



SUPERSEDED

COMMISSIONER'S PRACTICE FHOG 1.0

VARIATIONS TO PRESCRIBED RESIDENCY REQUIREMENTS

Commissioner's Practice History

Commissioner's Practice	Issued	Dates of effect	
		From	To
FHOG 1.0	6 November 2012	3 September 2012	7 May 2015

This Commissioner's practice provides guidance as to how the Commissioner will exercise the statutory discretions contained within the *First Home Owner Grant Act 2000* ("FHOG Act") when considering an application for a variation to the prescribed residence requirements. This practice statement also provides guidance in identifying the relevant facts, circumstances and evidentiary requirements that an applicant will need to furnish in support of an application for a variation to the prescribed residence requirements.

This practice applies from 3 September 2012, being the date the *Revenue Laws Amendment Act 2012* made relevant amendments to the FHOG Act. It does not apply to decisions made prior to that date concerning an applicant's compliance with the prescribed residency for which there was a right of objection that had not been exercised.

Background

The FHOG Act commenced operation on 1 July 2000 and was designed to put in place a scheme to assist eligible first home buyers by providing a grant to purchase or build their first home. To be eligible to receive the grant, the legislation provides that an applicant is required to comply with five eligibility criteria.

Criterion 5 – Residence requirements, which is set out in section 13 of the FHOG Act, requires that an applicant for the grant must occupy the property the subject of the grant as their principal place of residence for a continuous period of six months (“prescribed six month residence period”) within 12 months of the applicant gaining possession of the property (“prescribed 12 month take up period”). The FHOG Act also provides the Commissioner with discretionary powers to grant a variation to the prescribed residence requirements by enabling the Commissioner to:

- (a) approve an applicant complying with a shorter residence period than the prescribed six month residence period, if there are, in the Commissioner’s opinion, good reasons why the applicant cannot comply with the prescribed six month residence requirement;
- (b) extend the prescribed 12 month take up period by which an applicant can commence the prescribed six month residence period; and
- (c) exempt an applicant from complying with the residence requirements, but only in circumstances where there are two or more joint applicants and at least one of the applicants complies with the residence requirements.

There is an express obligation under the FHOG Act for an applicant to advise the Commissioner and repay the grant within 30 days after which the applicant becomes aware that they will be unable to comply with the residence requirements. Accordingly, it follows that an application for variation ought to be made within the same corresponding notification period. Where an application for a variation is not made within the required notification period, the reasons why a variation was not sought within the relevant period will be taken into account in determining whether a variation ought to be granted.

Object and purpose of the FHOG Act

The FHOG Act represents a scheme to encourage and assist in the acquisition of a first home. The encouragement and assistance, however, is not so wide that it would apply to any person wishing to purchase their first residential property. Rather, it is intended for those persons who have not previously held a relevant interest in residential property who both intend and will make the property the subject of the grant their principal place of residence. To ensure that the primary object of the legislation is met, the FHOG Act contains prescribed residence requirements, but also recognises that an applicant’s circumstances may change.

The prescribed six month residence period was inserted into the FHOG Act to overcome issues associated with gauging whether an applicant had occupied the property the subject of the grant as their principal place of residence in circumstances where the period of occupation was short term or transient in nature. Hence a six month period of continuous residence was prescribed, but with some flexibility to reduce this six month residence period if there are, in the Commissioner’s opinion, good reasons why the applicant cannot reside in the property the subject of the grant as the applicant’s principal place of residence for a continuous period of six months.

The prescribed 12 month take up period ensures that applicants for the grant take up residence of the property within a reasonable time period. Hence a 12 month take up period was prescribed but with some flexibility to increase this take up period where the Commissioner considers an extension is warranted.

In circumstances where there are two or more applicants for the grant, the FHOG Act requires that all applicants must satisfy the residence requirements, but provides flexibility for the Commissioner to exempt an applicant from complying with the residence requirements if at least one of the applicants will satisfy the residence requirements and there are, in the Commissioner's opinion, good reasons why the applicant seeking the exemption cannot comply with the residence requirements.

Relevant facts and circumstances

The onus rests upon the applicant to provide all the relevant information, facts and circumstances, together with supporting documentation, to the Commissioner to enable a decision to be made as to whether a variation to the prescribed residence requirements is warranted.

At a minimum, the relevant period that will need to be reviewed will cover the time period from when the applicant entered into the contract to purchase the property or have the property built or, as an owner builder, from the date they began laying the foundations ("commencement of the eligible contract"), up until the time it is apparent that the applicant no longer occupies or can no longer take up occupation of the property. There may also be situations where a longer period may need to be examined.

