



COMMISSIONER'S PRACTICE FHOG / DA 37.1

SEPARATED SPOUSES: FIRST HOME OWNER GRANT AND FIRST HOME OWNER RATE OF DUTY

This Commissioner's practice outlines the factors the Commissioner of State Revenue ('Commissioner') will consider when ascertaining if an applicant and their spouse or de facto partner are taken to be separated for the purpose of determining eligibility for the first home owner grant ('grant'), and/or first home owner concessional rate of duty¹ ('FHOR'), in respect of an eligible transaction² that commenced on or after 3 October 2015.

Eligibility for the grant and/or FHOR requires that the applicant or their spouse or de facto partner have not previously received a grant nor have held a relevant interest³ in a residential property.⁴

If an applicant and their spouse or de facto partner have separated, the applicant and their former spouse or de facto partner may each separately be eligible for the grant and/or FHOR.

People who are married remain spouses⁵ under the law until the marriage is legally dissolved. Under the *Family Law Act 1975 (Cth)*, a marriage is taken to have broken down irretrievably⁶ if the court is satisfied the parties separated and thereafter lived separately and apart for a continuous period of not less than 12 months⁷ regardless of whether they have continued to reside in the same residence or have rendered some household services to each other.⁸

Revenue Ruling [FHOG 4 'De Facto Partners'](#) outlines the factors the Commissioner will consider when determining if an applicant has a de facto partner for the purposes of the grant.

As de facto relationships do not require legal dissolution, it may be more difficult to determine that the relationship has ended. For the purposes of this practice, the application of discretion in respect of the legal relationship that exists between spouses is applied consistently for de facto partners, and references to the applicant's marriage to a spouse should be read as the applicant's relationship to a de facto partner, where relevant.

¹ Concessional first home owner rate of duty is defined in section 143 of the Duties Act.

² An eligible transaction is defined in section 14 of the FHOG Act, or is a first home owner concessional transaction as defined in section 142(1) of the Duties Act.

³ Relevant interest is defined in section 6(1) of the FHOG Act.

⁴ In certain circumstances, an applicant may be eligible for the grant if they have previously held a relevant interest in residential property. See the information about section 12 of the FHOG Act in the Background to this Commissioner's Practice.

⁵ Spouse, in relation to a person, means a person who is lawfully married to that person - *Interpretation Act 1984* section 5.

⁶ *Family Law Act 1975 (Cth)* section 48(1).

⁷ *Family Law Act 1975 (Cth)* section 48(2).

⁸ *Family Law Act 1975 (Cth)* section 49(2).

Background

Under the *First Home Owner Grant Act 2000* ('FHOG Act'), the term *spouse* is taken to mean the person to whom the applicant is married,⁹ and the term *de facto partner* is taken to mean the person with whom the applicant is living in a marriage-like relationship¹⁰ and has lived with on that basis for at least two years.¹¹

In accordance with section 7(2) of the FHOG Act, a person is taken not to be the applicant's spouse if the Commissioner is satisfied that:

- the applicant is married but living apart from the person to whom they are married; and
- they have no intention of again living together as a couple.

Under section 11 of the FHOG Act, an applicant is not eligible to receive the grant if they or their spouse had previously received a grant under this Act or a corresponding law¹² unless that grant, and any applicable penalty or interest, was repaid and the Commissioner doesn't consider the circumstances surrounding the repayment of that grant warrant the applicant being rendered ineligible.

Section 12 of the FHOG Act provides an applicant is not eligible if they or their spouse held a relevant interest in residential property anywhere in Australia before 1 July 2000, or held a relevant interest in residential property anywhere in Australia and:

- occupied the property as a place of residence between 1 July 2000 and 30 June 2004; or
- occupied the property as a place of residence for a continuous period of at least 6 months that began on or after 1 July 2004.

Under section 16 of the FHOG Act, all interested persons must be applicants.¹³ An *interested person* is a person who is, or will be, an owner of the relevant home on completion of the eligible transaction.

Section 5 of the FHOG Act provides a person is an *owner* of a home if the person has a relevant interest¹⁴ in land on which the home is built.¹⁵

Section 142A of the Duties Act 2008 ('Duties Act') provides an applicant for the FHOR includes a person who is eligible for the grant, or who would have been eligible except that the transaction is a contract for the purchase of an established home. A person applying for the FHOR is required to satisfy the eligibility criteria for the grant regardless of whether or not they are eligible to receive the grant.

⁹ FHOG Act section 7(1).

¹⁰ *Interpretation Act 1984* section 13A.

¹¹ FHOG Act section 3(1).

¹² *Corresponding law* is defined in section 3 of the FHOG Act.

¹³ Regulation 7 of the *First Home Owner Grant Regulations 2000* provides for certain owners of land to be excluded from the requirement to be an applicant for the grant.

¹⁴ For the purpose of the FHOG Act, any person who is registered as an owner on the Certificate of Title is deemed to have a relevant interest.

¹⁵ Unless the property is subject to a trust and that person is the trustee - FHOG Act section 6(2)(b).

