
Foreign owners of residential property face vacancy fee

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In brief

New laws have been enacted to implement certain aspects of the Federal Government's housing affordability agenda, which was announced in the 2017-18 Federal Budget. One of those measures seeks to impose an annual vacancy fee - commonly referred to as the 'ghost tax' - on a foreign owners of Australian residential property that is essentially vacant for at least half of a year.

The new rules also require certain foreign owners to report annually to the Commissioner of Taxation in respect of each dwelling, even where there is no liability to the vacancy fee. With the vacancy fee for a foreign owner being based on an individual reporting period, affected persons and entities will need to be diligent to ensure that their reporting deadlines under the new regime are being met, and not find themselves in a taxable 'deemed vacancy' position for the year.

These rules are completely separate to any additional taxes or surcharges applied by some States to certain foreign owners of property.

In detail

The new property vacancy fee and annual reporting by foreign owners of Australian residential property is part of the Government's comprehensive housing affordability plan, first announced in the 2017-18 Federal Budget. The measures are no doubt designed as a financial incentive for a foreign owner to make their property available for rent and thereby increase available housing stocks in Australia.

Who is affected by the new rules?

The new law will apply to a 'foreign person' (as specifically defined) who submits a Foreign Investment Review Board (FIRB) notice or application (or would be so required had an exemption certificate not applied) to acquire a residential dwelling or residential land at any time from 7:30pm (AEST) on 9 May 2017.

A foreign person for such purposes is very broad in its application and can include a company or trust.

An individual who is not 'ordinarily resident' in Australia (with certain exceptions such as Australian citizens), including a holder of a visa that permits the individual to remain in Australia for only a limited period, is subject to these rules.

The concept of ‘ordinarily resident’ is different for purposes of the FIRB law from the concept of residency for income tax purposes. Taxpayers will need to consider the relevant definitions carefully. For example, an individual who is on secondment to Australia under a temporary visa and who purchases a property to live in Australia with their family during the period of their secondment, is subject to the vacancy fee reporting rules even though he or she might be considered to be a temporary resident for Australian income tax purposes.

Furthermore, the use of Australian corporations, Australian domiciled trusts, or trustees who are Australian citizens or Australian corporations to hold residential property in Australia does not allow foreign persons to avoid these rules. The rules even extend so far as applying to a discretionary trust where one or more foreign persons is a potential beneficiary of the trust.

What are the obligations?

In summary, the new law will:

- require the foreign owner of Australian residential real estate with a dwelling to give the Commissioner of Taxation an annual ‘vacancy fee return’, within 30 days after the end of a ‘vacancy year’, even if there is no liability to a vacancy fee, and
- impose a vacancy fee on the foreign owner where the property is not residentially occupied in the specified manner for at *least 183 days* in the ‘vacancy year’, or in cases where the annual vacancy fee return is not lodged.

The annual vacancy fee return is required to be lodged by *all* affected foreign persons and is expected to require disclosure of the number of days the dwelling was residentially occupied. A dwelling will be taken to be residentially occupied on a day if either:

- the foreign owner (or their relative(s)) genuinely occupies the dwelling as a residence, or
- the dwelling is genuinely occupied, or available for occupation (at a market rent), as a residence under lease or licence with a term of *30 days or more*. This condition means that holiday letting or short stay rentals, even if provided for more than half of the year, will not alleviate the imposition of the vacancy fee.

The relevant ‘vacancy year’ is broadly based on the first, and each successive, twelve month period commencing from the owner’s initial right to occupy the dwelling. As such, there is no standard annual due date for lodging the return. That is, the due date will not be the same for affected property owners.

The vacancy fee return is required to be lodged even where there is no obligation to pay any vacancy fee.

Affected owners will need to be diligent to ensure that their reporting deadlines under the new regime are met as and when required.

Failure to submit the vacancy fee return (or keep records relating to the occupancy for at least five years) as required will result in the imposition of penalties (as high as AUD52,500) and as noted above, result in automatic imposition of the vacancy fee for the applicable dwelling for the relevant year.

The Treasurer or the Commissioner of Taxation will notify the owner of the applicable vacancy fee which will be equivalent to the foreign investment application fee paid (or payable if not for a certain exemption) at the time of application to the FIRB for its approval to purchase the real estate. For example, a current application fee of AUD5,500 generally applies when acquiring an interest in residential land where the price of the acquisition is AUD1 million or less.

In the event that any vacancy fee remains unpaid, the Treasurer or the Commissioner of Taxation has the right to recover the debt and/or create a charge over any Australian land owned by the foreign person.

The Takeaway

Any foreign person, including companies or trusts which are held substantially by foreign persons, that has acquired an interest in an Australian residential property on which a dwelling is, or will be, situated at any time since 7.30pm (AEST) 9 May 2017 needs to be aware of these new rules. The consequences for failing to comply with the reporting obligations and deadlines are significant. These rules are also in addition to any State-based taxes or surcharges imposed on foreign owners.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

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