



## COMMISSIONER'S PRACTICE FHOG / DA 39.2

### VARIATIONS TO PRESCRIBED RESIDENCE REQUIREMENTS: FIRST HOME OWNER GRANT AND FIRST HOME OWNER RATE OF DUTY

This Commissioner's practice details the factors the Commissioner of State Revenue ('Commissioner') will consider when determining an application to vary the prescribed residence requirements following receipt of the first home owner grant ('grant'), and/or first home owner concessional rate of duty<sup>1</sup> ('FHOR'), in respect of an eligible transaction<sup>2</sup> that commenced on or after 3 October 2015.

For the purposes of this Commissioner's practice, an *applicant* is a person applying for, or having applied for, the grant and/or FHOR.

#### Background

The grant is intended for those persons who have not previously held a relevant interest<sup>3</sup> in residential property who both intend to and will make the property for which the grant and/or FHOR was received ('the property') their principal place of residence.<sup>4</sup>

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.

Eligibility under the *First Home Owner Grant Act 2000* ('FHOG Act') requires, in part, that the applicant occupies the property as their principal place of residence<sup>5</sup> for a continuous period of at least six months<sup>6</sup> ('required residence period') commencing within 12 months of completion of the eligible transaction<sup>7</sup> ('take up period'). Payment of the grant and/or assessment at the FHOR is made in anticipation of compliance with these residence requirements.

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<sup>1</sup> *First home owner concessional rate of duty* is defined in section 143 of the Duties Act.

<sup>2</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>3</sup> FHOG Act section 6(1).

<sup>4</sup> FHOG Act section 13(1).

<sup>5</sup> See [Commissioner's Practice FHOG/DA 40 'Principal Place of Residence'](#) accessible from the [State Revenue website](#).

<sup>6</sup> FHOG Act section 13(2).

<sup>7</sup> FHOG Act sections 13(4) and 13(5).

The FHOG Act provides the Commissioner with the discretion to vary the prescribed residence requirements by approving:

- (a) a shorter required residence period,<sup>8</sup> but cannot reduce the residence period to nil;
- (b) an extended take up period;<sup>9</sup> and
- (c) an exemption from complying with the residence requirements,<sup>10</sup>

if there are, in the Commissioner's opinion, good reasons why the applicant seeking the variation cannot satisfy the residence requirements.

### ***Failure to comply with residence requirements***

Section 21(2) of the FHOG Act requires an applicant to give written notice to the Commissioner within 30 days after becoming aware they will be unable to comply with the residence requirements. Following this notice, the applicant must either repay the amount of the grant, make an application for the Commissioner to approve a repayment arrangement, or make an application for a variation of the residence requirements. A penalty may be imposed for failure to comply with these requirements.<sup>11</sup>

Where the FHOR has been applied to the eligible transaction, regardless of whether the grant has been received, and the applicant:

- applies for and receives a variation to the residence requirements – liability to duty at the FHOR remains applicable; or
- applies for but does not receive a variation to the residence requirements – liability to duty will be reassessed at the residential rate; or
- fails to comply with the residence requirements and does not notify the Commissioner of that fact – liability to duty will be reassessed at the residential rate and penalty tax may be applied.

### **Commissioner's Practice**

1. The Commissioner will give consideration to varying the residence requirements if there are good reasons to do so.
  - 1.1 *A reduction to the prescribed six month residence period will be considered where:*
    - 1.1.1 the applicant acquired the property with the intention of making it their principal place of residence within the take up period; and
    - 1.1.2 the applicant made the property their principal place of residence during the take up period; and
    - 1.1.3 there are good reasons why the applicant could not complete the required residence period.

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<sup>8</sup> FHOG Act section 13(6A)(a).

<sup>9</sup> FHOG Act section 13(6A)(b).

<sup>10</sup> FHOG Act section 13(6).

<sup>11</sup> FHOG Act Section 21(5).

