



## COMMISSIONER'S PRACTICE FHOG 5.0

### FIRST HOME OWNER GRANT – SEPARATED SPOUSES

#### COMMISSIONER'S PRACTICE HISTORY

Commissioner's Practice	Issued	Dates of effect	
		From	To
FHOG 5.0	11 June 2013	11 June 2013	31 October 2016

This Commissioner's practice outlines the factors that will be considered by the Commissioner in determining if a first home owner grant applicant and their spouse or de facto partner are taken to be separated for the purposes of the *First Home Owner Grant Act 2000* ('FHOG Act').

Eligibility for the first home owner grant requires, amongst other criteria, that the applicant or their spouse or de facto partner must not have previously received a first home owner grant nor have had a relevant interest in a residential property. However, where an applicant and their spouse or de facto partner have separated, the applicant may be eligible for the first home owner grant regardless of whether their relationship had previously rendered them ineligible.

#### BACKGROUND

The eligibility criteria for the first home owner grant includes that, as at the commencement date of the transaction to which the application relates, neither the applicant nor their spouse or de facto partner have previously:

- received a first home owner grant or other grant under corresponding law in Australia that has not been repaid under the conditions on which it was made or if the circumstances under which it was paid back do not, in the Commissioner's opinion, render the applicant ineligible<sup>1</sup>;
- held a relevant interest in a residential property anywhere in Australia before 1 July 2000; or
- held a relevant interest in a residential property anywhere in Australia after 1 July 2000 and;
  - occupied the property as a place of residence before 1 July 2004; or

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<sup>1</sup> FHOG Act section 11

- occupied the property as a place of residence for a continuous period of at least six months that began on or after 1 July 2004<sup>2</sup>.

Under the FHOG Act, the term 'spouse' is taken to mean the person to whom the applicant is married<sup>3</sup>, and the term 'de facto partner' to mean the person with whom the applicant is living in a marriage-like relationship<sup>4</sup> and has lived with on that basis for at least two years<sup>5</sup>.

For the purposes of this Commissioner's practice, references to the applicant's marriage to a spouse can be read as the applicant's relationship to a de facto partner.

For the purposes of the FHOG Act, if an applicant discloses that they are married or asserts to be living in a marriage-like relationship with a de facto partner, the Commissioner will accept that disclosure and will apply sections 11 and 12 of the FHOG Act accordingly<sup>6</sup>.

## COMMISSIONER'S PRACTICE

### *Discretion to disregard a marriage*

1. People who are married remain spouses<sup>7</sup> under the law until the marriage is legally dissolved.
2. Under the *Family Law Act 1975*, a marriage is taken to have broken down irretrievably<sup>8</sup> if the court is satisfied that the parties separated and thereafter lived separately and apart for a continuous period of not less than 12 months<sup>9</sup> notwithstanding that they may have continued to reside in the same residence or that either party has rendered some household services to the other<sup>10</sup>.
3. Under section 7(1) of the FHOG Act, a person is the spouse of an applicant if, on the commencement date of the transaction, the person is married to the applicant. As eligibility for the first home owner grant is determined with consideration of both the applicant and their spouse, the legal relationship that exists between the applicant and their spouse may have unintended consequences where the parties are separated but not divorced.

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2 FHOG Act section 12

3 FHOG Act section 7(1)

4 *Interpretation Act 1984* section 13A

5 FHOG Act section 3(1)

6 Revenue Ruling FHOG 4.0 – De facto Partners (paragraph 12)

7 spouse, in relation to a person, means a person who is lawfully married to that person  
- *Interpretation Act 1984* section 5

8 *Family Law Act 1975* (Cwth) section 48(1)

9 *Family Law Act 1975* (Cwth) section 48(2)

10 *Family Law Act 1975* (Cwth) section 49(2)

*Example: unintended consequences*

John and Joan, although legally married, have separated and have no intention of resuming living together as a couple. Neither has previously owned a home. If John purchased a home and, after satisfying the criteria, received the first home owner grant, his ownership would disqualify Joan from receiving the first home owner grant until their marriage was legally dissolved.

4. To recognise circumstances such as these, if at the time of deciding an application for the first home owner grant, the Commissioner is satisfied that:
  - 4.1 the applicant is married but is living apart from the person to whom they are married; and
  - 4.2 they have no intention of again living together as a couple,the person to whom the applicant is married is taken not to be the applicant's spouse<sup>11</sup>. The onus is on the applicant to satisfy the Commissioner that the separation is indicative of the ground that the marriage has broken down irretrievably.

*Test of separation*

5. The phrase 'married but living apart from the person to whom the applicant is married' has its ordinary meaning in the context of the breakdown of a marriage. It is directed at the effective severance of the marital relationship rather than the physical separation of the spouses.
6. Physical separation of the parties to a marriage is neither necessary nor a sufficient condition to establish that they are not living together as a couple for the purposes of the first home owner grant. For instance, married persons may not regard themselves as separated in a marital sense even though they are living apart for a period of time.

