



COMMISSIONER'S PRACTICE

FHOG 8.0

FIRST HOME OWNER GRANT INTERESTS HELD SUBJECT TO A TRUST

This Commissioner's practice details the evidence required by the Commissioner in support of an application for the first home owner grant ('FHOG') where residential property is or has been held subject to a trust.

For the purposes of the FHOG, a trust is the relationship which arises whenever 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

Sections 9 to 13A of the *First Home Owner Grant Act 2000* ('FHOG Act') set out the eligibility criteria for the FHOG. Criterion 4 provides that an applicant is ineligible if the applicant, or the applicant's spouse or de facto partner —

- before 1 July 2000 - held a relevant interest in residential property; or
- on or after 1 July 2000 but before 1 July 2004 - held a relevant interest in residential property and occupied the property as a place of residence; or
- on or after 1 July 2004 - held a relevant interest in residential property and occupied the property as a place of residence for a continuous period of at least 6 months (that began on or after that date).

Under section 16 of the FHOG Act, all interested persons must be applicants.¹ Section 16 defines an *interested person* as a person who is, or will be, on completion of the transaction to which the application relates, an owner of the relevant home.

Section 5 of the FHOG Act provides that a person is an owner of a home or a home owner if the person has a relevant interest in land on which a home is built.

The term *relevant interest* is defined in section 6(1) of the FHOG Act as including an estate in fee simple in the land.

The term *estate* is defined in section 5 of the *Interpretation Act 1984* to include any legal or equitable estate or interest in land.

For the purpose of the FHOG Act, any person who is registered as an owner on the Certificate of Title is considered to have a legal estate in the land and

¹ 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 FHOG.

deemed to have relevant interest in the property to which the application relates, unless the exception provided for in section 6(2)(b) of the FHOG Act applies.

Under section 6(2)(b) of the FHOG Act, an interest held by a person is not a relevant interest if that person holds the property subject to a trust and that person is the trustee.

Under section 6(2)(c) of the FHOG Act, an equitable interest held on trust by a guardian² for a person under a legal disability is not taken to be a relevant interest. Section 17 of the FHOG Act provides that a guardian may make an application for a person under a legal disability, and that, for the purpose of determining eligibility, the person under the legal disability is taken to be the applicant.

Any application for the FHOG that presents information to indicate that section 6(2)(b) or (c) of the FHOG Act may be relevant will be considered on the facts and circumstances necessary to prove that the parties intended to create a trust relationship. To determine the existence of a trust relationship, the evidence must be considered objectively and finding of fact must be based on the balance of probabilities.

Where an investigation is carried out to determine whether an applicant to whom, or for whose benefit, the FHOG had been paid was eligible to receive the FHOG, section 40 of the FHOG Act authorises the Commissioner to require a person —

- to provide oral or written answers to specified questions; or
- to produce to the Commissioner specified relevant material, or relevant material of a specified class, in the person's possession or control.

Commissioner's Practice

1. Where a person's interest in the residential property for which an application is made is held subject to a trust (i.e. as a trustee), that interest is not a relevant interest. The person will not be eligible for the FHOG in respect of that property. However, holding an interest subject to a trust will not preclude a person from eligibility for the FHOG for another residential property provided they satisfy the eligibility criteria in respect of the other property.
2. Where an applicant holds an interest in a residential property on trust as guardian for a person under a legal disability, the Commissioner will consider the eligibility of the person under the legal disability when determining eligibility for the FHOG.

² 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*.

3. In circumstances where a person applies for a FHOG in respect of residential property as their first home, and is also registered (or was registered) on the Certificate of Title for another residential property they hold or held merely in a trustee capacity, the applicant must notify the Commissioner of the existence of the trust and provide documentation evidencing the trust.
 - 3.1 The Commissioner will generally accept the existence of a trust if evidence is provided to show that a written declaration of the trust was signed and duly endorsed 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, as detailed below, to prove the existence of a trust.
4. Documents that may be presented as evidence to support an applicant's claim that a trust exists include, but are not limited to:
 - 4.1 any trust financial statements showing any rental income, and evidence to indicate how and to whom the income was distributed;
 - 4.2 the Offer and Acceptance contract showing the purchaser as the trustee of the trust (and if not, why not);
 - 4.3 documentation including emails and letters relating to any arrangements between the parties as to the acquisition and transfer of the property;
 - 4.4 any other documentation (for example, an order of a court) or evidence relevant to the creation of the trust;
 - 4.5 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;
 - 4.6 the applicant's personal income tax returns to show any rental income and whether any deductions were claimed for the property;
 - 4.7 statutory declarations from each applicant and the beneficiary or beneficiaries detailing facts and circumstances of the creation of the trust, including the reasons why it was necessary that the property was held in trust and not by the beneficiary in their own right;
 - 4.8 statutory declarations from independent third parties (such as real estate agents, bank employees, accountants or solicitors) that can corroborate the evidence of the applicant(s) as to the circumstances of the creation of the trust; and
 - 4.9 any other information or document that the Commissioner considers relevant.

Investigative enquiries may be necessary to gather oral testimony, assess the credibility of witnesses, and adjudicate the veracity of evidentiary material. The Commissioner will consider all documentation obtained and provided in determining whether the relevant interest was held by the trust.

5. Where a financial institution has provided a home loan to a purchaser on the condition that 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 that —
 - 5.1 the arrangement was entered into only as a result of the financial institution requirement that a third party acts as a guarantor or co-borrower;
 - 5.2 the guarantor or co-borrower does not hold a beneficial interest in the property; and
 - 5.3 the guarantor or co-borrower provided no money towards the purchase of the property and will not be making any loan payments.
6. To prove the matters described in paragraph 5, the applicant must provide:
 - 6.1 a letter or other documentation from the financial institution, dated at the time of the loan application, stating that the financial institution requires a third party to be a guarantor or co-borrower for security purposes;
 - 6.2 evidence that 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
 - 6.3 statutory declarations by both the borrower and the guarantor or co-borrower declaring:
 - 6.3.1 the reasons why the guarantor or co-borrower's name appears on the title;
 - 6.3.2 that 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;
 - 6.3.3 that 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
 - 6.3.4 that the applicant will notify the Commissioner immediately if there are any changes to the circumstances detailed in 6.3.2 and 6.3.3 above.

Date of Effect

This Commissioner's Practice takes effect from 3 March 2015.

Nicki Suchenia
COMMISSIONER OF STATE REVENUE

3 March 2015

Commissioner's Practice History

Document	Issued	Dates of effect	
		From	To
FHOG 8.0	3 March 2015	3 March 2015	31 October 2016

Superseded