EXPLANATORY MEMORANDUM

FIRST HOME OWNER GRANT BILL 2000

The purpose of this Bill is to put in place a scheme to assist eligible first home buyers by providing a $7,000 grant where they enter into a contract on or after 1 July 2000 to purchase or build their first home.

The Scheme forms part of the package arising from the Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations, which was signed by the Prime Minister and all Premiers and Chief Ministers in June last year.

Under that Agreement, the States and Territories committed to assist first home buyers through the funding and administration of a new uniform First Home Owners' Scheme to offset the impact of the GST on house prices.

The Scheme is restricted to first home buyers because other home buyers should benefit from a GST-induced increase in the selling price of their existing home.

The framework principles on which the Scheme is based were set out in the Intergovernmental Agreement and, together with the amount of the grant, are consistent across all jurisdictions. However, each State and Territory will implement separate legislation to give effect to the Scheme.

The impact of the assistance provided by this Scheme is expected to be significant. In the first year alone, it is expected that over 17,000 applicants in Western Australia will be able to claim assistance totalling nearly $120M. By the end of the decade, it is expected that assistance in excess of $1.3B will have been provided.

The payment of the grant is not means tested and there is no upper limit on the value of the property being acquired. However, to receive the grant, each of the applicants must comply with five eligibility criteria.

The first and second criteria require the application to be made by a natural person who is an Australian citizen or permanent resident. Where joint applications are made, only one of the applicants is required to meet the citizenship or residency test.

The third and fourth eligibility criteria will disqualify any person if the person or their spouse has previously received a grant anywhere in Australia, or has held a relevant interest in residential property, including an investment property, prior to 1 July 2000.

The fifth eligibility requirement provides that all applicants must occupy the home to which the grant relates as their principal place of residence within a 12-month period. Failure to fulfil this condition after the grant has been paid will result in the applicant being required to repay the full amount of the grant.

To be successful, the application for the grant must also relate to an "eligible transaction". Three types of transaction are provided for:

- A contract to purchase an established home that is entered into on or after 1 July 2000;
- A contract to build a new home that is entered into on or after 1 July 2000; and

- The construction of a first home by an owner builder where the building work commences on or after 1 July 2000.

Only one grant is payable for the same eligible transaction. This means that where two or more persons jointly purchase or build their first home, only one amount of $7,000 will be paid.

The Bill also contains anti-avoidance provisions to deny the payment of a grant to an applicant who effectively contracts before 1 July 2000 to enter into a binding contract after 1 July 2000.

It should be noted that the anti-avoidance provisions do not prevent pre-construction activity occurring as a precursor to a post 1 July 2000 binding contract, if the arrangement in relation to the pre-construction activity allows both parties to walk away at any time without a requirement to sign a binding contract.

A further important feature of the Scheme is that the applicant must either have title or other acceptable security of tenure to the land on which the home is or will be situated.

The Bill provides an extensive definition of what constitutes a relevant interest in the land on which the dwelling is located. The Bill also proposes that all persons who will have a relevant interest in the land on which the home is located at the completion of the eligible transaction must be an applicant for the grant.

This means that failure by any one applicant to meet the eligibility criteria will disqualify all parties from receiving the grant in relation to that transaction. A specific exclusion is provided from this requirement for Homeswest in relation to its shared equity schemes, and for certain purchases involving a "purple title".

The Bill includes a number of standard administration provisions, including rights of objection and appeal where a grant is not approved. Comprehensive information sharing powers are set out in the Bill, allowing information to be shared with agencies administering similar legislation across Australia. The Bill also includes extensive investigation powers to ensure only eligible applicants receive the grant.

Recovery powers, including the ability to lodge a memorial over the land acquired, are included in the Bill to ensure that the $7,000 grant can be recovered where no entitlement existed, or conditions attached to its payment were not met.

The Scheme has been actively promoted by the Ministry of Housing since early March this year. This was necessary to ensure that intending purchasers and builders of first homes could make informed decisions.

In this State, the Scheme will be administered by the State Revenue Department, which has significant expertise and data matching systems to ensure that only those persons who are eligible for the grant will receive the benefit of it.

To reduce the effort required for a person to make application for the grant, the State Revenue Department is working with a range of financial institutions and associated providers of first home finance to allow potential applicants to apply for the grant through their financial institution at the time they seek finance.

Those persons who do not require finance, or who are financing through a financial institution that has not elected to provide such an application service, will be able to apply directly to the State Revenue Department. It is also important to recognise that the $7,000 grant is in addition to, rather than in place of, existing first home buyer assistance currently provided by the State.

