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Foreign property owners hit by new Annual Vacancy Fee

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On 30 November 2017, the recently passed Federal legislation, *Treasury Laws Amendment (Housing Tax Integrity) Act (Cth.) 2017*, received Royal Assent.

As a result, foreign owners of residential property located in Australia may now be subject to an annual vacancy fee (commonly labelled as the "ghost tax") imposed by the Australian Taxation Office ("ATO").

Previously, this liability was proposed as a measure to help solve Australia's housing affordability issues, due to the significant number of vacant residential properties, especially those owned by foreign investors. It was formally announced by the Government in May 2017 as part of the Federal Budget.

When Does it Apply?

The new laws will apply if the following criteria are satisfied:

1. the owner of the property is a foreign individual who is not ordinarily a resident in Australia (including companies or trusts that are controlled by such foreign individuals);
2. the property is a residential property with a dwelling constructed on the land (vacant property is not affected);
3. the property is acquired after 7.30pm on 9 May 2017 (being the time of the announcement of the Federal Budget);
4. the acquisition of the property was a "notifiable acquisition" with the Foreign Investment Review Board ("FIRB"), or was subject to an exemption, such as the acquisition of a new dwelling where a New Dwelling Exemption Certificate has been issued by FIRB; and
5. the property was not occupied and was vacant for more than 183 days (6 months) in a year.

Occupying the Property

For the purpose of the new legislation, the property will generally be considered to be occupied for the required 183 days per year if the owner can prove:

1. the property owner or a relative genuinely occupied the property as a residence;
2. the property was genuinely occupied as a residence under a lease or licence with a term of 30 days or more. This effectively excludes forms of short term accommodation and holiday rentals (such as most Airbnb rentals); and
3. the property was genuinely available for accommodation as a residence under a lease or licence with a term of 30 days or more, where the property was publically advertised as being available at a market rent.

FIRB has issued Guidance Note 48 which includes helpful examples regarding the determination of this required period of occupation.

Which "Year" applies?

The relevant year period for the purpose of the new legislation is unique and a standard period (such as a financial year or calendar year) does not apply across the board.

Instead, the annual assessment period (known as the "vacancy year") is each successive 12 month period commencing from the initial date when the owner acquired the right to occupy the property (usually being the settlement or closing date).

If the owner does not continue to own the property at the end of the vacancy year, there will be no liability to pay the vacancy fee.

Reporting Requirements

A Vacancy Fee Return is required to be lodged with the ATO by all relevant foreign owners of residential properties acquired after 9 May 2017, even if the property was not vacant for the required 183 day period and will not be subject to the vacancy fee.

The Return must be lodged within 30 days of the end of the vacancy year for each property.

Vacancy Fee Liability

If the property has been vacant for more than 183 days in that vacancy year, the owner will be liable for the vacancy fee. A notice of assessment will be issued by the ATO and the liability must be paid within 21 days.

Generally, the vacancy fee is equivalent to the fee paid to FIRB (or the fee payable, if an exemption had not applied) for its approval to purchase the property. For example, a current application fee of \$AUD5,500 applies when acquiring an interest in residential land where the consideration is up to \$AUD1 million.

Moving Forward

The new legislation is intended to encourage foreign owners to increase the number of residential dwellings available for rent. The reporting and notification requirements are designed to facilitate improved data of vacancy rates for foreign owned residential dwellings.

However, foreign owners will need to be diligent to ensure that they comply with the new reporting deadlines.

Any failure to lodge the Vacancy Fee Return (or keep records relating to the occupancy of a property for at least five years) may result in a penalty being imposed (possibly as high as \$AUD52,500) as well as the liability to pay the vacancy fee for the relevant year.

For further information or a detailed discussion on how these issues may affect you, please contact Adam Raleigh on (07) 3223 9116 or adam.raleigh@brhlawyers.com.au.

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