasurer may impose conditions on such acquisitions to ensure that they are not contrary to the national interest. Section 26A of the Act provides for compulsory notification of proposed acquisitions of Australian real estate by foreign persons. Section 27 provides that notification must be made in accordance with the prescribed form. However, subsection 12A(8) provides that the Regulations may provide that the Act does not apply to certain acquisitions of real estate.

The *Foreign Acquisitions and Takeovers Regulations 1989* (the Principal Regulations) specify those acquisitions by specified foreign persons which are considered not to be contrary to the national interest and hence do not require notification. The Principal Regulations also specify the monetary thresholds, below which specified acquisitions do not require notification. The Foreign Acquisitions and Takeovers (Notices) Regulations (the Principal Notices Regulations) provide the prescribed forms of notice.

The purpose of the Regulations is to:

- amend the Principal Regulations and the Principal Notices Regulations to streamline the notification and administrative processes for certain acquisitions of real estate which are not considered contrary to the national interest and are currently routinely approved; and
- amend the Principal Regulations to correct an amendment made to a monetary threshold in December 2006.

The amendments reflect the policy reforms announced on 18 December 2008. Consultation was undertaken with relevant stakeholders in the private sector – including the Real Estate Institute of Australia, the Law Council of Australia, the Housing Industry Association and the Property Council of Australia – as well as the Departments of Prime Minister and Cabinet, Finance and Deregulation, Families, Housing and Community Services and Indigenous Affairs, Education, Employment and Workplace Relations, Immigration and Citizenship and the Attorney-General's Department.

The Regulations specify that:

- non-citizens who are temporarily resident in Australia are not required to notify the Government when acquiring specified types of residential real estate;
- acquisitions of accommodation facilities that are of a commercial nature and are valued below the relevant monetary threshold do not require notification;
- a new streamlined form has been introduced for notification of proposed acquisitions of residential real estate by individuals; and
- the monetary threshold for prescribed foreign investors acquiring an interest in a foreign company with Australian assets and/or subsidiaries (also known as 'offshore takeovers') has been increased to $200 million.

Details of the Regulations are set out in the Attachment.

Most of the provisions in the Regulations commence on the day after registration on the Federal Register of Legislative Instruments. The amendment to the monetary threshold is taken to have commenced on 2 December 2006.

This retrospective commencement is required because the amendment rectifies a misdescribed amendment from the *Foreign Acquisitions and Takeovers Amendment Regulations 2006 (No. 3)*. Those Regulations increased various monetary thresholds in the Principal Regulations, commencing on 2 December 2006. At that time, the proposed amendment to increase the offshore takeovers threshold for certain acquisitions by United States investors from $100 million to $200 million (in line with the offshore takeovers threshold for other foreign persons) was misdescribed (it referred to paragraph (a) instead of paragraph (aa)) and was not incorporated into the Principal Regulations. However, the policy documents and the Foreign Investment Review Board website announced that this threshold was increased to $200 million on 2 December 2006, and was subsequently indexed to $210 million in 2008 and $219 million in 2009.

The retrospective commencement does not infringe subsection 12(2) of the *Legislative Instruments Act 2003* because the amendments effected by the Regulations are beneficial in nature and do not affect the rights of a person (other than the Commonwealth or an authority of the Commonwealth) as at the date of registration so as to disadvantage that person. Nor do the amendments impose any liabilities on any person (other than the Commonwealth or an authority of the Commonwealth) in respect of anything done or omitted to be done before the date of registration. The Office of Legislative Drafting and Publishing has certified that the proposed retrospectivity is lawful and valid.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

ATTACHMENT

Details of the *Foreign Acquisitions and Takeovers Legislation Amendment Regulations 2009 (No. 1)*

Regulation 1 – Name of Regulations

This regulation provides that the title of the Regulations is the *Foreign Acquisitions and Takeovers Legislation Amendment Regulations 2009 (No. 1)*.

Regulation 2 – Commencement

This regulation provides for the Regulations to commence as follows:
(a) on 2 December 2006 – regulations 1 to 3 and Schedule 1;
(b) on the day after registration – regulations 4 and 5 and Schedules 2 and 3.

Regulation 3 – Amendment of *Foreign Acquisitions and Takeovers Regulations 1989*

This regulation provides that the Principal Regulations are amended as set out in Schedule 1.

Regulation 4 – Amendment of *Foreign Acquisitions and Takeovers Regulations 1989*

This regulation provides that the *Foreign Acquisitions and Takeovers Regulations 1989* (the Principal Regulations) are amended as set out in Schedule 1. It also provides that the amendment made by item [6] in Schedule 2 (that is, the exemption for certain acquisitions of residential real estate by temporary residents) applies to contracts entered on or after 18 December 2008, the date on which the Assistant Treasurer announced the policy changes.