The relevant facts and circumstances that will need to be furnished will include:

- (a) the date the applicant entered into the contract to purchase the property or have the house built or as an owner builder, began laying the foundations ("commencement of the eligible contract");
- (b) the date the applicant obtained possession of the property subject of the grant, or in the case of a contract to build a home or an owner builder, the date the home is ready for occupation ("completion date of the eligible contract");
- (c) the dates on which the applicant commenced and ceased residing in the property;
- (d) if applicable, the dates the property was leased out;
- (e) if applicable, the periods and date where a management agent was appointed to manage the property; and
- (f) the dates and details of specific events which are cited as reasons as to why the applicant was unable to satisfy the residence requirements.

Corroborative documentary evidence is also required to be presented to support any fact or circumstance that is to be relied upon in support of an application for variation to the residence requirements.

While it is not possible to give a definitive list of what corroborative evidence will be required, nor specify the standard of proof required in each case, a list of examples of the type of evidence that may be provided by an applicant to corroborate any of the relevant facts or circumstances relied upon is provided as Appendix A.

Matters to be considered

In considering whether a variation to the residence requirements is warranted, the Commissioner will take into account and consider the applicant's facts and circumstances and will assess these facts and circumstances against the following matters:

- (a) Whether the applicant's reasons for not satisfying the residence requirements were exceptional, unforeseen, unusual, or due to circumstances beyond their control.

Some examples of circumstances that may be considered exceptional or unforeseeable include those factors listed in Appendix B.

It should be noted that the existence of one of these circumstances of itself will not necessarily establish grounds which would warrant the Commissioner granting a variation. Furthermore, an applicant will also need to present evidence substantiating the circumstance cited and demonstrate how the circumstance cited prevented them from satisfying the residence requirements.

- (b) Whether the applicant's conduct was consistent with an intention of purchasing a property to occupy as the applicant's principal place of residence, within the relevant period.

Acquiring a property for the purpose of deriving rental income represents conduct inconsistent with an intention of purchasing a property to occupy as one's principal place of residence. Likewise, acquiring a property without the financial means to live in the property as the applicant's principal place of residence would not likely be considered conduct consistent with an intention to acquire a property for the purpose of making it one's principal place of residence.

Where the property has been made available to derive income, this may suggest conduct which is inconsistent with an intention to occupy the property as the applicant's principal place of residence. In such cases, further information will need to be presented to establish:

- (i) the period of time that the property was used or made available to be used as an investment property;
- (ii) methods employed by the applicant to rent out the property;
- (iii) the reasons why the applicant rented out the property; and
- (iv) the efforts the applicant has made to make the property their principal place of residence and whether those efforts were timely.

Acquiring a property for the purpose of making the property one's principal place of residence at some future time outside of the prescribed 12 month take up period, represents conduct which would be considered inconsistent with purchasing a property as one's principal place of residence in accordance with the objects and purpose of the legislative scheme.

- (c) Whether the variation requested is proportionate to the circumstances.

For example, if an applicant were to seek:

- (i) a reduction of the prescribed six month residence period to a period less than the circumstances of the case would suggest that the applicant could have reasonably resided in the property; or
- (ii) an extension to the prescribed 12 month take up period to a date in time which is greater than the circumstances of the case would suggest the applicant would reasonably require to take up occupation,

then the reasons for the additional reduction or extension will need to be provided. If reasons do not exist as to why a further reduction or extension is required, the variation requested will be considered disproportionate to the circumstances.

- (d) Where an applicant does not apply for a variation or exemption within the required notification period, whether reasonable grounds exist as to why the variation or exemption was not previously requested.

There is an express obligation under the FHOG Act for an applicant to advise the Commissioner and repay the grant within 30 days after the applicant becomes aware that they will be unable to comply with the residence requirements. Consequently, it is expected that a variation to the residence requirements should be made within the same notification period, which at most will be 30 days after the expiration of the 12 month take up period. However, the Commissioner accepts that there may be situations where it may not be practical or feasible for an applicant to do so.

Where an application for a variation or exemption is not made within the required notification period, the reasons why a variation was not sought within the relevant time period will be taken into account in determining whether a variation ought to be granted.

- (e) Whether a variation to the prescribed residence requirements would be in accordance to the objects and purposes of the FHOG Act.