This includes the:

- Keystart First Homebuyer Scheme;
- Aboriginal Home Ownership Scheme;
- Access Home Loan Scheme;
- GoodStart Scheme; and
- Right to Buy Scheme.

The assistance provided by the Home Buyers Assistance Fund and current stamp duty concessions for first home owners will also continue unaffected.

This legislation will have a significant and ongoing impact in ensuring that home affordability for first home buyers is maintained at existing levels for the people of Western Australia.

PART 1 – PRELIMINARY

Clause 1: **Short title**

This clause provides that the Act may be cited as the *First Home Owner Grant Bill 2000*.

Clause 2: **Commencement**

This clause provides that the Act will commence on 1 July 2000.

Clause 3: **Interpretation**

Subclause (1) contains a number of defined terms that are used throughout the Bill. Each of these definitions is self-explanatory, however, additional points of interest are noted with respect to a number of these terms.

"corresponding law" will include the similar Act in each State and Territory, pursuant to the commitment by all Premiers and Chief Ministers to introduce this scheme under the Intergovernmental Agreement signed in June 1999.

"guardian" is an exclusive definition. Where it is used in the Act, the guardian must be one appointed by the documentation specified or under the Act specified.

"permanent resident" refers to the holder of a permanent visa within the meaning of section 30 of the *Migration Act 1958* of the Commonwealth. This section states:

(1) A visa to remain in Australia (whether also a visa to travel to and enter Australia) may be a visa, to be known as a permanent visa, to remain indefinitely.

Subclause (2) provides a definition of **"residential property"** for the purposes of the Bill. This is an important definition as certain eligibility criteria are specific to a residential property (eg. refer clause 12).

Clause 4: **Meaning of "home"**

This clause provides a definition of "home". This term is used throughout the Bill and is relevant for the purposes of eligibility for the grant. Paragraph (a) provides that the home must be lawfully used as a place of residence.

Paragraph (b) provides that the building must, in the opinion of the Commissioner, be suitable for use as a place of residence.

Generally, most dwellings that are permanently connected to services such as power, water, and sewerage (or septic tanks) will be considered suitable for use as a residence. This will include new or established houses, home units, flats and will also include demountable dwellings. It should, however, be noted that caravans (other than those permanently affixed to land) would not fall within this definition.

Clause 5: **Meaning of "owner" of a home or "home owner"**

This clause provides a definition of **"owner"** or **"home owner"**. The terms link two requirements of the Bill, namely that an owner must have a relevant interest in land and a home must be built on that land.

Clause 6: **Meaning of "relevant interest"**

This clause provides the meaning of **"relevant interest".** To qualify for assistance under the Act, an applicant must have, or expect to have, title to the land or another acceptable form of security of tenure.

Subclause (1) provides a list of the types of interests in land that will constitute a relevant interest. Each type of relevant interest is considered to provide the owner with an acceptable level of security of tenure.

Subclause (1)(h) allows for further types of interests to be prescribed. It is intended that these matters will relate to circumstances where the person building a home may not be the registered owner of the land upon which the home is to be situated but where, in the circumstances, security of tenure is considered to exist.

Consideration is currently being given as to whether any other circumstances will warrant prescription.

It should be noted that any further types of relevant interests to be prescribed will usually only be relevant in situations where the applicant enters into a contract to build a home, or owner-builds a home. It is unlikely that a person

could purchase an existing home without obtaining a relevant interest in the land, due to the inability to sever the fixture (ie. building) from the land.

Subclause (2) provides three exceptions to subclause (1) where a person will not be considered to hold a relevant interest, despite the fact that they may be the registered legal owner of the interest.

Paragraph (a) is intended to ensure that at the time an interest is considered, it will only be a relevant interest if within 12 months it will be available for immediate occupation by the holder of the interest. This requirement was considered necessary to discourage persons from buying a building which had a significant existing lease in place which would prevent them from occupying. Such a purchase would be more in the nature of an investment property. However, some flexibility does exist for the Commissioner to extend the 12-month period if he considers it is warranted.

Paragraph (b) is intended to ensure a person is not able to claim the grant where they are merely holding the interest in trust for another. Such trust arrangements could otherwise be open to abuse. Moreover, this provision will ensure that where land is held on trust by a person, they will not be disqualified from accessing the grant in their own right due to such ownership in a trustee capacity.

Paragraph (c) provides that equitable interests are not relevant interests, except where the equitable interest is held on trust for a person under a legal disability by a guardian. **"Guardian"** is a defined term and its meaning limits the nature of trusts acceptable where a person has a legal disability. This will mean that while a person under a legal disability will not be the legal owner of the land, they will nonetheless be able to qualify for the grant.

