

# **EXPLANATORY STATEMENT**

## **Select Legislative Instrument 2012 No. 309**

### **Issued by authority of the Assistant Treasurer**

#### *Foreign Acquisitions and Takeovers Act 1975*

##### *Foreign Acquisitions and Takeovers Amendment Regulation 2012 (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 Regulation amends the *Foreign Acquisitions and Takeovers Regulations 1989* to give effect to Australia's commitments under the Protocol on Investment to the Australia-New Zealand Closer Economic Relations Trade Agreement.

The Protocol on Investment to the Australia-New Zealand Closer Economic Relations Trade Agreement, which was signed by the Australian and New Zealand Prime Ministers in February 2011, includes a commitment by Australia to provide New Zealand investors with the higher foreign investment screening thresholds that apply to United States investors.

The *Foreign Acquisitions and Takeovers Act 1975* and the associated *Foreign Acquisitions and Takeovers Regulations 1989* stipulate the notification and approval requirements for foreign investors proposing to invest in Australia. An investment proposal is subject to these notification and approval requirements if its value is greater than the relevant monetary thresholds specified in the *Foreign Acquisitions and Takeovers Regulations 1989*.

Currently, New Zealand investors seeking to obtain a substantial interest in an Australian business or corporation valued above A\$244 million (indexed annually) are required to notify and seek approval from the Treasurer. Also, New Zealand investors seeking to acquire an interest in developed commercial real estate valued at A\$53 million (indexed annually) or more require approval.

United States investors have benefited from higher monetary thresholds since 1 January 2005, following implementation of the Australia-United States Free Trade Agreement. As a result of the Australia-United States Free Trade Agreement, privately owned United States investors (businesses) are only subject to the notification and approval requirement if their investment proposal is greater than a higher threshold of A\$1,062 million (indexed annually) in relation to developed commercial real estate and most businesses. The lower A\$244 million threshold applies to acquisitions by these investors of businesses in the prescribed sensitive sectors, which are media, telecommunications, transport, military related goods and services, encryption and security technologies and communications systems and uranium or plutonium related activities.

The Regulation provides the higher screening thresholds to New Zealand investors by:

- including equivalent definitions for New Zealand enterprises and nationals to those applying to United States enterprises and nationals; and
- including New Zealand enterprises and nationals in the definition of prescribed foreign investors and prescribed foreign government investors.

Including New Zealand investors in the definition of prescribed foreign investors also implements Australia's commitment that proposed New Zealand investment in Australian financial sector companies would no longer be subject to foreign investment screening under the *Foreign Acquisitions and Takeovers Act 1975* (although approval is still required under the *Financial Sector (Shareholdings) Act 1998*).

The Regulation also includes an amendment to remove a minor inconsistency between the percentage interest threshold to be a foreign government investor (contained in the *Foreign Acquisitions and Takeovers Regulations 1989*) and that to be a foreign person (prescribed under Section 9 of the *Foreign Acquisitions and Takeovers Act 1975*). The amendment will ensure a consistent definition applies to all foreign persons, including foreign government investors.

The Protocol on Investment was tabled with the Joint Standing Committee on Treaties and considered at a hearing of the Committee. The Joint Standing Committee on Treaties recommended that binding treaty action be taken.

The National Interest Analysis provided to the Joint Standing Committee outlines the extensive consultation process undertaken as part of the negotiations.

Australia has worked closely with New Zealand to ensure implementation is consistent with the agreed Protocol on Investment.

The Regulation will commence on a day notified by the Minister in an instrument, following the agreement between Australia and New Zealand of a start date for the Protocol on Investment.

## **Statement of Compatibility with Human Rights**

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

### **Foreign Acquisitions and Takeovers Amendment Regulation 2012 (No. 1)**

This Legislative Instrument is 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*.

#### **Overview of the Legislative Instrument**

The Regulation makes amendments to the *Foreign Acquisitions and Takeovers Amendment Regulations 1989* to give effect to Australia's commitments under the Protocol on Investment to the Australia-New Zealand Closer Economic Relations Trade Agreement.

The amendments include New Zealand enterprises and nationals in the definition of prescribed foreign investors and prescribed foreign government investors so that the higher foreign investment screening thresholds applying to these investors (currently United States investors) apply to New Zealand. As a result, privately owned New Zealand investors (businesses) are only subject foreign investment screening if their investment proposal is greater than A\$1,062 million (indexed annually) in relation to developed commercial real estate and most businesses (the threshold is currently A\$244 million).

The Regulation also makes a minor amendment to ensure a consistent percentage interest threshold applies to the definition of all foreign persons, including foreign government investors.

#### **Human rights implications**

This Legislative Instrument does not engage any of the applicable rights or freedoms.

#### **Conclusion**

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.