



## COMMISSIONER'S PRACTICE FHOG / DA 38.2

### INTERESTS HELD SUBJECT TO A TRUST: FIRST HOME OWNER GRANT AND FIRST HOME OWNER RATE OF DUTY

This Commissioner's practice details the evidence required by the Commissioner of State Revenue ('Commissioner') to support an application for the first home owner grant ('grant'), and/or first home owner concessional rate of duty ('FHOR'), in respect of an eligible transaction<sup>1</sup> involving an applicant who holds, or has held, residential property<sup>2</sup> subject to a trust.

For the purposes of this Commissioner's practice, a *trust* is the relationship that arises when a person ('the trustee') is compelled in equity to hold residential property for the benefit of another person ('the beneficiary') in such a way that the real benefit of the property accrues to the beneficiary of the trust rather than to the trustee.

#### Background

The criteria for determining whether an applicant is eligible to receive the grant are set out in Part 2 Division 2 of the *First Home Owner Grant Act 2000* ('FHOG Act').

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.

Under section 16 of the FHOG Act, all interested persons must be applicants.<sup>3</sup> 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 interest<sup>4</sup> in land on which the home is built.

Where the person registered on the Certificate of Title is a guardian<sup>5</sup> holding the property on trust for a person under a legal disability, their interest is not taken to be a relevant interest.<sup>6</sup>

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<sup>1</sup> 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.

<sup>2</sup> *Residential property* is defined in section 3(2) of the FHOG Act.

<sup>3</sup> 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.

<sup>4</sup> 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.

An applicant is ineligible in relation to a transaction if the applicant owns or will, on completion of the transaction, own the home in circumstances where the applicant holds the relevant interest as a trustee.<sup>7</sup>

Any application for the grant and/or FHOR that presents information to indicate the property is, or another property is or was, held subject to a trust will be considered on the facts and circumstances necessary to prove the parties intended to create a trust relationship.

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1. Where the applicant is a trustee who holds the property subject to a trust, that person will not be eligible for the grant and/or FHOR in respect of that property. However, that person may be able to receive the grant and/or FHOR for another residential property provided they satisfy the eligibility criteria in respect of the other property.
2. Where the person making an application for the grant and/or FHOR holds the property on trust as guardian for a person under a legal disability, the person under the legal disability is taken to be the applicant.<sup>8</sup> The applicant must meet the eligibility criteria for the grant and documentation must be provided at the time of making the application to evidence:
  - 2.1 the applicant is under a legal disability; and
  - 2.2 the person making the application is the applicant's guardian.
3. Where the applicant holds or has held another property as trustee of a trust, documentation must be provided at the time of making the application to evidence the trust existed in respect of that other property.
  - 3.1 The Commissioner will generally accept the existence of a trust if evidence is provided to show a written declaration of the trust was signed and duly endorsed (if applicable) prior to, or at the time of, the dutiable transaction.
  - 3.2 In all other cases, the parties must provide the Commissioner with documentary evidence to support the claim a trust exists, including:
    - 3.2.1 the trust deed and any relevant amendments to indicate the trust existed at the time the property was acquired and who the trustee was;
    - 3.2.2 trust financial statements showing any rental income, and evidence to indicate how and to whom the income was distributed;

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<sup>5</sup> Section 3 of the FHOG Act defines a *guardian*, in relation to a person under a legal disability, to mean:  
(a) a trustee who holds property on trust for the person under an instrument of trust or by order or direction of a court or tribunal; or

(b) an administrator of the person's estate appointed under the *Guardianship and Administration Act 1990*.

<sup>6</sup> Section 6(2)(c) of the FHOG Act.

<sup>7</sup> Section 13B of the FHOG Act.

<sup>8</sup> Section 17 of the FHOG Act.

- 3.2.3 the Offer and Acceptance contract showing the purchaser as the trustee of the trust. Where the contract does not disclose the trust, full reasons why must be provided;
  - 3.2.4 documentation relating to any arrangements between the parties as to the acquisition and transfer of the property;
  - 3.2.5 any other documentation (for example, an order of a court) or evidence relevant to the creation of the trust;
  - 3.2.6 evidence of financial contributions to the trust property before and after acquisition in accordance with the terms of the trust, including copies of bank statements, deposit slips and receipts indicating such contributions by the beneficiary as the deposit and balance of the purchase price, the mortgage payments, capital improvements, insurance, public utilities, and rates and taxes;
  - 3.2.7 the applicant's personal income tax returns to show whether any rental income or deductions were claimed for the property;
  - 3.2.8 declarations from each applicant and any beneficiaries detailing facts and circumstances of the creation of the trust, including reasons why it was necessary the property was held in trust and not by beneficiaries in their own right;
  - 3.2.9 declarations from independent third parties (such as real estate agents, bank employees, accountants or solicitors) to corroborate the evidence of the applicant(s) as to the circumstances of the creation of the trust; and
  - 3.2.10 any other information or documents the Commissioner considers relevant.
4. Where a financial institution has provided a home loan to a purchaser on condition a third party is a guarantor or co-borrower, and that guarantor or co-borrower is registered on the title to the property, the Commissioner will generally accept the existence of a trust if evidence is provided which establishes:
  - 4.1 the arrangement was entered into only as a result of such a financial institution requirement; and
  - 4.2 the guarantor or co-borrower does not hold a beneficial interest in the property; and
  - 4.3 the guarantor or co-borrower provided no money towards the purchase of the property and will not be making any loan payments.
5. To prove the matters described in paragraph 4, the applicant must provide:
  - 5.1 a letter or other documentation from the financial institution, dated at the time of the loan application, stating the financial institution requires a third party to be a guarantor or co-borrower for security purposes;
  - 5.2 evidence the guarantor or co-borrower provided no money towards the purchase of the property, for example, mortgage documents

and bank statements showing the transfer of the deposit and balance of the purchase price from the borrower's account, as well as any loan repayments; and

- 5.3 statutory declarations by both the borrower and the guarantor or co-borrower declaring:
- 5.3.1 the reasons why the guarantor or co-borrower's name appears on the title;
  - 5.3.2 the guarantor or co-borrower is not entitled to any benefit in relation to the property, including right of occupancy or entitlement to rent or profits;
  - 5.3.3 the guarantor or co-borrower has not provided and will not provide any of the purchase monies, and has not made and will not make any loan payments; and
  - 5.3.4 the applicant will notify the Commissioner immediately if there are any changes to the circumstances detailed in 5.3.2 and 5.3.3 above.

### **Date of Effect**

This Commissioner's Practice takes effect from 25 May 2018.

Nicki Suchenia  
COMMISSIONER OF STATE REVENUE

25 May 2018

### **Commissioner's Practice History**

<b>Document</b>	<b>Issued</b>	<b>Dates of Effect</b>	
		<b>From</b>	<b>To</b>
FHOG 8.0	3 March 2015	3 March 2015	31 October 2016
FHOG/DA 38.1	1 November 2016	1 November 2016	24 May 2018
FHOG/DA 38.2	25 May 2018	25 May 2018	Current