Subclause (3) provides further clarification regarding the types of relevant interests that may be prescribed under subclause (1)(h). The regulations can provide for a **"non-conforming interest"** which will allow a grant to be paid as if a relevant interest existed, even though the relevant interest may not be recognised at law or in equity as an interest in land or does not fall within the operation of subclause (2).

Subclause (4) allows certain additional requirements to be imposed under the Regulations where a grant is paid in recognition of a non-conforming interest. It is intended that these conditions will be a protective measure to ensure non-conforming interests cannot be used to improperly access the grant.

Clause 7: **Meaning of an applicant's "spouse"**

This clause provides a meaning of **"spouse"** for the purposes of the Bill. Both the applicant and his or her spouse must meet two of the eligibility criteria to receive the grant, even where the applicant's spouse is not a party to the transaction.

In this context, subclause (1) provides that a spouse includes a person legally married to the applicant or a person who is in a de facto relationship with the

applicant. In the case of de facto relationships, the spouse must be a person of the opposite sex who is living with the other person on a genuine domestic basis and has been doing so for at least 2 years prior to the time of making application.

Subclause (2) provides an exclusion from this meaning where persons are legally married but are separated and are not intending to resume the relationship. This allows an applicant who is disqualified from the grant solely on the basis of his or her spouse's eligibility to still receive the grant where the marriage has broken down. This may also be appropriate where a couple may choose not to divorce for religious reasons, but are living apart and do not intend to resume cohabitation.

PART 2 – FIRST HOME OWNER GRANT

Clause 8: **Entitlement to grant**

This clause sets out the circumstances in which a person will be entitled to the grant.

Subclause (1) provides that a grant is payable when an applicant, or each applicant if there are two or more of them, meet all the eligibility criteria. These criteria are set out in clauses 9 to 13. Furthermore, there must be an eligible transaction that has been completed for the grant to be payable. Details of what constitutes an eligible transaction are set out in clause 14.

Subclause (2) provides an exception for two specific circumstances where not all applicants are required to meet the eligibility criteria. These are the exemptions allowing one of joint applicants to:

- not be an Australian citizen or permanent resident under subclause 10(2); or
- not occupy the home as a principal place of residence under subclause 13(2).

Subclause (3) provides that only one grant is payable per eligible transaction. Put simply, an eligible transaction involving one person or ten people will potentially qualify for a single $7,000 grant.

Without this clause, it would be possible for each joint applicant to claim a separate $7,000 grant on the same transaction.

Clause 9: **Criterion 1 – applicant to be a natural person**

This clause requires all applicants for the grant to be natural persons. Companies, trusts and other entities are not eligible for the grant.

Clause 10: **Criterion 2 – applicant to be Australian citizen or permanent resident**

This clause imposes an eligibility requirement requiring applicants for the grant to be Australian citizens or permanent residents.

Subclause (1) requires all applicants for the grant to be Australian citizens or permanent residents. Clause 3 contains definitions of these terms.

Subclause (2) makes an exception to this requirement in the case of joint applicants, if at least one of the applicants is an Australian citizen or permanent resident. This may be the case where an applicant's spouse has moved to Australia from overseas but has not become, at the time of the grant application, an Australian citizen or permanent resident.

Clause 11: Criterion 3 – applicant or applicant's spouse must not have received an earlier grant

This clause provides that a person is ineligible for the grant if the applicant or his or her spouse has received an earlier grant of this nature.

Subclause (1) provides that an applicant is ineligible if the applicant or his or her spouse has been a party to a previous application under this Act or a corresponding law and received the grant. Accordingly, where one applicant is eligible, but his or her spouse has previously received assistance in Western Australia or another jurisdiction, both parties are ineligible.

Subclause (2) provides that the applicant is not ineligible if the grant was received, but later paid back. This could occur where the grant was received subject to conditions, and the applicant was required to repay the grant because the conditions were not met.

Clause 12: Criterion 4 – applicant or applicant's spouse must not have had relevant interest in residential property

This clause provides that the grant is not payable where the applicant or his or her spouse have had a relevant interest in residential property before 1 July 2000.

The Commonwealth policy principles set down in the Intergovernmental Agreement dictate this criterion and are a uniform requirement across all jurisdictions.

Subclause (1) provides that an applicant is ineligible if the applicant or the applicant's spouse held, before 1 July 2000, a relevant interest in Western Australian residential property or an interest in residential property in another jurisdiction that is a relevant interest under the First Home Owner Grant Act of that jurisdiction.