In considering the discretion, consideration will be given to both the intent of the scheme and also the purpose for which the particular discretion is provided:

- (i) A reduction to the prescribed six month residence period may be considered within the ambit of the legislative scheme where:
- the applicant acquired the property with the intention of making the property their principal place of residence within the prescribed 12 month take up period;
 - the applicant has made the property their principal place of residence during the prescribed 12 month take up period; and
 - there are good reasons why the applicant could not reside in the property for a continuous period of six months.
- (ii) An extension to the prescribed 12 month take up period may be considered within the ambit of the legislative scheme where:
- the applicant acquired the property the subject of the grant with the intention of making the property their principal place of residence within the prescribed 12 month take up period;
 - there was a change in the applicant's circumstances after entering into the contract to acquire the property, which prevented the applicant from taking up residence during the prescribed 12 month take up period; and
 - the applicant has made or will make the property their principal place of residence.
- (iii) An exemption to the residence requirements may be within the ambit of the legislative scheme where:
- there are two or more joint applicants for the grant and at least one of the applicants will comply with the residence requirements;
 - all the applicants acquired the property with the intention of making the property their principal place of residence; and
 - there are good reasons why the applicant applying for the exemption cannot satisfy the residence requirements.
- (f) Whether the grant of a variation to the residence requirements would not be beyond the threshold point by which the objects and purpose of the legislative scheme would be defeated.

Some examples of circumstances where the grant of a variation will be considered beyond the threshold point by which the purpose of the legislative scheme would be defeated include:

- (i) A reduction of the prescribed six month residence requirement to nil.

Because a reduction in the prescribed six month residence requirement to nil would be akin to granting an exemption to the residence requirements, it is considered that there is no basis by which the Commissioner would entertain such a request, as a grant of relief in such circumstances would defeat the objects and purpose of the legislation.

- (ii) Circumstances where 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 that the applicant has made the property their principal place of residence.

An applicant for the grant is required to occupy the property the subject of the grant as their “principal place of residence”. In most cases it will be difficult for a person to establish that they have occupied a property as their principal place of residence for a very short period of time. Hence, it is considered that a reduction to the residence period to a shorter period, in the absence of clear and unambiguous evidence that the applicant did in fact occupy the property as their principal place of residence, a grant of variation in such circumstances would not be considered within the objects of the legislation.

- (iii) Circumstances where there is no probability of the applicant (if there is one) or at least one applicant (in the case of two or more applicants) ever making the property the subject of the grant their principal place of residence.
 - (iv) Circumstances where the property has been or will be leased out for such an extensive period of time that the property can only reasonably be considered to be an investment property.
 - (v) Circumstances where the variation requested is excessively disproportionate to the circumstances.
- (g) In the case of an application for an extension to the prescribed 12 month take up period, whether the interests of the State can be adequately protected if an extension were to be approved and not complied with.

Circumstances where it is considered that the interests of the State could not be adequately protected include circumstances where the Commissioner would be unable to verify compliance with the requested period of extension, such as a request for an undefined or indefinite extension, or where the length of extension requested would pose difficulties in the Commissioner adequately verifying compliance.

Commissioner’s Practice

1. This Commissioner’s practice provides general guidelines concerning the exercise of the Commissioner’s discretionary powers. This practice is not intended to restrict the exercise of the Commissioner’s discretion under the FHOG Act as the merits of each particular case will be considered by the Commissioner.
2. The Commissioner will consider requests for a variation to the prescribed residence requirements. Such a request must be made in writing, setting out all the relevant facts and circumstances. Documentary evidence to support all relevant facts and circumstances which the applicant relies upon in support of their application will also be required to be furnished.

3. Where an application for a variation is not made within 30 days after which the applicant becomes aware that they will be unable to comply with the residence requirements, which generally will be 30 days after the expiration of the prescribed 12 month take up period, the applicant is required to furnish reasons as to why the variation was not sought within this time period.
4. The onus rests upon the applicant to provide all the relevant information to support a request for a variation to the prescribed residence requirements. The Commissioner will not approve a request for a variation unless he is satisfied that he is in possession of sufficient information and corroborative evidence to make a reliable decision that the applicable discretion ought to be exercised in the circumstances of the case.
5. A decision on a request for a variation will be made by a delegated officer taking into account all the relevant facts and circumstances which will be assessed against the various matters to be considered (as outlined above) and any other matter that the Commissioner considers relevant.
6. As a general rule, a variation is likely to be granted where the Commissioner is satisfied, on the balance of probability, that an affirmative answer can be given to each and all of the matters to be considered (as outlined above).
7. Where an affirmative answer cannot be given to all the matters required to be considered, a weighting of the factors will be required to be given to various matters considered. However, significant weight will be given to the following matters:
 - 7.1. whether a variation to the prescribed residence requirements would be in accordance with the objects and purposes of the FHOG Act; and
 - 7.2. whether a grant of a variation to residence requirements would not be beyond the threshold point by which the objects and purpose of the legislative scheme would be defeated.