- 1.2 *An extension to the prescribed 12 month take up period* will be considered where:
  - 1.2.1 the applicant acquired the property with the intention of making it their principal place of residence within the take up period; and
  - 1.2.2 after entering into the contract to acquire the property, a change in the applicant's circumstances prevented the applicant from taking up residence during that period; and
  - 1.2.3 the applicant has made or will make the property their principal place of residence.
- 1.3 *An exemption to the residence requirements* will be considered where:
  - 1.3.1 there are two or more joint applicants for the grant and at least one of the applicants will comply with the residence requirements; and
  - 1.3.2 all applicants acquired the property with the intention of making it their principal place of residence; and
  - 1.3.3 there are good reasons why the applicant applying for the exemption cannot satisfy the residence requirements.
2. The Commissioner will not consider varying the residence requirements in circumstances where:
  - 2.1 the period of occupation of the property is considered to be of too short a duration, in the absence of clear evidence to the contrary, to reliably establish the applicant made the property their principal place of residence; or
  - 2.2 there is no probability of the applicant, or at least one of the applicants, ever making the property their principal place of residence.
3. To support a request to vary the residence requirements, the applicant should provide all relevant information and supporting documentation to evidence:
  - 3.1 the date the applicant entered into the contract to purchase or build the property, or in the case of an owner builder, the date the applicant began laying the foundations ('commencement of the eligible transaction');
  - 3.2 the date the applicant obtained possession of the property, or in the case of a contract to build a home or the building of a home by an owner builder, the date the home is or was ready for occupation ('completion of the eligible transaction');
  - 3.3 the dates on which the applicant commenced and ceased residing in the property;
  - 3.4 if applicable, the dates the property was leased out;
  - 3.5 if applicable, the dates for which a management agent was appointed to manage the property; and
  - 3.6 the dates and details of specific events cited as reasons as to why the applicant was or will be unable to satisfy the residence requirements.

While it is not possible to identify a definitive list of what evidence will be required, nor specify the standard of proof required in each case, examples of the type of evidence the applicant may rely upon is provided in Appendix A.

4. When considering an application, the Commissioner will assess the facts and circumstances provided by the applicant against the following matters:

4.1 Whether the applicant has good reasons for not satisfying the residence requirements that were unforeseen, unusual, or due to circumstances beyond their control.

While this may not necessarily establish grounds to warrant the Commissioner granting a variation, evidence should be presented to substantiate the circumstances and demonstrate how they prevented the applicant from satisfying the residence requirements.

Some examples of circumstances that may be considered to be good reasons are provided in Appendix B.

4.2 Whether the applicant's conduct was consistent with an intention to occupy the property as their principal place of residence within the take up period.

Acquiring the property for the purpose of deriving rental income or without the financial means to live in the property, or for the purpose of occupying it as the principal place of residence at some future time outside of the prescribed take up period, represents conduct inconsistent with the intent of the grant scheme. An inability to make loan repayments (without a change in circumstances) is not generally accepted as a good reason for not meeting the residence requirements.

Where the property has been rented during the take up period, further information will need to be presented to establish:

4.2.1 the period of time the property was used or made available for this purpose, and whether that period of time indicates the property can only reasonably be considered to be an investment property;

4.2.2 methods employed by the applicant to rent out the property;

4.2.3 reasons why the applicant rented out the property;

4.2.4 efforts by the applicant to make the property their principal place of residence and whether those efforts were timely; and

4.2.5 whether the loan for the property was approved as an owner occupier or investment loan.

4.3 Whether the variation requested is proportionate to the circumstances.

The applicant should provide reasons for any variation beyond what the circumstances of the case would suggest is reasonable if they are seeking, for example:

4.3.1 a reduction of the required residence period to a period less than the circumstances suggest they could have reasonably resided in the property; or

4.3.2 an extension to the take up period to a date in time greater than the circumstances would suggest they could have reasonably taken up occupation.

5. Where an application to vary the residence requirements is not made within 30 days of notifying the Commissioner of an inability to satisfy the residence requirements, the reasons why a variation was not sought within that time will be taken into account when determining whether a variation should be granted.
6. An applicant may be requested to provide additional information or documentation to support their application to vary the residence requirements if the Commissioner is not satisfied, on the balance of probability, that a variation should be granted.
7. If the Commissioner does not approve the requested variation the applicant will be provided with written reasons for the decision and will be advised of their rights to a review of that decision.

#### **Date of Effect**

This Commissioner's practice takes effect from 1 November 2016.