Regulation 5 – Amendment of Foreign Acquisitions and Takeovers (Notices) Regulations

This regulation provides that the Foreign Acquisitions and Takeovers (Notices) Regulations (the Principal Notices Regulations) are amended as set out in Schedule 3.

Schedule 1 – Amendment of *Foreign Acquisitions and Takeovers Regulations 1989* taken to have commenced on 2 December 2006

Item [1] – regulation 6, table, item 2, column 3

Regulation 6 of the Principal Regulations provides the various monetary thresholds applicable to acquisitions by prescribed foreign investors (currently only United States investors). Item 2 of that regulation provides the 'offshore takeovers' threshold – that is, acquisitions involving offshore companies which have Australian subsidiaries and/or assets. In December 2006, this threshold was increased from $100 million to $200 million, meaning that the Treasurer has no powers under the Act to prohibit an acquisition valued below $200 million. Although the increased threshold took effect at that time for 'offshore takeovers' by non-prescribed foreign investors, the amending regulation for 'offshore takeovers' by prescribed foreign investors was misdescribed – referring to paragraph (a) instead of paragraph (aa) – so it was not incorporated in the

Principal Regulations at that time. However, the policy documents and the Foreign Investment Review Board website announced that this threshold was increased to $200 million for all foreign investors on 2 December 2006, and (for US investors) was subsequently indexed to $210 million in 2008 and $219 million in 2009. This item would correct that error.

Schedule 2 – Amendments of *Foreign Acquisitions and Takeovers Regulations 1989* commencing on the day after registration

Item [1] – regulation 2, definition of *accommodation facility*

Regulation 2 of the Principal Regulations provides definitions for relevant terms referred to in those regulations. This item deletes the definition of accommodation facility as it is no longer necessary.

Item [2] – regulation 2, after definition of *spouse*

This item provides a definition of *temporary resident* to describe those foreign persons who will be exempt under the new regulation at item [6]. It refers to people who hold an appropriate visa which permits them to live in Australia for an extended period of time (generally more than 12 months). However, it does not matter how long they have actually been in Australia, nor how much time is remaining on their visa. This most commonly refers to people who are working or studying in Australia. It also includes people who intend to live in Australia permanently and who hold a bridging visa which permits them to stay here until such time as their application for permanent residency has been decided by the Department of Immigration and Citizenship, such as retirees/aged parents or people with an Australian spouse/de facto.

It does not include people who are only visiting Australia for short periods of time, such as:

- tourists;
- people undergoing medical treatment in Australia;
- business people who may visit Australia regularly for business purposes but are only permitted to stay for short periods at a time (for example, up to three months);
- air and sea crew who may regularly visit Australia as part of their job; and
- people in Australia for court proceedings (for example, holding a criminal justice visa).

Item [3] – paragraph 3 (p)

Regulation 3 of the Principal Regulations provides a list of specified acquisitions of real estate by specified persons which are not subject to the *Foreign Acquisitions and Takeovers Act 1975* (the Act) (that is, the acquisition is exempt and hence does not require notification). Paragraph 3(p) provides that acquisitions of developed, non-residential commercial real estate are exempt if valued below the relevant threshold ($5 million if the property is heritage listed, $50 million if it is not heritage listed, or $953 million (indexed annually) if the acquirer is a prescribed foreign investor). Previously, this exemption did not apply to property, the whole or part of which comprised an accommodation facility. Accommodation facilities such as hotels,

motels, hostels and guesthouses are essentially commercial in nature, not residential, and acquisitions of such facilities are routinely approved. Accordingly, this item provides that such facilities are included in the exemption applicable to other developed commercial property.

This exemption is intended to also include acquisitions of individual dwellings within such facilities, where those dwellings are part of the facility (not just physically located within the facility). For example, the acquisition of a hotel room in a strata titled hotel where the room is managed by the hotel operator (that is, it is part of the hotel) would be included in this exemption, but the acquisition of a unit in a hotel building which is owner-occupied or rented out privately by the owner (that is, it is not part of the hotel) would not be covered by this exemption.

Item [4] – paragraph 3 (s)

Paragraph 3(s) of the Principal Regulations provides that acquisitions of individual units within 'designated' strata titled hotels do not require notification where the Treasurer has provided a certificate to that effect. This item deletes this exemption, since it is no longer necessary – such acquisitions are now included in the expanded exemption under paragraph 3(p) (see item [3]), without the need for the Treasurer to provide a certificate.

Item [5] – sub-subparagraph 3 (v) (iv) (B)

This item merely changes the punctuation at the end of sub-subparagraph 3(v)(iv)(B) from a full-stop to a semi-colon, indicating that there are additional paragraph(s) under regulation 3.

