

Appendix E

Foreign Acquisitions and Takeovers Regulations 1989

*Foreign Acquisitions and Takeovers (Notices)
Regulations*



Foreign Acquisitions and Takeovers Regulations 1989

Statutory Rules 1989 No. 177 as amended

made under the

Foreign Acquisitions and Takeovers Act 1975

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¹ The latest compilation of the Regulations can be accessed via ComLaw(Commonwealth Law) at www.comlaw.gov.au.

Contents

- 1 Name of Regulations [see Note 1]
- 2 Definitions
- 2AA References to *United States of America*
- 2AB Meaning of *US enterprise*
- 2A Prescribed interests in shares
- 2B Kind of interest
- 3 Exempt acquisitions of interests in Austurban land
- 4 Prescribed corporations — value of assforeign corporation
- 5 Exempt dealings — value of assets
- 6 Asset thresholds for exempt foreign invprescribed corporations etc — prescribeinvestors
- 7 Asset thresholds for exempt foreign invprescribed corporations etc — prescribegovernment investors
- 8 Condition relating to exempt foreign invfinancial sector companies etc
- 9 Condition relating to prescribed foreign
- 10 Condition relating to foreign governmen
- 11 Conditions relating to prescribed foreigngovernment investor
- 12 Conditions relating to prescribed sensiti
- 13 Indexation of amounts

Notes

1 Name of Regulations [see Note 1]

These Regulations are the *Foreign Acquisitions and Takeovers Regulations 1989*.

2 Definitions

In these Regulations, unless the contrary intention appears:

Act means the *Foreign Acquisitions and Takeovers Act 1975*.

charitable institution means:

- (a) any charitable, religious, scientific or educational institution (including an institution providing residential accommodation wholly or principally for full-time students attending an educational institution);
- (b) any institution being, or carrying on, a hospital; and
- (c) any institution the sole or principal purpose of which is to assist in the saving of life, or the prevention of loss or damage to property, whether at sea or otherwise;

being an institution which is not carried on for the purpose of profit or gain to its individual members and which is not empowered to make any distribution, whether in money, property or otherwise, to its members.

entity includes an individual.

foreign person includes a person to whom section 26A of the Act applies.

spouse, in relation to a person, includes a de facto partner of the person within the meaning of the *Acts Interpretation Act 1901*.

temporary resident means a person:

- (a) who resides in Australia; and
- (b) who is the holder of a temporary visa within the meaning of the *Migration Act 1958*; and
- (c) to whom one of the following circumstances applies:
 - (i) if the person holds a bridging visa — the person has applied for a permanent visa under that Act and the application has not been withdrawn or otherwise finally determined;
 - (ii) if the person holds any other temporary visa — the visa permits the person to remain in Australia for a continuous period of more than 12 months.

US enterprise has the meaning given by regulation 2AB.

US national means:

- (a) a national of the United States of America, as defined in Title III of the *Immigration and Nationality Act* of the United States of America; or
- (b) a permanent resident of the United States of America.

2AA References to *United States of America*

In these Regulations:

- (a) a reference to the territory of the United States of America includes Puerto Rico and the District of Columbia; and
- (b) a reference to a law of the United States of America includes a law that applies in a State of the United States of America or in any part of the territory of the United States of America.

2AB Meaning of *US enterprise*

- (1) A *US enterprise* is:
 - (a) an entity of a kind described in subregulations (2) to (4); or
 - (b) a branch of an entity (other than an entity that is a US enterprise under paragraph (a)) that satisfies subregulation (5);
that is not disqualified under subregulation (6).
- (2) The entity is constituted or organised under a law of the United States of America.
- (3) The form in which the entity may be constituted or organised may be, but is not limited to, any of the following forms:
 - (a) a corporation;
 - (b) a trust;
 - (c) a partnership;
 - (d) a sole proprietorship;
 - (e) a joint venture;
 - (f) an unincorporated association.
- (4) It is immaterial whether the entity:
 - (a) is carried on for profit; or
 - (b) is owned or controlled privately.
- (5) If an entity is not described in subregulations (2) to (4), a branch of that entity is a US enterprise if the branch:
 - (a) is located in the United States of America; and