Commissioner's Practice

1. If an applicant discloses they are married or living in a de facto relationship, the Commissioner will accept that disclosure.
2. As eligibility for the grant and/or the FHOR is determined by considering both the applicant and their spouse, the legal relationship that exists between them may have unintended consequences where they are separated but not divorced.

Example: unintended consequences

John and Joan, although legally married, have separated and have no intention of resuming living together as a couple. Neither has previously owned a home. If John purchased a home and, after satisfying the criteria, received the grant and/or FHOR, his ownership would disqualify Joan from receiving the grant and/or FHOR until their marriage was legally dissolved, unless the Commissioner disregarded their marriage for the purposes of the grant and/or FHOR.

3. The phrase *married but living apart from the person to whom the applicant is married* relates to the severance of the marriage rather than the physical separation of the spouses, as physical separation is neither necessary nor a sufficient condition to establish the parties are not living together as a couple for the purposes of the grant and/or FHOR.

Examples: physical separation without being 'separated'

Sally and Mark, although married, have spent eighteen months apart due to Mark's armed forces commitments. While they have physically been located in different countries throughout that time, they hold themselves out to be married and consider each to be the other's spouse.

Peter and Kevin have been in a long term de facto relationship, but for the last three years have lived in separate residences. Peter resides on the family farm while Kevin occupies a rented unit in the city, close to his workplace. They see each other most weekends and consider themselves to be in a de facto relationship.

4. The Commissioner must be satisfied the following elements of separation exist to establish that the applicant and their spouse are not living together as a couple:
 - 4.1 a communicated intention on the part of at least one of the persons to sever the relationship and act upon that intention;¹⁶ and
 - 4.2 the presence of indicators that the parties are not in a marriage-like relationship, which may include not holding themselves out to be a couple as well as discontinuance of financial and emotional support;¹⁷ and

¹⁶ Pavey, In Marriage of, 25 FLR 450, 10 ALR 259, 1 Fam LR 11,358, [1976] FLC 90-051.

¹⁷ Johnson v Scott [1989] Tas R 240.

- 4.3 action has been or is being taken towards severance of financial interdependence.¹⁸
5. To be satisfied, the Commissioner will take into consideration:
- 5.1 the circumstances and facts of the relationship in order to compare and contrast the relationship before and after the alleged separation;
- 5.2 the statutory declaration of the applicant and any other supporting evidence (see 'Application requirements' in this Commissioner's practice), as well as information obtained from other parties including the applicant's spouse; and
- 5.3 the material facts of each case, including:¹⁹
- 5.3.1 whether the parties are living in separate residences and the period of that separation. It will be considered that the longer the period of physical separation, the less likelihood there is of recommencement of cohabitation;
- 5.3.2 where the parties are living under the same roof,²⁰ whether that situation is intended to be temporary, long-term or permanent;²¹

Examples: Separated parties living under the same roof

Temporary arrangement –

Although Mike and Molly have ended their de facto relationship, they are residing in the same house while Mike looks for other accommodation. They occupy separate bedrooms, have commenced proceedings to separate their finances and have made it clear to their families and friends that they are no longer a couple.

Long-term arrangement –

Sam and Jane consider their marriage to have broken down irretrievably. They have separated their finances, commenced proceedings to dissolve their marriage, and Jane has returned to using her maiden name. However, they agree it is in the best interests of their children that they continue living in the same house until the children have completed school.

Permanent arrangement –

After 30 years of marriage, Mary and Phil decide to divorce and follow through with legal dissolution. Due to Phil's ill health, Mary remains living in the residence indefinitely. Mary has her own bedroom, eats meals separately from Phil and has her own social life. While she continues to provide care for Phil, she considers herself to be living with him solely in her capacity as a carer.

¹⁸ Monaghan v Secretary, Department of Education, Employment and Workplace Relations [2012] AATA 908.

¹⁹ The specific matters the Commissioner will take into account under these requirements are relative to those set out in Revenue Ruling [FHOG 4 'De Facto Partners'](#)

²⁰ The *Family Law Act 1975 (Cth)* section 49(2) does not require the parties to have moved into separate residences before the decree nisi is pronounced.

²¹ When the *Family Law Act 1975 (Cth)* sections 48, 49 and 50 are read together, they indicate that 'separation' is a term used in contrast with 'cohabitation' and, generally speaking, parties are to be regarded as 'separated' in the relevant sense when 'cohabitation' between them has in substance ceased.

- 5.3.3 the financial arrangements between the parties;
- 5.3.4 the arrangements put in place for the care of children;
- 5.3.5 any physical relationship that may exist between the parties;^{22,23}
- 5.3.6 the social relationship between the parties;²⁴
- 5.3.7 the commitment between the parties;²⁵
- 5.3.8 whether the parties have commenced, or engaged in, relationships with other people;²⁶
- 5.3.9 whether the parties had previously separated then resumed living together as a couple;²⁷
- 5.3.10 whether the parties have commenced proceedings, including instructing their legal representatives, to dissolve the relationship or to settle property and maintenance arrangements;
- 5.3.11 whether the parties are listed as dependent spouses for tax, insurance, Medicare or any other purposes;
- 5.3.12 whether Centrelink has assessed them as single or partnered, where relevant; and
- 5.3.13 whether the applicant's spouse is ineligible for the grant and/or FHOR. In these circumstances, having regard to other factors, the Commissioner must be satisfied the separation is genuine.

