

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2010 No. 30**

Issued by authority of the Treasurer

*Foreign Acquisitions and Takeovers Act 1975*

*Foreign Acquisitions and Takeovers Amendment Regulations 2010 (No. 1)*

Section 39 of the *Foreign Acquisitions and Takeovers Act 1975* (the Act) provides that the Governor-General may make regulations prescribing all 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 foreign investment screening regime to ensure that foreign investment in Australia is not contrary to the national interest. It provides that the Treasurer may prohibit certain acquisitions of Australian corporations, businesses, land and/or other assets by foreign persons, where such acquisitions would be contrary to the national interest (sections 18 to 21A of the Act refer). Sections 26 and 26A of the Act provide that some acquisitions must be compulsorily notified to the Treasurer. However, subsection 11(5A) of the Act provides that certain kinds of interests in shares may be prescribed and hence disregarded for the purposes of certain prescribed provisions, such as the compulsory notification provisions. The concept of 'substantial interest' is fundamental to the Act, both in terms of the Treasurer's powers and the compulsory notification provisions. The *Foreign Acquisitions and Takeovers Amendment Act 2010* (the Amendment Act) expands the definition of 'substantial interest' to include rights to future shares and voting power, in addition to currently held shares and voting power.

The *Foreign Acquisitions and Takeovers Regulations 1989* (the Principal Regulations) prescribe the kinds of interests and provisions which are to be disregarded.

The purpose of the Regulations is to amend the Principal Regulations to ensure that Australian companies are not inadvertently treated as foreign companies under the compulsory notification provisions of the Act, by virtue of the expanded definition of 'substantial interest' upon commencement of the Amendment Act. The Revised Explanatory Memorandum accompanying the Amendment Act outlined the Commonwealth's intention to introduce regulations to this effect.

The Regulations specify that rights to future shares and voting power are to be disregarded when determining if an investor is effectively a 'foreign person' for the purposes of the compulsory notification provisions of the Act. That is, only currently held shares and voting power are to be taken into consideration for these purposes.

Details of the Regulations are set out in the Attachment.

The Regulations are taken to have commenced on 12 February 2009.

This retrospective commencement is required to coincide with commencement of Schedule 1 to the Amendment Act, to ensure that Australian companies are not inadvertently treated as foreign companies as a result of the expanded definition of 'substantial interest' in the Amendment Act.

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 would be 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 Amendment Regulations 2010 (No. 1)*****Regulation 1 – Name of Regulations**

This regulation provides that the title of the Regulations is the *Foreign Acquisitions and Takeovers Amendment Regulations 2010 (No. 1)*.

**Regulation 2 – Commencement**

This regulation provides for the Regulations to be taken to have commenced on 12 February 2009.

**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.

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

This item is a consequential amendment related to the substantive amendment at item [2] below.

**Item [2] – regulation 2A**

Upon commencement of the *Foreign Acquisitions and Takeovers Amendment Act 2010*, the definition of ‘substantial interest’ in the *Foreign Acquisitions and Takeovers Act 1975* (the Act) will be expanded to include financing arrangements which may confer potential future ownership and/or control rights (in addition to traditional shares and voting power).

The Act provides for compulsory notification of certain acquisitions by foreign persons. The concept of ‘substantial interest’ applies to the compulsory notification provisions of the Act in two ways. First, the acquirer must be substantially foreign as defined by the ‘substantial interest’ test (effectively a ‘foreign person’). This test applies to *both* compulsory notification provisions in the Act – that is, subsection 26(1) for acquisitions of interests in corporations which are subject to the Treasurer’s powers under section 18 of the Act, and subsection 26A(1) for acquisitions of interests in land which are subject to powers under section 21A. Second, the acquirer must be acquiring a ‘substantial interest’ in an Australian corporation. This test only applies to acquisitions of interests in corporations (subsection 26(2)), not acquisitions of interests in land.

With respect to the first component, an entity may not be aware (or be able to determine) that they are a person to whom the compulsory notification provisions apply (effectively a ‘foreign person’), due to the expanded notion of ‘substantial interest’. Given the characteristics of derivative instruments (for example, options, futures, warrants and convertible notes) which may confer potential future ownership and/or control rights, and the way they may be traded off-market, an entity may not know the

identity of all persons holding such interests. It is therefore possible that a company may not know whether it was required to lodge a notice based upon who may hold substantial interests in it.

Item 2 inserts a new subregulation 2A(2) to provide that rights to future shares and potential voting power are disregarded with respect to the first component of the compulsory notification provisions of the Act. That is, only *currently held* shares and voting power (not *rights to future* shares and voting power) are taken into consideration in determining whether an entity is effectively a ‘foreign person’. This ensures that Australian companies are not inadvertently treated as foreign companies. For example, an Australian company whose share register indicates 100 per cent Australian ownership should not be considered a ‘foreign person’ and be required to notify the Treasurer of all its acquisitions of interests in other corporations and/or land, simply because a foreign person or company has rights to future shares in that company.

This item does not affect the second component of the compulsory notification provisions applicable to section 26. That is, the expanded definition of ‘substantial interest’ (including *rights to future* shares and voting power) is applicable in determining whether the foreign person is acquiring a substantial interest in an Australian corporation.

### **Item [3] – regulation 2B**

This item is a consequential amendment related to the substantive amendment at item [2] above.