Nicki Suchenia  
 COMMISSIONER OF STATE REVENUE

1 November 2016

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

<b>Commissioner's Practice</b>	<b>Issued</b>	<b>Dates of effect</b>	
		<b>From</b>	<b>To</b>
FHOG 1.0	6 November 2012	3 September 2012	7 May 2015
FHOG 1.1	8 May 2015	8 May 2015	31 October 2016
FHOG / DA 39.2	1 November 2016	1 November 2016	Current

## Appendix A: Evidentiary Requirements

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The following are examples of the type of evidence the applicant may provide to assist in corroborating the facts relied upon.

### *Commencement of the eligible transaction:*

- In the case of a contract to purchase an existing or new home – the contract to purchase the property.
- In the case of a contract to have a home built – the comprehensive building contract.
- In the case of an owner builder – documentary evidence confirming the foundations have been laid.

### *Completion of the eligible transaction / Commencement of the take up period:*

- Statement of settlement.
- Landgate Certificate of Title.
- Transfer of land document.
- If the property was subject to a lease at the time the contract to purchase the property was entered into – a copy of the lease agreement.
- Builder's statement confirming the date the keys were handed to the owner.

### *Occupation of the property by the applicant:*

- Utility accounts (such as electricity and gas) in the name of the applicant. If these accounts are connected in a name other than the applicant, details of the relationship and payment arrangements between the applicant and the account holder, and the reason why the utility is not in the applicant's name, should be provided.
- Invoices from removalists.
- Home contents insurance policy.
- Mail re-direction receipt from Australia Post.
- Note: Water or council rate notices will not be accepted as proof of residence as they do not evidence occupation by the applicant.

### *Applicant's living arrangements when not occupying the property:*

- Utility accounts in the name of the applicant.
- Invoices from removalists.
- Home contents insurance policy.
- Mail re-direction receipt from Australia Post.
- Lease agreements.
- Letters from banks, employers, or others addressed to the applicant confirming place of residence over a period of time.

*Lease(s) of the property:*

- A copy of all exclusive management agent authorities entered into by the applicant granting the agent authority to manage the property.
- A copy of all leases entered into in respect of the property during the period under review.
- Bond lodgment and/or disposal recorded with the Department of Commerce.
- Bank financing arrangements in relation to the property, including loan applications.
- Reports of income and expenditure in relation to the property.

*Health issues:*

- Letters from medical practitioners outlining the circumstances of the medical issues.

*Change in employment circumstances:*

- A copy of any relevant contracts of employment.
- Confirmation by the relevant employer of the change of circumstances.

*Condition of the property:*

- Confirmation from the local council or health authority confirming the property could not lawfully be used as a place of residence during a particular period.
- A statutory declaration by an architect or builder that the property was not suitable for use as a place of residence at a particular time, and the reasons to support this statement. It should be noted it will not be sufficient to merely establish the house was not suitable to the applicant's taste or the requirements of the applicant's family in order to establish the house was not suitable for use as a place of residence.

## **Appendix B: Circumstances that may constitute good reasons for varying the residence requirements**

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Below are examples of circumstances which may prevent an applicant from satisfying the residence requirements.

1. Inability of the applicant to live in the home due to:
  - 1.1 the health of the applicant (for example, hospitalisation, rehabilitation, nursing home care);
  - 1.2 the health of a relative where the applicant becomes the carer for that relative; or
  - 1.3 the death of a person who lived with the applicant in the home (for instance, the death of a child in the home leaves the applicant unable to occupy the property).
2. The home becomes uninhabitable (through no fault or wilful action of the applicant) due to:
  - 2.1 damage to, or destruction of, the home (for example, natural disaster or fire); or
  - 2.2 a determination by the local council or health authority in relation to such reasons as health issues or structural issues.
3. The applicant's employment objectively or practically does not allow them to live in the home due to:
  - 3.1 a change in the place of employment which is a significant increase in distance from the home; or
  - 3.2 loss of employment; or
  - 3.3 forced transfer by an employer which requires relocation of the applicant to continue their usual employment; or
  - 3.4 new employment or a voluntary job change which requires a change in location.
4. The applicant fears for their personal health or safety by occupying the home.
5. A breakdown in the domestic relationship of the applicants, resulting in one or both applicants vacating the home.
6. Any other circumstance which the Commissioner considers to be good reasons why a variation ought to be granted.