As a general rule, a variation is unlikely to be granted where the Commissioner is satisfied, on the balance of probability that an affirmative answer cannot be given to each of these two matters.
8. The Commissioner will have regard to this procedure in deciding whether a discretionary variation ought to be granted, but will not make a decision without regard to the unique merits of each particular case.
9. If a preliminary decision or an adverse decision is likely to be made based upon information not provided by the applicant, or a conclusion drawn from an analysis of that information, the applicant will be given the opportunity to refute or otherwise comment on any such information or conclusion.
10. If an adverse decision is made the applicant will be provided with written reasons for the decision and be advised of their rights to a review of that decision.

Legislative Status of this Practice

Commissioner's practices regarding the FHOG Act are provided to give an indication of how the Commissioner would exercise these discretions under the 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 3 September 2012.

Bill Sullivan
COMMISSIONER OF STATE REVENUE

6 November 2012

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Appendix A: Evidentiary Requirements

It is not possible to give a definitive list of what corroborative evidence will be required, but as a guide the following list of examples of the type of evidence that may be provided to assist in corroborating various facts relied upon.

Circumstance/Event	<u>Examples</u> of documentation that may be of assistance in providing corroborative support
Commencement of the eligible transaction.	<p>In the case of:</p> <ul style="list-style-type: none"> • A contract to purchase an existing home, the contract to purchase the property. • A contract to have a home built, the comprehensive building contract. • An owner builder, confirmation from the council when the foundations have been laid.
Completion of the eligible transaction. Commencement of the take up period.	<p>Settlement statement. Landgate title. Transfer of land document. If the property was subject to a lease at the time the contract to purchase the property, a copy of the lease agreement will be required. Builder's hand over statement confirming the date the keys were handed over to the owner.</p>
Occupation of the FHOG property by the applicants.	<p>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 will also need to be provided. Invoices from removalists. Home contents insurance policy. Mail re-direction receipt from Australia Post.</p>

Circumstance/Event	<u>Examples</u> of documentation that may be of assistance in providing corroborative support
	<u>Note:</u> Water or council rate notices will not be accepted as proof of residence because they do not evidence occupation over a period of time.
Applicant's living arrangements when not occupying the FHOG property.	Utility accounts (such as electricity and gas) 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 the subject of the grant.	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 lodgement 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 of the applicant or other person cited as reasons preventing the applicant from satisfying the residence requirements.	Letters from medical practitioners outlining the circumstances of the medical issues.

Circumstance/Event	<u>Examples</u> of documentation that may be of assistance in providing corroborative support
A change in employment circumstances cited as reasons which prevented the applicant for satisfying the residence requirements.	A copy of any relevant contracts of employment. Confirmation of the change of circumstances to be provided by the relevant employer.
Condition of the property cited as reasons which prevented the applicant satisfying the residence requirements.	Confirmation from the local council confirming that 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 period. The declaration must also provide reasons as to why the property was not suitable for use as a place of residence. It should be noted it will not be sufficient to merely establish that the house was not suitable to the applicant's taste or the requirements of the applicant's family in order to establish that the house was not suitable for use as a place of residence.

Appendix B: Exceptional and Unforeseeable Circumstances

Examples of circumstances which may prevent an applicant from satisfying the residence requirements may include:

1. Inability of the applicant to live in the home due to:
 - 1.1. the health of the applicant (e.g. hospitalisation, rehabilitation, nursing home care);
 - 1.2. the health of a relative or the applicant 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 (e.g. the death of a child in the home makes 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 which results in the home becoming uninhabitable (e.g. natural disaster or fire); or
 - 2.2. the local council deeming the home to be uninhabitable (e.g. health issues, 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. a loss of employment of the applicant; or
 - 3.3. a closure of the local office or factory in which the applicant or their spouse or partner is employed; or
 - 3.4. a forced transfer by an employer which requires relocation of the applicant to continue their usual employment; or
 - 3.5. new employment or a voluntary job change/change of career which requires a change in location (e.g. a promotion, redundancy, moving from unemployment to employment or an employee initiated change of employment).
4. The applicant fears for their personal health or safety by occupying the home.
5. A break down in the domestic relationship of the applicants, resulting in an applicant or both applicants vacating the home.

6. Any other circumstance which the Commissioner considers good reasons why:
 - 6.1. the six month residence period should be reduced;
 - 6.2. the 12 month take up period should be extended; and/or
 - 6.3. the applicant should be granted an exemption from the residence requirements, in circumstances where there are two or more applicants and at least one of the applicants will satisfy the residence requirements.

Note:

The existence of one of these circumstances of itself will not necessarily establish grounds which would warrant the Commissioner granting a variation. Furthermore, an applicant will also need to present evidence substantiating the circumstance cited and demonstrate how the circumstance cited prevented them from satisfying the residence requirements.

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