- (b) is carrying on business activities in the United States of America:
 - (i) in a way other than being solely a representative office; and
 - (ii) in a way other than being engaged solely in agency activities, including the sale of goods or services that cannot reasonably be regarded as undertaken in the United States of America; and
 - (iii) by having its administration in the United States of America.
- (6) However, an entity or a branch of an entity is not a US enterprise if the Treasurer decides that this subregulation should apply to the entity or branch because:
 - (a) it is owned or controlled by a person or persons of a country other than the United States of America, and:
 - (i) Australia does not maintain diplomatic relations with that country; or
 - (ii) Australia adopts or maintains measures in relation to that country or a person of that country that have the effect of prohibiting transactions with the entity or branch; or
 - (b) it is owned or controlled by a person or persons of a country other than the United States of America (including Australia) and the entity or branch has no substantial business activities in the United States of America.

2A Prescribed interests in shares

For paragraph 11 (5) (c) of the Act, an interest in a share is prescribed if:

- (a) the interest is of the kind described in regulation 2B; and
- (b) the interest is held by a corporation (a *foreign custodian company*) that:
 - (i) is a foreign person; and
 - (ii) is in the business of providing custodian services to other persons in relation to the holding of shares.

2B Kind of interest

For paragraph 2A (a), the interest is an interest in a share:

- (a) in:
 - (i) a prescribed corporation to which paragraph 18 (1) (a) of the Act applies; or

- (ii) a holding corporation of a prescribed corporation to which paragraph 18 (1) (a) of the Act applies; and
- (b) in which an equitable interest is held by a person that is not the holder of the legal interest in the share; and
- (c) in which the holder of the legal interest in the share exercises voting rights associated with the interest in the share only at, or in accordance with, the direction of:
 - (i) another person that is providing custodian services to a person in relation to the holding of the legal interest; or
 - (ii) the holder of an equitable interest in the share that is receiving custodian services that are related to that interest.

3 Exempt acquisitions of interests in Australian urban land

For subsection 12A (8) of the Act, the Act does not apply in relation to an acquisition of an interest in Australian urban land of each of the following kinds, namely, the acquisition of such an interest by a foreign person:

- (a) that is:
 - (i) a charitable institution operating in Australia primarily for the benefit of persons ordinarily resident in Australia; or
 - (ii) a trustee of a foreign-controlled trust established for charitable or benevolent purposes, where the beneficiaries of the trust are persons ordinarily resident in Australia;
- (b) that is a life insurance company operating in Australia and the acquisition is made by way of investment of its statutory funds (within the meaning of the *Life Insurance Act 1995*) primarily for the benefit of policy holders ordinarily resident in Australia;
- (c) that is an insurance company (other than a life insurance company) operating in Australia and the acquisition:
 - (i) is made from the reserves of the company; and
 - (ii) is consistent with the company's obligations under the *Insurance Act 1973*;
- (d) that is a corporation operating in Australia that maintains a superannuation fund for its employees, (within the meaning of the *Superannuation Industry (Supervision) Act 1993*), for the benefit of the members of the fund or their dependents, being persons ordinarily resident in Australia, and the acquisition is made as an investment of all or part of the assets of that fund;
- (e) where:
 - (i) the acquisition is of an interest in land on which a dwelling will be or is being constructed; and

- (ii) the Treasurer has certified that the sale of that interest, (whether or not the certificate also refers to other interests) by a specified real estate developer to foreign persons is not contrary to the national interest; and
 - (iia) the conditions (if any) set out in the certificate are satisfied; and
 - (iii) the real estate developer provides the foreign person with a copy of that certificate;
- (f) where:
 - (i) the land is being used, or is able to be used immediately and in its present state, for industrial or non-residential commercial purposes; and
 - (ii) the acquisition is wholly incidental to the conduct of the existing or proposed business activities of the foreign person (other than business activities that include acquisitions of land or the development of, or investment in, land or the development or operation of any form of accommodation facility);
- (g) where the acquisition is of an interest in a time share scheme and the entitlement of the foreign person and any of that person's associates is not in the aggregate greater than 4 weeks in any year;
- (h) where:
 - (i) the Treasurer has certified that a programme of land acquisitions by a foreign person in respect of a year is not contrary to the national interest; and
 - (ii) the acquisition is an acquisition referred to in that certificate;
- (i) where the acquisition is of shares as a consequence of which the foreign person holds less than a substantial interest in an Australian urban land corporation less than 10 per cent of the real estate assets of which are in the form of developed residential real estate that the corporation has not developed itself, being an Australian urban land corporation that is:
 - (i) publicly listed on an Australian Stock Exchange; and
 - (ii) primarily involved in the development of land;
- (j) where the acquisition is of shares as a consequence of which the foreign person holds less than a substantial interest in an Australian urban land corporation less than 10 per cent of the real estate assets of which are in the form of developed residential real estate, being an Australian urban land corporation that is publicly listed on an Australian Stock Exchange, or, where

