

EXPLANATORY STATEMENT

Issued by authority of the Treasurer

Foreign Acquisitions and Takeovers Act 1975

Foreign Acquisitions and Takeovers Amendment (Vacancy Fees and Other Measures) Regulations 2017

The *Foreign Acquisitions and Takeovers Act 1975* (the Act) provides for the regulation of foreign investment in Australia, specifying the circumstances under which foreign investors require the Treasurer's approval to invest in Australia.

Subsection 139(1) of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The *Foreign Acquisitions and Takeovers Amendment (Vacancy Fees and Other Measures) Regulations 2017* (the Regulations) amend the *Foreign Acquisitions and Takeovers Regulation 2015* to clarify the circumstances under which a person can be exempt from payment of vacancy fees imposed by Schedule 3 to the *Treasury Laws Amendment (Housing Tax Integrity) Act 2017* which amends the Act.

The Regulations would exempt foreign persons from the application of the vacancy fee in respect of residential dwellings owned by them in Australia. The vacancy fee is payable when the foreign person is unable to demonstrate that the residential dwelling has been occupied, leased or made genuinely available on the rental market for at least 6 months (equivalent to 183 days) in a vacancy fee year (12 months).

Under the Regulations, if a foreign person can show that they are covered by an exemption, they will not be subject to the vacancy fee. The exemptions will apply if a foreign person can show that, for at least 6 months (equivalent to 183 days) in a 12 month period (vacancy year), the relevant dwelling is incapable of being occupied as a residence.

The circumstances in which a dwelling may be incapable of being occupied as a residence would include that the dwelling is damaged or unsafe or otherwise unsuitable to be occupied as a residence. This will be evidenced by the foreign person demonstrating that as a result of the dwelling undergoing substantial repair, the dwelling was unable to be occupied. This could include damage to the structure of the dwelling.

A dwelling may also be considered unsuitable to be occupied if it is subject to an order of a court or tribunal, or a law (of the Commonwealth, a State or a Territory) prohibits the occupation of the dwelling as a residence. Similarly, a dwelling undergoing a major renovation where all, or substantially all, of a building is removed or replaced resulting in the dwelling being unsuitable to be occupied, could mean the foreign person would not be liable to pay the vacancy fee.

Foreign persons who are subject to the vacancy fee regime will also be required to comply with certain obligations, even when they have no liability to pay the vacancy fee as a result of being exempt due to the application of the Regulations. Those obligations would include reporting annually to the Commissioner of Taxation in the form of lodgement of an annual vacancy fee return and maintaining records with respect to the vacancy fee liability.

The Regulations give effect to measures announced with the 2017-2018 Budget as part of a suite of measures to address housing affordability and were therefore not the subject of consultation.

Consistent with the Australian Taxation Office's (ATO) responsibility for managing screening and compliance for residential real estate applications under the foreign investment framework, the ATO will administer the vacancy fee and monitor compliance with the vacancy fee regime. Foreign persons who purchase a residential property after 9 May 2017 will be required to make a declaration (annual vacancy fee return) to the ATO as to whether their property was occupied or not.

The ATO will be able to identify the owners that the charge will apply to through the existing screening process, which occurs before a property settles. The ATO will also deploy its data matching capabilities to support compliance monitoring. Additionally, the ATO works with partner agencies including State and Territory counterparts to share data, intelligence and expertise, with a high probability of detection of non-compliance.

The Regulations amend the *Foreign Acquisitions and Takeovers Regulation 2015* to apply the vacancy fee retrospectively from 7:30PM (AEST) on 9 May 2017 to align with the 2017-18 Budget announcement that included the measure (along with the Government's broader housing affordability package). Foreign persons who made an application to acquire residential real estate prior to the public Budget announcement (at 7:30PM (AEST) on 9 May 2017) will not be liable for the vacancy fee and as such, the exemptions the Regulations implement will not apply. Further, if a foreign person is acquiring residential real estate under a New Dwelling Exemption Certificate that was granted before this time, they would not be liable for the vacancy fee,

The purpose of the Regulations is to implement commitments already made. The Regulations give effect to measures announced with the 2017-2018 Budget as part of a suite of measures to address housing affordability and were therefore not the subject of consultation.

