



COMMISSIONER'S PRACTICE DA 30.0

DUTIES – CALCULATION OF FIRST HOME OWNER CONCESSION INVOLVING EXCLUDED PERSONS UNDER THE FIRST HOME OWNER GRANT ACT

SUPERSEDED

COMMISSIONER'S PRACTICE HISTORY

Commissioner's Practice	Issued	Dates of effect	
		From	To
DA 30.0	11 June 2013	11 June 2013	21 July 2014

This Commissioner's practice details how the Commissioner will calculate the first home owner concessional rate of duty under the *Duties Act 2008* ('Duties Act') in circumstances where:

- the dutiable transaction is the purchase or acquisition of vacant land;
- the parties to the transaction are:
 - a person or persons eligible to receive the first home owner grant under the provisions of the *First Home Owner Grant Act 2000* ('FHOG Act'); and
 - a person or persons who are excluded from the requirement to be an eligible first home owner grant applicant under regulation 7(2a) of the *First Home Owner Grant Regulations 2000* ('FHOG Regulations'); and
- the parties to the transaction intend to subdivide and partition the land resulting in one lot being owned solely by the party or parties eligible to receive the first home owner grant.

BACKGROUND

Upon application, the first home owner grant may be payable in respect to an eligible transaction¹ that will result in an eligible person acquiring a relevant interest² in, and therefore becoming an owner³ of, land on which a home⁴ is, or is to be, built.

The first home owner concessional rate of duty is chargeable on a transfer of, or an agreement for the transfer of, dutiable property if:

- the unencumbered value of the land, or the land and home, does not exceed statutorily prescribed value limits⁵; and
- each transferee⁶ receives the first home owner grant in relation to the property; or
- each transferee would have received the first home owner grant if consideration had been given for the transfer of the property⁷.

Where the eligible transaction⁸ concerns the acquisition of a relevant interest in land on which it is intended that a home will be built under a comprehensive home building contract or by construction as an owner builder, the application of duty will differ from an eligible transaction concerning a contract to purchase an existing home with regard to:

- the commencement⁹ and completion¹⁰ dates of the transaction;
- the date on which duty is assessed and, if required, reassessed; and
- the date on which the first home owner receives or becomes eligible to receive the first home owner grant.

Under section 8 of the FHOG Act, a first home owner grant is payable if each applicant complies with the eligibility criteria and the eligible transaction has been completed. In circumstances concerning the acquisition of a relevant interest in land on which it is intended that a home be built:

- liability for duty arises when the instrument effecting the transaction is executed¹¹; and
- duty is chargeable at the general rate of duty as per the dutiable value provided for in the instrument effecting the transaction¹².

¹ FHOG Act section 3

² FHOG Act section 6

³ FHOG Act section 5

⁴ FHOG Act section 4

⁵ Under the Duties Act section 142(1)(b), the unencumbered value is not to exceed \$400,000 if there is no home on the land, otherwise \$600,000 for the land and home. NB. A person who is not entitled to the first home owner concessional rate of duty due to the value of the home or vacant land exceeding the specified thresholds may be eligible for the residential concessional rate of transfer duty.

⁶ Other than a person who is not required to join in making an application for a first home owner grant as per Duties Act section 141(1)(c)

⁷ Duties Act section 142(1)(a)

⁸ FHOG Act section 14

⁹ Under the FHOG Act section 14AA(1), the commencement of a comprehensive home building contract is the date when the contract is made, and the commencement of a home built by an owner builder is the date when laying the foundations for the home begins.

¹⁰ Under the FHOG Act section 14AA(2), the eligible transaction is considered to have been completed when the building is ready for occupation as a place of residence.

¹¹ Duties Act section 19(1)(b)

However, a reassessment at the concessional rate of duty will be made under section 143(1) of the Duties Act, and a refund of duty may be provided to the first home owner if and when:

- all applicants receive or become eligible to receive the first home owner grant;
- the transaction is deemed to be a first home owner grant concessional transaction under section 142(1) of the Duties Act; and
- application for reassessment is made within the statutorily imposed period¹³.

While most transactions of this nature are reasonably straightforward, particular difficulties arise where a transaction involves the purchase of vacant land that is to be subdivided and partitioned after construction of the new home is complete, and the parties to the transaction are the first home owner grant applicant and another person who is an excluded person¹⁴ for the purposes of the first home owner grant.

Excluded persons

Under section 16(1) of the FHOG Act, an application for the first home owner grant must be made by all interested persons¹⁵, unless a person is excluded by virtue of regulation 7 of the FHOG Regulations.

