



Foreign Acquisitions and Takeovers Amendment Act 2010

No. 1, 2010

**An Act to amend the *Foreign Acquisitions and
Takeovers Act 1975*, and for related purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

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No. 1, 2010

An Act to amend the *Foreign Acquisitions and Takeovers Act 1975*, and for related purposes

[Assented to 12 February 2010]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Foreign Acquisitions and Takeovers
Amendment Act 2010*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	12 February 2010
2. Schedule 1	12 February 2009.	12 February 2009
3. Schedule 2	The day this Act receives the Royal Assent.	12 February 2010

Note: This table relates only to the provisions of this Act as originally passed by both Houses of the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments

Foreign Acquisitions and Takeovers Act 1975

1 Subsection 5(1)

Insert:

aggregate substantial interest in a corporation has the meaning given by subsection 9(1A).

2 Subsection 5(1)

Insert:

potential voting power has the meaning given by section 14.

3 Subsection 5(1) (paragraph (b) of the definition of *share*)

Omit “or 26”.

4 Subsection 5(1)

Insert:

substantial interest in a corporation has the meaning given by subsection 9(1).

5 Subsection 5(1)

Insert:

voting power has the meaning given by subsection 14(1).

6 At the end of paragraphs 5(4)(a) and (c)

Add “and”.

7 After paragraph 5(4)(c)

Insert:

(d) acquiring an asset or a share;

8 Subsection 9(1)

Repeal the subsection, substitute:

- (1) For the purposes of this Act, a person is taken to hold a **substantial interest** in a corporation if the person, alone or together with any associate or associates of the person:
- (a) is in a position to control not less than 15% of the voting power in the corporation; or
 - (b) is in a position to control not less than 15% of the potential voting power in the corporation; or
 - (c) holds interests in not less than 15% of the issued shares in the corporation; or
 - (d) would hold interests in not less than 15% of the issued shares in the corporation, if shares in the corporation were issued as the result of the exercise of all rights of a kind mentioned in subsection 11(2A).
- (1A) For the purposes of this Act, 2 or more persons are taken to hold an **aggregate substantial interest** in a corporation if they, together with any associate or associates of any of them:
- (a) are in a position to control not less than 40% of the voting power in the corporation; or
 - (b) are in a position to control not less than 40% of the potential voting power in the corporation; or
 - (c) hold interests in not less than 40% of the issued shares in the corporation; or
 - (d) would hold interests in not less than 40% of the issued shares in the corporation, if shares in the corporation were issued as the result of the exercise of all rights of a kind mentioned in subsection 11(2A).
- (1B) For the purposes of paragraphs (1)(c) and (1A)(c), in determining the percentage of the interests in the issued shares in a corporation that a person holds at a particular time, if:
- (a) the person has a right that, if exercised, might result in the person holding an interest in an issued share in the corporation; and
 - (b) it cannot be determined at that time (whether from the right itself or from the circumstances existing at that time) whether the exercise of the right would have that result;
- assume that the right were exercised at that time.
- (1C) For the purposes of paragraphs (1)(d) and (1A)(d), in determining the percentage of the interests in the issued shares in a corporation
-

that a person would hold at a particular time if shares were issued as mentioned in those paragraphs, if:

- (a) the person has a right that, if exercised, might result in the person holding an interest in an issued share in the corporation; and
- (b) it cannot be determined at that time (whether from the right itself or from the circumstances existing at that time) whether the exercise of the right would have that result;

assume that the right were exercised at that time.

9 After subsection 11(2)

Insert:

- (2A) To avoid doubt, a right covered by paragraph (2)(b) or (c) includes a right under an instrument, agreement or arrangement, whether the right is exercisable presently or in the future and whether on the fulfilment of a condition or not.

Example: A convertible note.

9A After subsection 11(5)

Insert:

- (5A) For the purposes of a prescribed provision of this Act, disregard an interest in a share if the interest is of a kind prescribed in respect of that provision.

9B Subparagraph 12C(b)(i)

After “voting power”, insert “or potential voting power”.

9C Subparagraph 12C(b)(i)

Omit “issued shares”, substitute “shares”.

9D Paragraph 12C(c)

After “voting power”, insert “or potential voting power”.

9E Paragraph 12C(c)

Omit “issued shares”, substitute “shares”.

10 Section 14

Before “In this Act”, insert “(1)”.

Note: The heading to section 14 is altered by omitting “**Voting power**” and substituting “**Voting power and potential voting power**”.

11 Section 14

Omit “voting power”, substitute “*voting power*”.

12 At the end of section 14

Add:

- (2) In this Act, a reference to *potential voting power* in a corporation is a reference to the voting power in the corporation, on the assumption that the votes that might be cast at a general meeting of the corporation included each vote that:
 - (a) because of the exercise of a right (whether the right is exercisable presently or in the future and whether on the fulfilment of a condition or not), might come to exist in the future; and
 - (b) if it came into existence, might be cast at a general meeting of the corporation.
- (3) In determining how much of the *potential voting power* in a corporation a person is in a position to control at a particular time, if:
 - (a) a right exists that, if exercised, might result in the person being in a position to control more of the potential voting power in the corporation than the person would be in a position to control if the right were not exercised; and
 - (b) it cannot be determined at that time (whether from the right itself or from the circumstances existing at that time) whether the exercise of the right would have that result;assume that the right were exercised at that time.