Further details of the Regulations are set out in [Attachment A](#).

The Statement of Compatibility is set out in [Attachment B](#).

The Act does not specify any conditions that need to be met before the power to make the Regulations may be exercised.

A Regulation Impact Statement is not required.

The Regulations are a legislative instrument for the purpose of the *Legislative Instruments Act 2003*. Section 2 of the Regulations specifies when each provision takes effect.

Section 1 — Name

The title of the Regulations is the *Foreign Acquisitions and Takeovers Amendment (Vacancy Fees and Other Measures) Regulations 2017*.

Section 2 — Commencement

The Regulations commence at the same time as Schedule 3 to the *Treasury Laws Amendment (Housing Tax Integrity) Act 2017* commences. The retrospective application of the Regulations (from 7:30PM (AEST) on 9 May 2017) is expected to have minimal adverse impact given that the retrospective application was included in the 2017-2018 Budget announcement and has been widely publicised.

Section 3 — Authority

The Regulations are made under the *Foreign Acquisitions and Takeovers Act 1975*.

Section 4 — Schedules

Section 4 provides that '[e]ach instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.' This is a technical provision which gives operational effect to the amendments contained in the Schedules.

Schedule 1 — Amendments to the *Foreign Acquisitions and Takeovers Regulation 2015*

1 Section 5

Item 1 amends the *Foreign Acquisitions and Takeovers Regulation 2015* to insert definitions for ‘business or entities certificate’, ‘residential land (near-new dwelling interests) certificate’, ‘residential land (other than established dwellings) certificate’ and ‘tenements and mining, production or exploration entities certificate’. The substance of these definitions is provided in the sections identified in Section 5. The purpose of these definitions is to provide greater clarity around the types of exemption certificates that are available under the Act. The definitions will enhance clarity for foreign persons and the administrator of the foreign acquisitions regime.

2 After Section 26

Item 2 creates an objects clause for Division 4A that explains that Division 4A exempts foreign persons from liability to pay the vacancy fee in certain circumstances.

3 After Division 4 of Part 3

Section 43C

Section 43C is inserted by the Regulations to clarify that the exemption from liability to pay the vacancy fee applies in relation to the application of subsection 115C(1) of the Act and any other provision of the Act to the extent that it relates to subsection 115C(1). Subsection 115C(1) of the Act creates the liability to pay the vacancy fee. Exempting foreign persons from this, in the circumstances contemplated by section 43D, is the intended outcome of the Regulations.

Subsection 43C(1)(b) makes it clear that foreign persons who are subject to the vacancy fee regime must continue to comply with certain obligations, even when they have no liability to pay the vacancy fee as a result of being exempt due to the application of these Regulations. Those obligations include reporting annually to the Commissioner of Taxation in the form of lodgement of an annual vacancy fee return and maintaining records with respect to the vacancy fee liability.

Section 43D

Section 43D operates to exclude a foreign person from application of the vacancy fee in a vacancy fee year when the foreign person can demonstrate that they are covered by an exemption.

A foreign person will be exempt if they can show that, for at least 183 days in a vacancy year, the residential dwelling subject to the vacancy fee is incapable of being occupied as a residence (subsection 43D(2)). In those circumstances, the vacancy fee will not be payable for that vacancy year.

Subsection 43D(3) sets out the circumstances in which a dwelling may be incapable of being occupied as a residence, including that the dwelling is damaged or unsafe or otherwise unsuitable to be occupied as a residence. This will be evidenced by the foreign person demonstrating that as a result of the dwelling undergoing substantial repair, the dwelling was unable to be occupied. This could include damage to the structure of the dwelling. A dwelling may also be considered unsuitable to be occupied if the dwelling is subject to an order of a court or tribunal or a law of the

Commonwealth, a State or a Territory prohibiting the occupation of the dwelling as a residence.

Similarly, a dwelling undergoing a major renovation where all, or substantially all, of a building is removed or replaced, resulting in the dwelling being unsuitable to be occupied, could mean the foreign person is not liable to pay the vacancy fee.

Further, subsection 43D(2) also acknowledges that sometimes a foreign person, or their permitted occupant, may need medical care or residential care and therefore be unable to occupy the dwelling. In these circumstances (supported by evidence), the foreign person may be exempted from payment of the vacancy fee.

