

Residential Property – Annual Vacancy Fee for Foreign Owners

02/07/2018

The Foreign Acquisitions and Takeovers Act 1975 has been amended by the Treasury Laws Amendment (Housing Tax Integrity) Act 2017 to introduce an annual vacancy fee, levied on foreign owners of residential property that is not occupied or genuinely available on the rental market for at least six months of the year.

The change in law affects foreign buyers of residential property.

The fee will be based on the same amount as the FIRB application fee. For example, the fee for residential land where the price of the acquisition is between \$2million and less than \$3million (\$2,000,000 – \$2,999,999) is \$22,300.

An annual report must be given to the ATO to say how long the property has been occupied as a residence during the year. Failure to provide the report, will mean the fee is deemed to apply.

The change in law affects foreign buyers who submit an application or notice to the Foreign Investment Review Board after 9 May 2017 to buy a property (or purchased a pre-approved property under a New Dwelling Certificate).

Foreign investors who submitted an application or notice to the Foreign Investment Review Board (FIRB) after 7:30pm (AEST) on 9 May 2017 will need to consider the impacts of the amendment. It affects all FIRB applications for the purchase of residential property and purchases in developments with New Dwelling Exemption Certificates from this date onward.

Essentially, any foreign owner without an exemption after this date will be liable to pay an annual vacancy fee unless the property is residentially occupied for at least six months (equivalent to 183 days) in a 12-month period (the vacancy year). A property will be deemed 'residentially occupied' by proving that:

- the foreign person, or a relative of the foreign person, genuinely occupied the property as a residence (whether or not with other persons); or

- the property was genuinely occupied as a residence under a lease or licence with a term of 30 or more days; or
- the property was genuinely available for occupation as a residence under a lease or licence with a term of 30 or more days.

New reporting obligations

Foreign owners are required to lodge an annual vacancy fee return with the Australian Taxation Office (ATO) within 30 days of the vacancy year. The vacancy year is the 12 months after the first day the foreign person acquires the right to occupy the property; for example, the date of settlement or receipt of an occupancy certificate.

Details about how to lodge the vacancy fee return will be provided with the foreign investment approval. The owner must lodge a return every vacancy year, regardless of whether the property is occupied or not. All relevant

records for five years after disposal of the interest in residential land.

Fee payable

The ATO will assess the vacancy fee amount, generally equivalent to the residential land application fee that was paid at the time the application for foreign investment approval was made to purchase the property. The fee begins at \$5,500 for properties acquired for less than \$1 million and can reach above \$100,000 for properties acquired for over \$10 million.

In the case of joint tenants or tenants in common, the fee payable will depend on the portion of the legal interest held by the person in question, equivalent to the portion of the foreign investment application fee that was payable. Where the property is co-owned by a non-foreign person, the non-foreign person will have no liability to pay a vacancy fee.

Exemptions

Foreign owners may benefit from exemptions in certain circumstances with acceptable supporting evidence. For example, foreign owners may be exempt from paying the annual vacancy fee in circumstances where:

- legal ownership of the property changed during the year;
- the property is undergoing substantial repair or renovations;
- the foreign owner or tenant is receiving long-term, in-patient, medical or residential care;
- legal restrictions by an order of a court or tribunal, or a law of the Commonwealth, a State or a Territory apply; or
- the registered owner is deceased and administration of the estate is pending.

Foreign owners should seek advice on their ability to obtain an exemption from the annual vacancy fee.

Evidence required

The ATO may require evidence of exemptions, occupation, or availability. Acceptable supporting evidence includes but is not limited to tenancy agreement(s), income tax returns or notices of assessment, title search or certificate of title showing the date that title was transferred, bank statements, insurance certificates for the tenant's or landlord's insurance, evidence of the reason of repairs, and evidence of the property being genuinely available for rent.

Penalties

A failure to submit the vacancy fee return will result in deemed vacancy for that property in the vacancy year. Further, civil penalties apply for a failure to keep required records and a failure to submit the vacancy fee return on time.

Suggested Actions

To mitigate the impact of the annual vacancy fee, foreign investors should:

- consider the fees that could payable on their investments from May 2017 onward;
- consider the possibility of ensuring that the property is occupied or genuinely available;
- consider any exemptions that may apply and seek advice on evidence required; and
- protect themselves against penalties by safekeeping all records and evidence required for the annual vacancy fee return.

Further information can be found on the Foreign Investment Review Board website. If you have any questions, please contact us.

Obtain Advice and Know Your Rights

If you are a foreign buyer, property developer or real estate agent dealing with foreign investors residential property market, you will need to

obtain clear and relevant advice about how you will be affected by these changes.

Contact Hickey lawyers

If you have any questions about the annual vacancy fee, the Foreign Acquisitions and Takeovers Act 1975 or the Foreign Acquisitions and Takeovers Fees Imposition Act 2015, you should contact **Joe Welch** - Owner Partner or **Julie Lee** - Solicitor at Hickey Lawyers who practices in the areas of Property Development, Management Rights, Agency Law and Body Corporate law.

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Laws in force

The Treasury Laws Amendment (Housing Tax Integrity) Act 2017 came into force on 30 November 2017.

No Substitute for Formal Advice

You should obtain formal advice from Hickey Lawyers before acting on any of the issues referred to above. This is not intended to be a substitute for formal legal advice and this does not take into account your particular circumstances. The comments above are current as at the date of this document.