- 2 or more foreign persons hold interests in the Australian urban land corporation, those foreign persons hold less than an aggregate substantial interest in that corporation;
- (k) who is an Australian citizen not ordinarily resident in Australia;
 - (l) that is a corporation in which the government of an overseas country within the meaning of the *Diplomatic Privileges and Immunities Act 1967* holds a substantial interest and the acquisition is of an interest in land where the land is to be used exclusively for the purposes of the diplomatic mission of that country or as a diplomatic residence;
 - (m) that is an Australian corporation that is a foreign person only because of direct interests held in it by Australian citizens not ordinarily resident in Australia;
 - (n) that is a trustee of a trust estate, where the trustee is a foreign person only because of direct interests held in the trust estate by Australian citizens not ordinarily resident in Australia;
 - (o) where the acquisition is of units in a unit trust as a consequence of which:
 - (i) the foreign person holds less than a substantial interest in an Australian urban land trust estate:
 - (A) that is a unit trust that accepts funds from the public on the basis of a prospectus approved by the Corporate Affairs Commission of a State or Territory;
 - (B) that has at least 100 unit holders;
 - (C) that is primarily engaged in the development of land; and
 - (D) that has less than 10 per cent of its real estate assets in the form of developed residential real estate that the trust has not developed itself; or
 - (ii) the foreign person holds less than a substantial interest in an Australian urban land trust estate:
 - (A) that is a unit trust that accepts funds from the public on the basis of a prospectus approved by the Corporate Affairs Commission of a State or Territory;
 - (B) that has at least 100 unit holders; and
 - (C) that has less than 10 per cent of its real estate assets in the form of developed residential real estate;
- or, where 2 or more foreign persons hold interests in the Australian urban land trust estate, those foreign persons

hold less than an aggregate substantial interest in that trust estate;

- (p) if:
 - (i) the acquisition is of an interest:
 - (A) in non-residential commercial land; or
 - (B) in land that comprises a hotel, motel, hostel or guesthouse, or an individual dwelling that is part of a hotel, motel, hostel or guesthouse; and
 - (ii) the land is valued at:
 - (A) for land which is being acquired by a prescribed foreign investor — less than:
 - (I) for the calendar year 2009 — \$953 000 000; or
 - (II) for any later calendar year — the amount worked out under regulation 13; and
 - (B) for land the whole or part of which is entered in the Register of the National Estate and the interest is being acquired by a foreign person other than a prescribed foreign investor — less than \$5 000 000; and
 - (C) in any other case — less than \$50 000 000; and
 - (iii) the land is not vacant land;
- (q) where the acquisition is of an interest in land that is zoned as residential property and the person:
 - (i) is, at the time of acquisition, the holder of a permanent visa (within the meaning of the *Migration Act 1958*); or
 - (ii) is, at the time of acquisition, the holder of a special category visa (within the meaning of that Act); or
 - (iii) if he or she had entered Australia lawfully immediately before the time of acquisition, would have been entitled to the grant, on presentation of a passport, of a special category visa (within the meaning of that Act); or
 - (iv) is an Australian corporation that is a foreign person only because of a direct interest held in it by a person to whom subparagraph (i), (ii) or (iii) applies; or
 - (v) is the trustee of a trust estate, where the trustee is a foreign person only because of a direct interest held in the trust estate by a person to whom subparagraph (i), (ii) or (iii) applies;
- (r) if:

- (i) the acquisition is of an interest in land on which a dwelling exists that is, or may be, used for residential purposes, other than land that is part of a subdivided building in which hotel services are provided; and
 - (ii) the Treasurer has certified that the sale of an interest of that kind to foreign persons is not contrary to the national interest; and
 - (iii) the conditions (if any) set out in the certificate are satisfied; and
 - (iv) the person who intends to dispose of the interest gives the foreign person a copy of the certificate;
- (t) where the acquisition is of an interest in land that is zoned as residential property and:
 - (i) the person is the spouse of an Australian citizen; and
 - (ii) the interest is held by the person and his or her spouse as joint tenants;
- (u) that is the responsible entity of a managed investment scheme registered under section 601EB of the *Corporations Act 2001* and the acquisition is primarily for the benefit of scheme members ordinarily resident in Australia;
- (v) where the following circumstances apply:
 - (i) the foreign person is a corporation;
 - (ii) the foreign person is in the business of providing custodian services to other persons in relation to the holding of interests in Australian urban land;
 - (iii) the foreign person acquires the interest in Australian urban land in the course of the foreign person's business;
 - (iv) the foreign person exercises rights associated with the interest only at, or in accordance with, the direction of:
 - (A) another person that is providing custodian services to a person in relation to the holding of the legal interest in the Australian urban land; or
 - (B) the holder of an equitable interest in the interest in the Australian urban land that is receiving custodian services that are related to that interest;
- (w) if:
 - (i) the foreign person is:
 - (A) a temporary resident; or
 - (B) an Australian corporation that is a foreign person only because of a direct interest held in it by a person referred to in sub-subparagraph (i) (A); or

- (C) the trustee of a trust estate, where the trustee is a foreign person only because of a direct interest held in the trust by a person referred to in subparagraph (i) (A); and
- (ii) the acquisition is of an interest in land that is zoned as residential property, and one or more of the following circumstances apply:
 - (A) the acquisition is of a single residential block of vacant land that is zoned to permit the construction of no more than one residential dwelling on the block and the person does not have an interest in any vacant land adjacent to the land to be acquired;
 - (B) the acquisition is of an interest in land on which a single established residential dwelling exists that is to be used as the person's principal place of residence;
 - (C) the acquisition is of an interest in land on which a new residential dwelling exists.

4 Prescribed corporations — value of assets of foreign corporation

- (1) For paragraph 13 (1) (d) of the Act, the amount of \$200 000 000 is prescribed.
- (2) For paragraph 13 (1) (e) of the Act, the amount of \$200 000 000 is prescribed.

5 Exempt dealings — value of assets

- (1) For subparagraph (b) (i) of the definition of *exempt corporation* in subsection 13A (4) of the Act, the amount of \$100 000 000 is prescribed.
- (2) For subparagraph (b) (ii) of the definition of *exempt corporation* in subsection 13A (4) of the Act, the amount of \$100 000 000 is prescribed.
- (3) For paragraph (a) of the definition of *exempt business* in subsection 13A (4) of the Act, the amount of \$100 000 000 is prescribed.
- (4) For paragraph (b) of the definition of *exempt business* in subsection 13A (4) of the Act, the amount of \$100 000 000 is prescribed.

6 Asset thresholds for exempt foreign investments in prescribed corporations etc — prescribed foreign investors

For a provision of section 17B of the Act mentioned in the following table, the amount is set out in the table:

Item	Provision	Amount
1	paragraph 17B (1) (b)	(a) For the calendar year 2006 — \$52 000 000; or (aa) For the calendar year 2007 — \$100 000 000; or (b) For any other calendar year — the amount worked out under regulation 13
2	paragraph 17B (1) (c)	(a) For the calendar year 2006 — \$52 000 000; or (aa) For the calendar year 2007 — \$200 000 000; or (b) For any other calendar year — the amount worked out under regulation 13
3	paragraph 17B (2) (b)	(a) For the calendar year 2005 — \$800 000 000; or (b) For any other calendar year — the amount worked out under regulation 13
4	paragraph 17B (2) (c)	(a) For the calendar year 2005 — \$800 000 000; or (b) For any other calendar year — the amount worked out under regulation 13

Appendix E: Foreign Acquisitions and Takeovers Regulations

Item	Provision	Amount
5	subparagraph 17B (3) (a) (ii)	(a) For the calendar year 2006 — \$52 000 000; or (aa) For the calendar year 2007 — \$100 000 000; or (b) For any other calendar year — the amount worked out under regulation 13
6	subparagraph 17B (3) (b) (ii)	(a) For the calendar year 2005 — \$800 000 000; or (b) For any other calendar year — the amount worked out under regulation 13

7 Asset thresholds for exempt foreign investments in prescribed corporations etc — prescribed foreign government investors

For a provision of section 17C of the Act mentioned in the following table, the amount is set out in the table:

Item	Provision	Amount
1	paragraph 17C (1) (a)	(a) For the calendar year 2006 — \$52 000 000; or (aa) For the calendar year 2007 — \$100 000 000; or (b) For any other calendar year — the amount worked out under regulation 13

Item	Provision	Amount
2	paragraph 17C (1) (b)	(a) For the calendar year 2006 — \$52 000 000; or (aa) For the calendar year 2007 — \$200 000 000; or (b) For any other calendar year — the amount worked out under regulation 13
3	subsection 17C (2)	(a) For the calendar year 2006 — \$52 000 000; or (aa) For the calendar year 2007 — \$100 000 000; or (b) For any other calendar year — the amount worked out under regulation 13

8 Condition relating to exempt foreign investments in financial sector companies etc

For subsection 17D (3) of the Act, the condition is that the investor is a prescribed foreign investor.

9 Condition relating to prescribed foreign investor

For paragraph 17E (1) (a) of the Act, the condition to be satisfied by an entity is that the entity is:

- (a) a US national; or
- (b) a US enterprise.

10 Condition relating to foreign government investor

For paragraph 17F (c) of the Act, it is a condition that the interest is greater than 15%.

11 Conditions relating to prescribed foreign government investor

- (1) For paragraph 17G (b) of the Act, the conditions are that:

- (a) the entity mentioned in section 17G of the Act (*entity 1*) is not:
 - (i) a body politic of a foreign country; or
 - (ii) a body politic of part of a foreign country; or
 - (iii) a part of a body politic of a foreign country or part of a foreign country; and
 - (b) either:
 - (i) entity 1 is controlled by another entity (*entity 2*); or
 - (ii) an entity (*entity 2*) holds an interest in entity 1 that satisfies the condition specified in regulation 10 for paragraph 17F (c) of the Act; and
 - (c) entity 2 is:
 - (i) a body politic of a relevant foreign country; or
 - (ii) a body politic of part of a relevant foreign country; or
 - (iii) a part of a body politic of a relevant foreign country or part of a relevant foreign country.
- (2) In subregulation (1):
relevant foreign country means the United States of America.

12 Conditions relating to prescribed sensitive sector

- (1) For paragraph 17H (a) of the Act, the condition is that the investor is a prescribed foreign investor.
- (2) For paragraph 17H (b) of the Act, the condition is that the business activity is any of the following:
 - (a) media;
 - (b) telecommunications;
 - (c) transport (including airports, port facilities, rail infrastructure, international and domestic aviation and shipping services provided within, or to or from, Australia);
 - (d) the supply of training or human resources, or the manufacture or supply of military goods or equipment or technology, to the Australian Defence Force or other defence forces;
 - (e) the manufacture or supply of goods, equipment or technology able to be used for a military purpose;
 - (f) the development, manufacture or supply of, or the provision of services relating to, encryption and security technologies and communications systems;
 - (g) the extraction of (or the holding of rights to extract) uranium or plutonium or the operation of nuclear facilities.

13 Indexation of amounts

(1) This regulation explains how to work out an amount for a provision of regulation 3, 6 or 7.

(2) In this regulation:

existing amount, for a calendar year, means:

- (a) if an indexed amount has not been previously worked out under this regulation — the original amount; or
- (b) the indexed amount for the year before the relevant year.

GDP implicit price deflator value, for a calendar year, means the GDP implicit price deflator value that was published by the Australian Bureau of Statistics in the publication *Australian System of National Accounts (cat. 5204.0)* (Table 7, Expenditure on GDP, Implicit Price Deflators), for the last financial year that ended before the calendar year.

indexed amount means an amount mentioned in subregulation (1).

latest GDP implicit price deflator value, for a relevant year, means the GDP implicit price deflator value for that year.

original amount means an amount that is replaceable under this regulation by an indexed amount.

relevant year means the calendar year for which an indexed amount is worked out.

(3) The indexed amount for a relevant year is worked out in accordance with the formula:

$$\frac{\text{existing amount} \times \text{latest GDP implicit price deflator value}}{100}$$

(4) If, apart from this subregulation, an indexed amount that is worked out under this regulation would not be a multiple of \$1 000 000, the indexed amount is rounded to the nearest multiple of \$1 000 000 (rounding up if the indexed amount ends in \$500 000).

(5) However, if the amount worked out under subregulation (3) (after any rounding under subregulation (4)) is less than the existing amount, the indexed amount for the relevant year is taken to be the existing amount.