In each of these cases, the foreign person will still be required to lodge an annual vacancy return, retain records and comply with other obligations under the Act.

4 In the appropriate position in Part 7

Item 4 inserts section 70 to clarify that the amendments made by the Regulations apply when a foreign person has a liability to pay the vacancy fee. The exemptions created by the Regulations do not apply to exempt a foreign person from any other obligation they have under the Act.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Foreign Acquisitions and Takeovers Amendment (Vacancy Fees and Other Measures) Regulations 2017 (the Regulations)

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Foreign Acquisitions and Takeovers Amendment (Vacancy Fees and Other Measures) Regulations 2017* amends the Foreign Acquisitions and Takeovers Regulation 2015 to create a range of exemptions to the liability to pay the annual vacancy fee.

An annual vacancy fee was created to increase the stock of available housing on the Australian market and ensure that dwellings purchased by foreign persons are not able to remain vacant without the imposition of a vacancy fee. If the dwelling is occupied for 183 days in a vacancy year, then the foreign person is not subject to the vacancy fee.

Sometimes, a foreign person may be unable to make the dwelling available for occupation. The circumstances when a foreign person will not be subject to the annual vacancy fee include if the dwelling is unsuitable for occupation or the foreign person is in receipt of medical care and is unable to manage the dwelling.

Human rights implications

This Legislative Instrument engages the right to freedom from discrimination.

Article 26 of the ICCPR recognises that all persons are equal before the law and are entitled without discrimination to the equal protection of the law. Article 26 further provides that ‘the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as national origin.

However, the Human Rights Committee has recognised that ‘not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant’.¹

The Legislative Instrument also generally engages the rights protected by the International Convention on the Elimination of All Forms of Racial Discrimination. Paragraph 1 of Article 1 of International Convention on the Elimination of All Forms of Racial Discrimination defines the term ‘racial discrimination’ to mean ‘any distinction, exclusion, restriction or preference based on race, colour descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and

¹ General Comment No 18: Non-discrimination at [13].

fundamental freedoms in the political, economic, social, cultural, or any other field of public life’.

Under Article 2(a)(a) of the International Convention on the Elimination of All Forms of Racial Discrimination, [E]ach State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local shall act in conformity with this obligation’. Under Article 5 of International Convention on the Elimination of All Forms of Racial Discrimination States Parties ‘undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to ...national ...origin, to equality before the law’ in the enjoyment of civil, political, economic, social and cultural rights, including the ‘right to own property alone as well as in association with others’.

The Legislative Instrument engages these human rights as it applies based on the citizenship of the investor. The Legislative Instrument interacts with provisions in the *Foreign Acquisitions and Takeovers Act 1975* to determine whether or not an investor is subject to Australia’s foreign investment framework.

The foreign investment framework, including the *Foreign Acquisitions and Takeovers Act 1975* (the Act), imposes rules and screening requirements on foreign persons that are investing in Australia – the vacancy charge is consistent with the scope of the framework.

The vacancy charge applies to foreign persons as defined under the Act who apply for and subsequently receive approval to purchase the property and choose to leave their property vacant. The vacancy charge is only payable when a property is not occupied or genuinely available on the rental market for at least six months in a 12 month period.

The occupation of the property is not restricted to the foreign owner but is extended to their relative or permitted occupant under a lease or license. If genuine attempts are made to make the property available on the rental market then the vacancy charge will not apply.

The impact of the vacancy charge will be narrowed by exemptions included this Legislative Instrument that cover circumstances where the property could not be reasonably occupied, such as the property is undergoing substantial renovations or has been damaged or the person occupying the property is receiving medical care.

The underlying principle of Australia’s foreign investment framework is that foreign investment in Australia is welcome where it is in the national interest. The objective of the framework is to provide a predictable and welcoming environment for foreign investors while giving the Treasurer the power to review certain investments to ensure that investment is not contrary to the national interest.

While the legislative instrument affects individuals who are citizens of countries other than Australia, in the context of Australia’s foreign investment framework there is no less restrictive way of achieving the framework’s objectives. Accordingly those limitations are reasonable, necessary and proportionate.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.