6. Where it is claimed the applicant and their spouse have separated but continue to live under one roof, the onus is on the applicant to satisfy the Commissioner they have separated.²⁸

²² "Neither casual acts of sexual intercourse nor an agreement to resume cohabitation which is not carried out constitutes an interruption of separation." Todd, In Marriage of [No 2] 25 FLR 260, 9 ALR 401, [1976] FLC 90-008.

²³ "Isolated or casual acts of sexual intercourse or social association between spouses may be consistent with living separately and apart." Saunders v Saunders [1976] VR 695, 27 FLR 72, 12 ALR 283, 1 Fam LR 11,477, [1976] FLC 90-096.

²⁴ "In forming an opinion about the relationship between two people [consideration must be given to]... (iii) whether [other] people consider that the relationship is likely to continue indefinitely; and (iv) whether [other] people see their relationship as a marriage-like relationship or a de facto relationship." Monaghan v Secretary, Department of Education, Employment and Workplace Relations [2012] AATA 908.

²⁵ "The degree of mutual commitment to a shared life will be a sufficient factor in establishing the existence of a de facto [or marriage-like] relationship." Robson v Quijarro [2009] NSWCA 365.

²⁶ "A person who considers themselves free to have involvements of a sexual nature with other persons does not necessarily mean they show a lack of commitment to a shared life with their de facto partner." Robson v Quijarro [2009] NSWCA 365.

²⁷ "Resumption of cohabitation after separation is to be regarded as negating 'separation' and 'separation and living separately and apart thereafter' as negating cohabitation. Once a condition of 'separation and living separately and apart' is in existence, it requires a resumption of cohabitation, or something which is substantially a resumption of cohabitation, to negate that condition of 'living separately and apart'." Saunders v Saunders [1976] VR 695, 27 FLR 72, 12 ALR 283, 1 Fam LR 11,477, [1976] FLC 90-096 .

²⁸ "In layman's terms, the test that has to be applied is whether or not the parties have in fact established separate households, albeit the same roof covers both." Wiggins, In Marriage, of 9 ALR 8, [1976] FLC 90-004.

Examples: When parties living under the same roof would not be considered 'separated'

Chris and Sarah make the decision to end their marriage but continue to reside under the same roof. While they have separate bedrooms, they still eat meals together, socialise together and contribute to the management of the household in the same capacity as they did before their decision to separate.

Fran and Jay had been living in a de facto relationship for seven years when Fran decides the relationship has broken down irretrievably. She opens and commences using a separate bank account in her name, changes the beneficiary details on her insurance policies and her will, starts dating other people and establishes a social network to which she is seen as single. However she does not communicate her intention to sever the relationship to Jay who believes they are still cohabiting in a marriage-like relationship.

Michael and Fiona agree to divorce and, while holding themselves out socially to no longer be a couple, continue to provide emotional and financial support for each other. While they both agree their marriage is over, they have not commenced proceedings to dissolve the marriage nor have they separated their finances.

7. Where an applicant and their spouse are separated but still residing in the same premises, an application for the grant and/or FHOR should be accompanied by additional supporting documentation that evidences the applicant's declaration of separation. This may include declarations from third parties, evidence of commencement of divorce or maintenance proceedings, or recognition of the parties' separation by government agencies such as Centrelink.²⁹

Application requirements

8. An application to disregard a marriage must be made to the Commissioner by the applicant at the time of making an application for the grant and/or FHOR. The application must be in the form of a statutory declaration that includes:
 - 8.1 the full name of the spouse;
 - 8.2 the spouse's date of birth;
 - 8.3 the date they were married;
 - 8.4 the date they separated;
 - 8.5 the spouse's current address (if known); and
 - 8.6 a statement to the effect they do not live together as a couple and have no intention of resuming living together as a couple.

²⁹ "Where the parties have continued to reside in the same residence, their attitudes to each other and the extent of their recognition of the marital relationship may be of great significance in determining whether they still regard the marriage as existing." Falk, In Marriage of, 29 FLR 463, 15 ALR 189, 3 Fam LR 11,238 [1977] FLC 90-247.

9. Applications should be accompanied by any documentation that would assist the Commissioner in ascertaining that:
 - 9.1 the relationship has broken down irretrievably;
 - 9.2 the applicant is living apart from their spouse; and
 - 9.3 they have no intention of again living together as a couple.

Date of Effect

This Commissioner’s Practice takes effect from 1 November 2016.

Nicki Suchenia
 COMMISSIONER OF STATE REVENUE

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Commissioner’s Practice History

Commissioner’s Practice	Issued	Dates of effect	
		From	To
FHOG 5.0	11 June 2013	11 June 2013	31 October 2016
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