13 After paragraph 18(3)(a)

Insert:

- (aa) be in a position to control more of the total potential voting power in the corporation than:
 - (i) such proportion of the total potential voting power in the corporation as is equal to the proportion of the total potential voting power in the corporation at the time of the coming into operation of the first-mentioned order that that foreign person, together with any associate or

associates of that person, was in a position to control at that time; or

- (ii) such greater proportion (if any) of the total potential voting power in the corporation as is specified in the order; or

14 Paragraph 20(5)(a)

After “determine the policy of the corporation”, insert “in relation to any matter”.

15 Paragraph 21(5)(a)

After “determine the policy of the business”, insert “in relation to any matter”.

15A Subsection 25(4)

Omit “an option”, substitute “a right (including a right under an option)”.

16 Paragraph 26(2)(a)

Omit “acquires a substantial shareholding”, substitute “acquires a substantial interest”.

17 Paragraph 26(2)(b)

Omit “acquire a substantial shareholding”, substitute “acquire a substantial interest”.

18 Paragraph 26(3)(b)

Omit “the acquisition of the interests in the shares”, substitute “the acquisition of the substantial interest”.

19 Subsection 26(5A)

Omit “the acquisition of a substantial shareholding”, substitute “the acquisition of a substantial interest”.

20 Subsection 26(6)

Repeal the subsection, substitute:

- (6) In this section, a reference to an agreement by virtue of which a person acquires a substantial interest in a corporation is a reference to an agreement by virtue of which:

- (a) the person:
 - (i) starts to hold a substantial interest in the corporation; or
 - (ii) would start to hold a substantial interest in the corporation on the assumption that the person held interests in shares that are interests that he or she has offered to acquire; or
 - (iii) would start to hold a substantial interest in the corporation on the assumption that the person held rights to votes that might be cast at a general meeting of the corporation that are rights that he or she has offered to acquire; or
- (b) if the person already holds a substantial interest in the corporation—any of the following conditions are satisfied:
 - (i) the person becomes in a position to control more of the voting power or potential voting power in the corporation;
 - (ii) the person starts to hold additional interests in the issued shares in the corporation;
 - (iii) the person would start to hold additional interests in the issued shares in the corporation, if shares in the corporation were issued as the result of the exercise of all rights of a kind mentioned in subsection 11(2A).

21 Subsection 26(7)

After “interests in shares” (wherever occurring), insert “or rights”.

22 Section 28

Omit “an option”, substitute “a right (including a right under an option)”.

Note: The heading to section 28 is altered by omitting “**options**” and substituting “**rights**”.

23 Section 28

Omit “that option”, substitute “that right”.

Schedule 2—Transitional provisions

1 Transitional—arrangements entered into between 12 February 2009 and commencement

- (1) This item applies if:
- (a) a person enters into an arrangement in the period:
 - (i) starting on 12 February 2009; and
 - (ii) ending on the day on which this item commences; and
 - (b) by entering into the arrangement, the person:
 - (i) would not have committed an offence under subsection 26(2) or 26A(2) of the *Foreign Acquisitions and Takeovers Act 1975* (disregarding the amendments made by Schedule 1 to this Act); and
 - (ii) would (apart from subitem (2)) have committed an offence under subsection 26(2) or 26A(2) of the *Foreign Acquisitions and Takeovers Act 1975* (as amended by Schedule 1 to this Act).

Note: The amendments in Schedule 1 are taken to have commenced on 12 February 2009.

- (2) The person is taken not to have committed the offence mentioned in subparagraph (1)(b)(ii).
- (3) Section 25 of the *Foreign Acquisitions and Takeovers Act 1975* applies to the arrangement as if:
- (a) the arrangement were still a proposed arrangement; and
 - (b) paragraphs (1C)(b), (1D)(b) and (2)(b) and subparagraph (3)(c)(ii) of that section were omitted.
- (4) Without limiting section 27 of that Act, a form prescribed for the purposes of that section may deal with notification of an arrangement to which this item applies.

2 Transitional—requirement to give notice after commencement of certain pre-commencement arrangements

A person commits an offence if:

- (a) the person enters into an arrangement in the period:
 - (i) starting on 12 February 2009; and

- (ii) ending on the day on which this item commences; and
- (b) by entering into the arrangement, the person:
 - (i) would not have committed an offence under subsection 26(2) or 26A(2) of the *Foreign Acquisitions and Takeovers Act 1975* (disregarding the amendments made by Schedule 1 to this Act); and
 - (ii) would (apart from subitem 1(2)) have committed an offence under subsection 26(2) or 26A(2) of the *Foreign Acquisitions and Takeovers Act 1975* (as amended by Schedule 1 to this Act); and
- (c) the person does not give the Treasurer a notice having effect for the purposes of section 25 of that Act in respect of the arrangement within 30 days after the day on which this item commences.

Penalty: 500 penalty units or imprisonment for 2 years, or both.

[*Minister's second reading speech made in—
House of Representatives on 20 August 2009
Senate on 26 November 2009*]

(155/09)
