

EXPLANATORY STATEMENT

Select Legislative Instrument 2009 No. 104

Issued by authority of the Assistant Treasurer

Foreign Acquisitions and Takeovers Act 1975

Foreign Acquisitions and Takeovers Legislation Amendment Regulations 2009 (No. 2)

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 of the Act 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 foreign persons which are considered not to be contrary to the national interest and hence do not require notification (known as exemptions). The *Foreign Acquisitions and Takeovers (Notices) Regulations 1975* (the Principal Notices Regulations) provide the prescribed forms of notice.

The purpose of the Regulations is to:

- amend the Principal Regulations to remove inconsistency with the Act as a consequence of recent legislative changes regarding same-sex relationships; and
- amend the Principal Notices Regulations to introduce new and revised prescribed forms to streamline the notification and administrative processes for certain acquisitions of real estate.

The amendments regarding same-sex relationships reflect the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* which came into effect on 10 December 2008. The amendments regarding the streamlined forms reflect the policy reforms announced by the Assistant Treasurer on 18 December 2008.

The Regulations specify that:

- *spouse* includes de facto partners (within the meaning of the *Acts Interpretation Act 1901*) irrespective of whether they are in opposite or same-sex relationships; and
- new/revised forms are to be used for the notification of proposed acquisitions of real estate:
 - Form 5 (new form) is for companies/trusts acquiring residential real estate;
 - Form 4 (revised form) is for individuals acquiring residential real estate; and
 - Form 3 (revised form) is for all other real estate acquisitions.

Details of the Regulations are set out in the Attachment.

The proposed Regulations commence on the day after they are registered on the Federal Register of Legislative Instruments.

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. 2)***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. 2)*.

Regulation 2 – Commencement

This regulation provides for the Regulations to commence on the day after registration.

Regulation 3 – 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.

Regulation 4 – Amendment of *Foreign Acquisitions and Takeovers (Notices) Regulations 1975*

This regulation provides that the *Foreign Acquisitions and Takeovers (Notices) Regulations 1975* (the Principal Notices Regulations) are amended as set out in Schedule 2.

Schedule 1 – Amendment of *Foreign Acquisitions and Takeovers Regulations 1989***Item [1] – regulation 2, definition of *spouse***

Regulation 2 of the Principal Regulations currently provides a definition of spouse to include 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. This item amends the definition to include de facto partners (within the meaning of the *Acts Interpretation Act 1901*) irrespective of whether they are in opposite or same-sex relationships, in accordance with the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008*.

Schedule 2 – Amendment of *Foreign Acquisitions and Takeovers (Notices) Regulations 1975***Item [1] – subregulation 4 (1)**

This item amends the subregulation to reflect the change made by item [4].

Item [2] – subregulation 4 (2)

This item amends the subregulation to reflect the change made by item [4].

Item [3] – subregulation 4 (3)

Regulation 4 of the Principal Notices Regulations specifies the prescribed forms of notice. Subregulation 4(3) currently provides that the prescribed form of notice under section 26A of the Act (that is, to notify acquisitions of real estate) is:

- Form 4 for acquisitions of residential real estate by individual(s); and
- Form 3 for all other acquisitions.

This item introduces an additional prescribed form of notice under section 26A (Form 5), to be used by foreign person(s) acquiring *residential* real estate in the name of a *company or trust* (see item [5]). Form 4 will continue to be applicable for acquisitions of residential real estate by individual(s) and Form 3 will continue to be applicable for all other notifications under section 26A (that is, all non-residential real estate).

Item [4] – Schedule, title

This item amends the title of the Schedule in accordance with current drafting practices.

Item [5] – Schedule, Forms 3 and 4

This item amends Forms 3 and 4 in accordance with item [3]. The amended Forms also include some minor technical improvements.

This item also introduces an additional prescribed form of notice under section 26A (Form 5), to be used by foreign person(s) acquiring *residential* real estate in the name of a *company or trust* (see item [3]). It completes the streamlining process for the notification of proposed acquisitions of residential real estate which commenced with the introduction of Form 4 on 31 March 2009 (see *Foreign Acquisitions and Takeovers Legislation Amendment Regulations 2009 (No. 1)*).