*Examples: physical separation without being 'separated'*

Sally and Mark, although married, have spent eighteen months apart due to Mark's armed forces commitments. While they have physically been located in different countries throughout that time, they hold themselves out to be married and consider each to be the other's spouse.

Peter and Kevin have been in a long term de facto relationship, but for the last three years have lived in separate residences. Peter resides on the family farm while Kevin occupies a rented unit in the city which is close to his workplace. They see each other most weekends and consider their relationship to be marriage-like.

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<sup>11</sup> FHOG Act section 7(2)

7. Before deciding to disregard a marriage, the Commissioner must be satisfied that the following elements of separation exist to establish that married persons are not living together as a couple:
  - 7.1 a communicated intention on the part of at least one of the married persons to sever the marital relationship and action upon that intention<sup>12</sup>; and
  - 7.2 the presence of indicators that the parties are not in a marriage-like relationship which may include not holding themselves out to be a couple as well as discontinuance of financial and emotional support<sup>13</sup>; and
  - 7.3 action has been or is being taken towards severance of financial interdependence<sup>14</sup>.
8. The Commissioner will take into account the circumstances and facts of the relationship in order to compare and contrast the relationship that existed in the period prior to the alleged breakdown of the marriage with that which exists afterwards.
9. The Commissioner will take into consideration the statutory declaration of the applicant and any other supporting evidence (see 'Application requirements'). He may also conduct inquiries with other parties, including the applicant's spouse, in order to be satisfied that the parties have genuinely separated and have no intention of resuming living together as a couple.
10. The Commissioner will have regard to all of the material facts of each case in determining whether a married couple has ceased living together as a couple, treating the requirements set out below only as indicators:
  - 10.1 whether the parties are living in separate residences and the period of that separation. It will be considered that the longer the period of physical separation, the less likelihood there is of recommencement of cohabitation;
  - 10.2 where the parties are living under the same roof<sup>15</sup>, whether that situation is intended to be temporary, long-term or permanent<sup>16</sup>;

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12 Pavey, In Marriage of, 25 FLR 450, 10 ALR 259, 1 Fam LR 11,358, [1976] FLC 90-051

13 Johnson v Scott [1989] Tas R 240

14 Monaghan v Secretary, Department of Education, Employment and Workplace Relations [2012] AATA 908

15 The *Family Law Act 1975* (Cwth) section 49(2) does not require the parties to have moved into separate residences before the decree nisi is pronounced.

16 When the *Family Law Act 1975* (Cwth) sections 48, 49 and 50, are read together they indicate that "separation" is a term used in contrast with "cohabitation", and, generally speaking, parties are to be regarded as "separated" in the relevant sense when "cohabitation" between them has in substance ceased.

*Examples: separated parties living under the same roof*

*Temporary arrangement –*

Although Mike and Molly have ended their de facto relationship, they are residing in the same house while Mike looks for other accommodation. They occupy separate bedrooms, have commenced proceedings to make financial arrangements and have made it clear to their families and friends that they are no longer a couple.

*Long-term arrangement –*

Sam and Jane consider their marriage to have broken down irretrievably. They have separated their finances, commenced proceedings to dissolve the marriage, and Jane has returned to using her maiden name. However they agree that it is in the best interests of their children that they continue living in the same house until the children have completed school.

*Permanent arrangement –*

After 30 years of marriage, Mary decides that she is unhappy with her relationship and tells Phil that she wants a divorce. She engages a lawyer to draft the financial arrangements. Due to Phil's ill health, Mary agrees to remain living in the residence indefinitely. Mary has her own bedroom, eats meals separately from Phil and has her own social life, and while she continues to provide care for Phil as she did before the decision to separate, she considers herself to be living with him solely in her capacity as a carer.

- 10.3 the financial arrangements between the parties;
- 10.4 the arrangements put in place for the care of children;
- 10.5 any sexual relationship that may exist between the parties<sup>17,18</sup>;
- 10.6 the social relationship between the parties<sup>19</sup>;
- 10.7 the commitment between the parties<sup>20</sup>;
- 10.8 whether the parties have commenced, or engaged in, relationships with other people<sup>21</sup>;

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17 "Neither casual acts of sexual intercourse nor an agreement to resume cohabitation which is not carried out constitutes an interruption of separation." Todd, In Marriage of [No 2] 25 FLR 260, 9 ALR 401, [1976] FLC 90-008

18 "Isolated or casual acts of sexual intercourse or social association between spouses may be consistent with living separately and apart." Saunders v Saunders [1976] VR 695, 27 FLR 72, 12 ALR 283, 1 Fam LR 11,477, [1976] FLC 90-096

19 "In forming an opinion about the relationship between 2 people [consideration must be given to]... (iii) whether [other] people consider that the relationship is likely to continue indefinitely; and (iv) whether [other] people see their relationship as a marriage-like relationship or a de facto relationship." Monaghan v Secretary, Department of Education, Employment and Workplace Relations [2012] AATA 908