Item [6] – after paragraph 3 (v)

This item adds a new exemption to the list provided at regulation 3 of the Principal Regulations. It applies to those acquisitions of residential real estate by temporary residents (see item [2]) which are not considered contrary to the national interest and are currently routinely approved.

Subparagraph 3(w)(i) states that this exemption applies to acquisitions made in individual name(s) or in the name of the temporary resident's Australian company or trust estate (it does not include companies or trusts in which other types of foreign persons have an interest). Subparagraph 3(w)(ii) specifies the types of residential real estate for which notification is not required:

- *Vacant land* – this exemption only applies to individual block(s) which are zoned to permit the construction of a single residential dwelling on each block. It does not include land on which multiple dwellings may be constructed (such as dual occupancy houses, townhouses or units). Nor does it include acquisitions of land where the temporary resident has an interest in any adjacent vacant land, in order to prevent the possibility of 'land banking' (that is, persons acquiring large tracts of land which they do not intend to develop, but rather to retain for the purpose of restricting supply in order to put upward pressure on land prices). Temporary residents may still acquire land which is not covered by this exemption, but they must submit a notice under section 26A

of the Act – the same as other foreign persons – and approval would generally be granted subject to development conditions.

- *Established dwellings* (that is, dwellings which are not *new dwellings* – see below) – this exemption only applies to an established dwelling which is to be used as the temporary resident's principal place of residence; it does not apply to an established dwelling which is acquired for any other purpose (for example, to be used as a holiday home or rented out as an investment property).

- *New dwellings* – these are defined in the policy as dwellings which have not previously been sold and have either never been occupied or have been occupied for no more than 12 months.

Schedule 3 – Amendments of Foreign Acquisitions and Takeovers (Notices) Regulations

Item [1] – regulation 1

This item renames the Principal Notices Regulations using current drafting conventions – that is, italicised and including the year.

Item [2] – subregulation 4 (3)

Regulation 4 of the Principal Notices Regulations specifies the prescribed forms of notice. Subregulation 4(3) provides that the prescribed form of notice under section 26A of the Act (that is, to notify acquisitions of real estate) is Form 3. This item introduces an additional prescribed form of notice under section 26A (Form 4), to be used by foreign person(s) acquiring *residential* real estate in *individual name(s)* (see item [9]). Form 3 will continue to be applicable for all other notifications under section 26A (this Form is expected to be updated in the near future).

Item [3] – paragraph 6 (b)

Regulation 6 of the Principal Notices Regulations provides that a person must annex copies of all relevant documents to a notice submitted under section 25, 26 or 26A of the Act. Section 27 of the Act provides that notification must comply with the directions set out in the prescribed form, so this regulation is redundant where the form directs the person submitting the notice to annex copies of the relevant documents. This item means that regulation 6 no longer applies to notices submitted under section 26A.

The streamlined notice relating to acquisitions of residential real estate by individuals (Form 4 – see item [9]) no longer requires supporting documents to be attached. The notice relating to other acquisitions of real estate (Form 3) has been amended to direct the person submitting the notice to annex copies of the relevant documents (see item [8]).

Item [4] – regulation 6, at the foot

This item inserts a comment related to item [3].

Item [5] – regulation 8

Regulation 8 of the Principal Notices Regulations provides the manner in which a notice submitted under section 25, 26 or 26A of the Act must be signed. As with item [3], this regulation is redundant where the form gives directions for signing the notice. This item means that regulation 8 no longer applies to notices submitted under section 26A, since both of the prescribed section 26A notices give directions specifying the manner in which those forms are to be signed (see item [8] for Form 3 and item [9] for Form 4).

Item [6] – regulation 8, at the foot

This item inserts a comment related to item [5].

Item [7] – Schedule, Forms 1 and 2

The Schedule in the Principal Notices Regulations provides the prescribed forms of notice under sections 25, 26 and 26A of the Act (Forms 1, 2 and 3 respectively). This item amends Forms 1 and 2 to incorporate the updated title of the Principal Notices Regulations (see item [1]).

Item [8] – Schedule, Form 3, General Directions, items 1 to 3

This item amends Form 3 in accordance with items [2], [3] and [5].

Item [9] – Schedule, after Form 3

This item introduces an additional prescribed form of notice under section 26A (Form 4), to be used by foreign person(s) acquiring *residential* real estate in *individual name(s)* (see item [2]). It is a simplified version of the current notice (Form 3) and is written in 'plain English' in order to be more user-friendly. Foreign person(s) can reasonably be expected to be able to understand and complete Form 4 without having to employ a solicitor to do so (depending on their level of English competency).