- (6) If, at any time, whether before or after the commencement of these Regulations, the Australian Statistician publishes a GDP implicit price deflator value for a financial year in substitution for a GDP implicit price deflator value previously published for the financial year, the publication of the later GDP implicit price deflator value is to be disregarded for this regulation.
- (7) However, if, at any time, whether before or after the commencement of these Regulations, the Australian Statistician changes the reference base for the GDP implicit price deflator value, then, in applying this regulation after the change is made, regard is to be had only to values published in terms of the new reference base.

Notes to the *Foreign Acquisitions and Takeovers Regulations 1989*

Note 1

The *Foreign Acquisitions and Takeovers Regulations 1989* (in force under the *Foreign Acquisitions and Takeovers Act 1975*) as shown in this compilation comprise Statutory Rules 1989 No. 177 amended as indicated in the Tables below.

For all relevant information pertaining to application, saving or transitional provisions *see* Table A.

Table of Instruments

Year and number	Date of notification in <i>Gazette</i> or FRLI registration	Date of commencement	Application, saving or transitional provisions
1989 No. 177	6 July 1989	1 Aug 1989 (<i>see Gazette</i> 1989, No. S240)	
1991 No. 302	30 Sept 1991	30 Sept 1991	—
1994 No. 295	31 Aug 1994	1 Sept 1994	—
1995 No. 416	19 Dec 1995	19 Dec 1995	—
1999 No. 199	10 Sept 1999	10 Sept 1999	—
2004 No. 49	30 Mar 2004	30 Mar 2004	—
2004 No. 316	11 Nov 2004	1 Jan 2005 (<i>see r. 2 and Gazette</i> 2004, No. GN51)	—
2004 No. 401	23 Dec 2004	1 Jan 2005 (<i>see r. 2 and Gazette</i> 2004, No. GN51)	—
2006 No. 286	17 Nov 2006 (<i>see</i> F2006L03741)	18 Nov 2006	—
2006 No. 316	1 Dec 2006 (<i>see</i> F2006L03836)	2 Dec 2006	—
2006 No. 364	13 Dec 2006 (<i>see</i> F2006L04021)	14 Dec 2006	—
2009 No. 53	30 Mar 2009 (<i>see</i> F2009L01190)	Rr. 1–3 and Schedule 1: 2 Dec 2006 Rr. 4, 5, Schedules 2 and 3: 31 Mar 2009	R. 4
2009 No. 104	5 June 2005 (<i>see</i> F2009L02155)	6 June 2009	—

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
R. 1	rs. 1999 No. 199
Heading to r. 2	rs. 2004 No. 316
R. 2	am. 1995 No. 416; 1999 No. 199; 2004 No. 316; 2009 Nos. 53 and 104
R. 2AA.....	ad. 2004 No. 316
R. 2AB.....	ad. 2004 No. 316
R. 2A.....	ad. 2004 No. 49 am. 2006 No. 286
R. 2B.....	ad. 2004 No. 49 rs. 2006 No. 286
R. 2C.....	ad. 2004 No. 49 rep. 2006 No. 286
R. 3	am. 1991 No. 302; 1994 No. 295; 1995 No. 416; 1999 No. 199; 2004 Nos. 49 and 316; 2006 No. 286; 2009 No. 53
R. 4	ad. 1999 No. 199 am. 2006 No. 316
R. 5	ad. 1999 No. 199 am. 2006 No. 316
R. 6	ad. 2004 No. 316 am. 2006 No. 316; 2009 No. 53
R. 7	ad. 2004 No. 316 am. 2006 No. 364
R. 8	ad. 2004 No. 316
R. 9	ad. 2004 No. 316
R. 10	ad. 2004 No. 316
R. 11	ad. 2004 No. 316 am. 2004 No. 401
R. 12	ad. 2004 No. 316
R. 13	ad. 2004 No. 316 am. 2006 No. 316

Table A Application, saving or transitional provisions

Select Legislative Instrument 2009 No. 53

4 Amendment of *Foreign Acquisitions and Takeovers Regulations 1989*

- (1) Schedule 2 amends the *Foreign Acquisitions and Takeovers Regulations 1989*.
- (2) The amendment made by item 6 of Schedule 2 applies in relation to a contract for the acquisition of an interest in land that was entered into on or after 18 December 2008.