Regulation 7(2a) of the FHOG Regulations excludes a person from the requirement to be an applicant for the first home owner grant with respect to a new home¹⁶ where that person owns the land to which the application relates and the land is to be subdivided, subject to satisfying the Commissioner that:

- it is proposed at the commencement date of the eligible transaction that the land on which the home is to be built will be the subject of a strata plan or survey-strata plan registered under the *Strata Titles Act 1985*;
- the strata plan or survey-strata plan is, or will be, registered as soon as practicable after the eligible transaction is completed; and
- the person is not, or will not become, as a result of the registration of the strata plan or survey-strata plan, an owner of the home.

It should be noted that there is no such provision for excluding a person where the land is to be subdivided by way of other freehold subdivisional plans.

Transaction consideration and value

Section 14AB of the FHOG Act provides that the consideration for a transaction is, in the case of a building contract, the total consideration payable for the building work, and in the case of a home built by an owner builder, the actual

¹² Duties Act section 26(1)

¹³ Duties Act section 144(2)

¹⁴ As per FHOG regulation 7(2a)

¹⁵ FHOG Act section 16(3): interested person, in relation to an application for a first home owner grant, means a person who is, or will be, on completion of the transaction to which the application relates, an owner of the relevant home.

¹⁶ A 'new home' means a home that is built under a comprehensive home building contract or by an owner builder.

costs to the owner of carrying out the work excluding any allowance for the owner builder's own labour.

When determining the total value of a transaction:

- in the case of a contract to build a home¹⁷, the total value of the transaction is the amount calculated by adding:
 - the consideration for the transaction; and
 - the value of the relevant interest in the land on which the home is to be built at the commencement date; or
- in the case of a home built by an owner builder¹⁸, the total value of the transaction is the amount calculated by adding:
 - the unencumbered value of the home at the date the transaction is completed; and
 - the value of the relevant interest in the land on which the home is built at the date the transaction is completed,

where the value of the relevant interest is the greater of the consideration paid for the transaction or the unencumbered value of the home at the date the transaction is completed¹⁹.

Application of Commissioner's practice

In order to illustrate how the Commissioner will apportion and calculate the duty to give effect to the legislative intent of the FHOG Act and Duties Act in circumstances detailed in this practice, a hypothetical example, set out below, is provided as a guide only. As each actual case must be considered upon its own facts and circumstances, appropriate adjustments may need to be made to take into account varying ownership proportions and/or other distinguishing factors in order to determine the applicability of the duty concession.

¹⁷ FHOG Act section 14AC(1)(b)

¹⁸ FHOG Act section 14AC(1)(c)

¹⁹ FHOG Act section 14AC(2)

Facts for worked example

- A Son and his Parents enter into a contract to buy a vacant block of land for \$400,000 with the intention of subdividing the land and each building a new home. They purchase the land as tenants in common with the relevant interest of the Son being 50% and the Parents (jointly) as 50%.
- Duty of \$14,915 is paid on the purchase at the general rate of duty.
- While the Son may meet the eligibility criteria in order to qualify to receive the first home owner grant, his Parents are ineligible to receive the grant on the basis of having previously owned a home.
- The Son and his Parents commence the process of subdividing the land and have paperwork drawn up for a survey-strata plan which will be registered once the construction of the home is complete. Subsequently, the Son enters into a comprehensive building contract to build a home for \$300,000 on the front strata lot, while his Parents enter into a contract to build a home for \$450,000 on the rear strata lot.
- After entering into a contract for the construction of the homes, the transaction is reassessed at the residential rate of duty. Duty of \$13,015 is payable based on the value of the original eligible transaction. An amount of \$1,900 is refunded to the Son and his Parents to account for the difference between duty assessed at the general rate and duty subsequently reassessed at the residential rate.
- Following completion of the homes, the parties intend to register the survey-strata plan and have a separate strata title issued for each strata lot. The Son will then become the sole owner of the front strata lot and his Parents will become the joint owners of the rear strata lot.

COMMISSIONER'S PRACTICE

1. Where, for the purpose of building a new home, vacant land is acquired by an eligible first home owner and an interested person who is excluded under section 16(1) of the FHOG Act due to the operation of regulation 7(2a) of the FHOG Regulations:
 - 1.1 concessional duty is to be calculated and apportioned between the original transferees who purchased the unsubdivided vacant land when the eligible first home owner becomes entitled to the first home owner grant; and
 - 1.2 the relevant interest in the land held by the eligible first home owner is the interest that person has at the time of the eligible transaction.

Worked example – total value, relevant interest and eligibility for the first home owner grant

Following registration of the survey-strata plan, the land will be subdivided and partitioned such that the Son will be the only owner of the front strata lot, and consequently the only owner of the home built on that strata lot.

