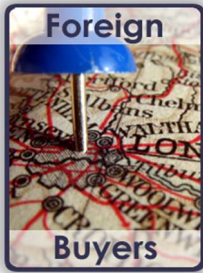


### RESIDENTIAL VACANCY FEE FOR FOREIGN BUYERS

In December 2017, The Australian Government introduced a vacancy fee for foreign owners of residential dwellings.



Under the legislation, foreign owners of residential dwellings are required to pay an annual vacancy fee if their dwelling is not *residentially occupied or rented out* for more than 183 days (6 months) in a year.

The intention behind this legislation is to motivate foreign owners to make their dwelling available for rent and increase available housing in Australia.



#### **Who needs to pay?**

The vacancy fee will apply to those foreign owners of residential dwellings who either:

- ❖ made a FIRB application for residential property after 7.30pm AEST on **9 May 2017**; or
- ❖ purchased under a new dwelling exemption certificate that a developer applied for after 7.30pm AEST on **9 May 2017**.

The vacancy fee may also apply where a foreign person failed to submit a FIRB application but purchased residential property anyway before 9 May 2017.

#### **Lodging an annual return**

Foreign owners will need to lodge an annual return to the Australian Taxation Office, even if their dwelling has been occupied or made available for rent. The return must be lodged within 30 days at the end of each vacancy year.

Where property is owned by two or more people as joint tenants, only one return needs to be lodged.

Where property is owned by two or more people as tenants in common, each person must lodge a return.

#### **Does it apply to residential vacant land?**

No, there is no vacancy fee or return that needs to be lodged until a dwelling has been constructed on the land. Where multiple dwellings are constructed on the land, a vacancy fee return must be lodged for each new dwelling.

#### **When am I not required to lodge a vacancy fee return?**

- ❖ If you sell or transfer your dwelling during a vacancy year
- ❖ In the event of death of the owner
- ❖ You are no longer a foreign person

#### **What is the vacancy year?**

A vacancy year is each successive period of 12 months starting on the occupation day for the dwelling during which you have continuously held an interest in the dwelling. It is not a calendar year nor a financial year. It is unique to your dwelling and when you commenced occupation.

The occupation day is the first day that you obtained the rights to occupy the dwelling. Usually, this will be the date of settlement of your purchase.

**Example:** Andrew purchases a new apartment in Sydney. He will be entitled to occupy the apartment on 23 September 2017. In this case the first occupation day is 23 September 2017, and it will be no later than 12 months and 30 days from this day that Andrew will be required to submit a vacancy fee return to the ATO. Andrew would need to occupy or genuinely make available the property for occupation, 6 months or more from that date to 23 September 2018, otherwise a fee will be payable.

### When is a dwelling residentially occupied?

If a dwelling is residentially occupied, there will be no vacancy fee payable by a foreign person.

A dwelling is considered residentially occupied if, for at least 183 days in a vacancy year, any of the following circumstances are met:<sup>1</sup>

- the owner or relative of the owner genuinely occupied the dwelling as a residence
- the dwelling was genuinely occupied as a residence subject to lease or licence for minimum terms of 30 days
- the dwelling was made *genuinely available for occupation* as a residence on the rental market (with minimum terms of 30 days). See below for further clarification.

During a vacancy year the residential occupancy of at least 183 days does not have to be continuous. You can have multiple continuous periods of *at least* 30 days throughout this period.

### Short term lettings

Short term lettings are those for less than 30 days. These include lettings via web-based stay sites (e.g. airbnb; stayz; short term apartment rentals). Dwellings made

available for short term lettings **are not** considered residentially occupied and would be liable for a vacancy fee.

### Dwellings genuinely available for occupation

A dwelling will be considered genuinely available for occupation as a residence with a minimum term of 30 days), if the dwelling is:

- made available on the rental market
- advertised publicly
- available at a market rent.

### Supporting Evidence

To prove that the property was genuinely occupied or made available for occupation, foreign investors may be required to provide supporting evidence. Here are some examples:

- tenancy agreements
- income tax returns or notices of assessment
- title search or certificate of title
- bank statements
- insurance certificates for tenants or landlords' insurance
- evidence of the reason for repairs
- evidence of making the property available for rent (advertisements online or written instructions to agent)

### Exemptions

If your residence is damaged, so as to be considered unsafe for occupation or is undergoing substantial repairs or renovations for at least 183 days in a vacancy year, or occupation is made illegal for that period, you will not be liable to pay the vacancy fee.

You will also be exempt if the person who was ordinarily occupying the dwelling, is absent due to long term illness or

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<sup>1</sup> [www.ato.gov.au/general/foreign-investment-in-australia/annual-vacancy-fee/](http://www.ato.gov.au/general/foreign-investment-in-australia/annual-vacancy-fee/)

residential care. Supporting evidence will be required to support any claim for an exemption.

### When do you lodge a return?

Within 30 days of the end of each vacancy year, regardless of whether a vacancy fee is payable.

You must be registered on the Land and Water Register to lodge.<sup>2</sup>

The period that the ATO assesses liability is the 12 months after the first day the foreign person has the right to occupy (e.g. settles the purchase).

### How much is the vacancy fee

The vacancy fee if applicable, will generally be the same amount as the FIRB application fee you paid at the time you submitted your FIRB application.

If you purchased the dwelling under a new dwelling exemption certificate from the developer, the fee will be equal to the FIRB fee you would have paid had the exemption certificate not been available.

If your FIRB application fee was waived at the time, the fee payable will be equal to the lowest tier FIRB fee that would have been payable (e.g. \$5,500 as at Feb 2019).<sup>3</sup>

### Penalties

If you fail to lodge your vacancy fee on time, you may be liable to pay a vacancy fee regardless of whether the dwelling was residentially occupied during a vacancy year.

You may also be liable for a civil penalty of 250 units if you fail to lodge on time and if you fail to keep records available relevant to your vacancy fees. Records must be kept for at least 5 years.

In addition, a failure to submit the vacancy fee return will result in a deemed vacancy for that dwelling in the 12 month period.

Any unpaid vacancy fees for a property may be recovered as a debt or by the creation of a charge over the land.

### Further Enquiries

For further enquiries on how this may effect you, please contact **Despina Priala** of **Priala Legal** for a more detailed discussion.



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<sup>2</sup> FIRB Guidance Note 48 – 24 July 2018

<sup>3</sup> [www.ato.gov.au/general/foreign-investment-in-australia/annual-vacancy-fee](http://www.ato.gov.au/general/foreign-investment-in-australia/annual-vacancy-fee)