20 "The degree of mutual commitment to a shared life will be a sufficient factor in establishing the existence of a de facto [or marriage-like] relationship." Robson v Quijarro [2009] NSWCA 365

21 "A person who considers themselves free to have involvements of a sexual nature with other persons does not necessarily mean they show a lack of commitment to a shared life with their de facto partner." Robson v Quijarro [2009] NSWCA 365

- 10.9 whether the parties had previously separated then resumed living together as a couple<sup>22</sup>;
  - 10.10 whether the parties have commenced proceedings, including instructing their legal representatives, to dissolve the marriage or to settle property and maintenance arrangements;
  - 10.11 whether the separation has been recognised by a government agency such as Centrelink; and
  - 10.12 whether the spouse of the applicant is ineligible for the first home owner grant. In these circumstances, having regard to other factors, the Commissioner would need to be satisfied that the separation is not a 'sham' to obtain the benefit of the first home owner grant.
11. The decision will not be made by treating the above information as a checklist but rather by using the factors listed above to show "consideration of the whole of their interpersonal relationships"<sup>23</sup>. The specific matters that the Commissioner will take into account under these requirements are relative to those set out in [Revenue Ruling FHOG 4 - De facto Partners](#) (pages 3 to 6) with regard to the characteristics that are otherwise used to determine whether a relationship is 'marriage-like'.

#### *Separated spouses living under the same roof*

12. Where it is claimed that the applicant and their spouse have separated but continue to live under one roof, there may be some difficulty in establishing when the separation commenced or even that it has occurred at all<sup>24</sup>.
13. It is important to note that parties can be considered to be separated when the three elements outlined in paragraph 7 are in existence. In these cases, the onus is on the applicant to satisfy the Commissioner that the three elements of separation exist.

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22 "Resumption of cohabitation after separation is to be regarded as negating 'separation' and 'separation and living separately and apart thereafter' as negating cohabitation. Once a condition of 'separation and living separately and apart' is in existence, it requires a resumption of cohabitation, or something which is substantially a resumption of cohabitation, to negate that condition of 'living separately and apart'." Saunders v Saunders [1976] VR 695, 27 FLR 72, 12 ALR 283, 1 Fam LR 11,477, [1976] FLC 90-096

23 Johnson v Scott [1989] Tas R 240

24 "In layman's terms, the test that has to be applied is whether or not the parties have in fact established separate households, albeit the same roof covers both." Wiggins, In Marriage, of 9 ALR 8, [1976] FLC 90-004

*Examples: when separated parties living under the same roof would not be considered 'separated'*

Chris and Sarah make the decision to end their marriage but continue to reside under the same roof. While they have separate bedrooms, they still eat meals together, socialise together and contribute to the management of the household in the same capacity as they did prior to the decision to end their marriage.

Fran and Jay had been living in a de facto relationship for seven years when Fran decides that the relationship has broken down irretrievably. She opens and commences using a separate bank account in her name, changes the beneficiary details on her insurance policies and her will, starts dating other people and establishes a social network to which she is seen as single. However she does not communicate her intention to sever the relationship to Jay who believes they are still cohabiting in a marriage-like relationship.

Michael and Fiona agree to divorce and, while holding themselves out socially to no longer be a couple, continue to provide emotional and financial support for each other. While they both agree that their marriage is over, they have not commenced proceedings to dissolve the marriage nor have they separated their finances.

14. Where an applicant and their spouse are separated but still residing in the same premises, the first home owner grant application should be accompanied by additional supporting documentation that evidences the applicant's declaration of separation. This may include declarations from third parties, evidence of commencement of divorce or maintenance proceedings, or recognition of the parties' separation by government agencies such as Centrelink<sup>25</sup>.

#### *Application requirements*

15. Applications to the Commissioner to disregard a marriage or de facto relationship must be made to the Commissioner at the time of making an application for the first home owner grant. The application must be in the form of a statutory declaration, made by the applicant, addressing the matters referred to below:
  - 15.1 the full name of the spouse;
  - 15.2 the spouse's date of birth;
  - 15.3 the date they were married or entered into the relationship;
  - 15.4 the date they separated or ended the relationship;
  - 15.5 the spouse's current address (if known); and

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<sup>25</sup> "Where the parties have continued to reside in the same residence, their attitudes to each other and the extent of their recognition of the marital relationship may be of great significance in determining whether they still regard the marriage as existing."

Falk, In Marriage of, 29 FLR 463, 15 ALR 189, 3 Fam LR 11,238, [1977] FLC 90-247

- 15.6 a statement to the effect that they do not live together as a couple and have no intention of resuming living together as a couple.
16. Applications should be accompanied by any documentation that would assist the Commissioner in ascertaining that:
- 16.1 the marriage or de facto relationship has broken down irretrievably;
  - 16.2 the person is living apart from their spouse or de facto partner; and
  - 16.3 they have no intention of again living together as a couple.

### **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