The relevant interest held by the Son in the land at the time of signing the comprehensive building contract (the commencement of the eligible transaction) is 50% of the original lot (the subject of the building contract entered into by the Son), with the value of the Son's interest being \$200,000, assuming that the value of the land had not increased between the time of its purchase and the time of signing the building contract).

The total value of the transaction for the purposes of determining the FHOG Act imposed cap would be \$500,000 consisting of the value of the contract to build the home (\$300,000) plus the value of the Son's 50% interest in the lot of land on which the home is to be built at the time the contract is made (\$200,000). As the total value of the transaction is within the cap amount of \$750,000 (as it relates to property that is situated in Western Australia below the 26th parallel), the Son is eligible to receive a \$7,000 first home owner grant.

Note: If the subdivision had been completed prior to the signing of the home building contract, the total value would comprise the consideration for the construction of the home together with the value of the strata titled lot on which the home is to be built. This would require the strata titled lot to be valued independently of the value otherwise ascribed by way of relevant interest in the pre-subdivided lot.

2. While the Duties Act does not explicitly state what interest in the land is to be valued for the purposes of determining whether a first home owner duty concession applies, the interrelationship between the FHOG Act and regulation 7(2a) of the FHOG Regulations makes it clear that it is only the eligible first home owner's interest that is considered for FHOG purposes.

As such, where duty is reassessed for the purposes of applying the first home owner concessional rate²⁰, the Commissioner will only consider the first home owner's interest in the land the subject of the transaction.

3. While it is the value of the land and home that determines the total transaction value for the purposes of the FHOG Act cap, the Duties Act concessional value threshold only takes into account the unencumbered value of the land prior to the construction of the home. As such, where duty is reassessed for the purposes of applying the first home owner concessional rate, the value of land that is the subject of the eligible transaction is the first home owner's relevant interest in the land at the time of the dutiable transaction.

Worked example – relevant interest and eligibility for concessional rate of duty

The dutiable transaction is the transfer of, or agreement for the transfer of, dutiable property. In this instance, the dutiable transaction occurred when the Son and his Parents purchased the block of land.

When calculating the value of the total transaction for the purposes of the first home owner concessional rate of duty, only the Son's relevant interest in the land at the time of the dutiable transaction is to be taken into account.

The value of the Son's relevant interest (50%) in the land at the date on which the dutiable transaction was entered into is \$200,000 which is below the \$400,000 cap.

Calculation of concessional duty

4. The Commissioner has regard to the fact that, by virtue of not qualifying in their own right for the first home owner grant, an excluded person's interest in an eligible transaction is not subject to the first home owner concessional rate of duty but may be subject to the residential rate of duty.
5. In such circumstances, duty is apportioned and calculated by:
 - 5.1 assessing the duty at the general rate on the value of the original dutiable transaction;
 - 5.2 upon entering into a contract for the construction of a residence on the land or beginning construction as an owner builder, reassessing the duty payable by all parties at the residential rate on the value of the original dutiable transaction;
 - 5.3 refunding to all applicants the amount by which the duty has been reduced as a result of applying the residential rate of duty with regard

²⁰ Duties Act section 142

to the fact that the refund is taken to be apportioned to the parties in accordance with their percentage interest in the property;

- 5.4 upon applying for and meeting the eligibility requirements for the first home owner grant, reassessing the duty payable by the eligible party at the first home owner concessional rate on the basis of their percentage interest in the property; and
- 5.5 refunding to the eligible applicant the amount by which the duty has been reduced as a result of applying the concessional rate of duty on their percentage interest in the property.

Worked example - reassessment of duty

Duty of \$14,915 is assessed at the general rate of duty and paid on the dutiable transaction.

When reassessed as \$13,015 under the residential rate of duty, the Son and his Parents receive a refund of \$1,900.

When the Son's percentage interest in the land (\$200,000) is reassessed at the first home owner concessional rate of duty, his duty liability is reduced to nil as per Division 2 of Schedule 2 to the Duties Act. The Son receives a refund of \$6,507.50 (50% of the residential rate assessment) which, along with his percentage share in the refund from the residential rate reassessment (\$950), equates to the Son's initial apportioned payment of \$7,457.50.

LEGISLATIVE STATUS OF THIS PRACTICE

Commissioner's practices regarding the FHOG Act are provided to give an indication of how the Commissioner would exercise discretions under the FHOG Act.

There is no legislative requirement to publish Commissioner's practices or procedures in relation to the exercise of discretionary powers under the FHOG Act. However, to ensure that applicants are able to understand the basis by which a decision regarding a variation to the prescribed residence requirements will be made, this document is made available to the public.

DATE OF EFFECT

This Commissioner's practice takes effect from 11 June 2013.

Bill Sullivan
COMMISSIONER OF STATE REVENUE

11 June 2013