This provision will apply even where the applicant's spouse is not registered on the title of the home. The reasoning behind the restriction arises because a spouse would in most cases benefit from the grant by also living in the home as the principal place of residence. To allow a spouse a separate application for a grant would open a loophole that would see couples purchasing additional homes in individual names and receiving more than one grant.

This clause, considered in conjunction with clause 11, means that an applicant would be ineligible where they or their spouse have owned a residential property prior to 1 July 2000, whether as their principal place of residence, or as an investment property. Ownership of non-residential property or ownership of vacant land only prior to 1 July 2000 will not affect eligibility.

Subclause (2) requires the Commissioner to disregard the lack of an applicant's right of occupation for the purposes of determining whether a relevant interest is held by the applicant. Without this subclause, the provisions contained in subclause 6(2)(a) would operate to allow the grant to applicants who hold

investment properties prior to 1 July 2000. Such a situation is not in accordance with the principles set out in the Intergovernmental Agreement.

Subclause (3) provides additional disqualifying circumstances where an applicant or his or her spouse held a relevant interest in property on or after 1 July 2000 that is used at any time on or after 1 July 2000 as a principal place of residence. Two examples of when this provision would be used are noted below:

Example 1:

Two non-Australian citizens/permanent residents purchase a home on 20 July 2000 and move into it as their principal place of residence. At the time of purchase, both parties are ineligible on the basis that they do not meet Criterion 2 set out in clause 10 of the Bill. Two years later, they become permanent residents.

On 15 September 2002, the persons sell their existing home and purchase another. Without this clause, they would be eligible for the grant on the purchase of their second home as they now meet all the eligibility criteria. This is clearly against the principles and policy of the scheme.

Example 2:

A and B are married and purchase a principal place of residence after 1 July 2000. Both parties are registered on the title and live in the property.

A has previously had a relevant interest prior to 1 July 2000, therefore A and B do not apply for the grant as the requirements of clause 12(1) would make them ineligible. A and B divorce.

B now purchases a principal place of residence.

B has not had a relevant interest prior to 1 July 2000 and would now meet the requirements of subclause 12(1).

Without this subclause, B can receive the grant for a second home after 1 July 2000. This is clearly against the principles and policy of the scheme.

In summary, ownership prior to 1 July 2000 of any residential property (principal residence or investment) by the applicant or their spouse will make the applicant ineligible for the grant. Ownership of vacant land only, or of non-residential property, will not make a person ineligible.

Any transaction after 1 July 2000 in respect of residential property will only attract the grant where all criteria are satisfied, including the prohibition on having received and retained a grant in this State or elsewhere in Australia.

Notably, the purchase of a residential property for investment purposes (as opposed to for principal residence usage) after 1 July 2000 will not qualify for the grant. However, such a purchase of itself will not disqualify an otherwise

eligible person from receiving the grant when they do buy or build their first home.

Moreover, if an otherwise eligible person purchases an investment property then subsequently moves into it as their principal residence and applies for the grant, providing the application is within the application period (see clause 15(5)), the grant may still be paid. Any application outside that period will not qualify and any future transaction will not be eligible as the person would no longer be a first home owner.

Clause 13: Criterion 5 – residence requirement

This clause sets out the eligibility requirements regarding occupation of the home as a principal place of residence.

Subclause (1) provides that all applicants for the grant must occupy the home for which a grant was obtained as their principal place of residence within a period of 12 months of completion. "Completed" is defined in clause 14(6). It is noted that no time limit is provided as to how long occupation must occur.

The key point is that the home must be a person's principal place of residence. This term is not defined and each case will be judged on its relevant facts. However, any transitory occupation by an applicant to satisfy this requirement will be carefully examined by the Commissioner, and his determination as to the validity of claimed satisfaction of the residence requirement will be guided by existing case law precedent.

The ability does exist for the Commissioner to extend the period for occupation to occur beyond 12 months. An example of where this may be appropriate may include an applicant receiving a work posting overseas or interstate after purchase, but prior to completion, if the applicant intends to take up occupation upon his or her return.

To enable the grant to be paid before this criterion is met (eg. at settlement), clause 21 sets out the circumstances surrounding payment of the grant prior to an applicant residing in the property.

Subclause (2) provides an exemption from the residence requirement in certain circumstances. The exemption is only available where there are two or more joint applicants for a first home owner grant. One applicant must occupy the home as a principal place of residence and good reasons must exist for the other applicant to not meet this criterion.

Clause 14: Eligible transaction

This clause sets out a number of fundamental elements underlying the scheme concerning the type of transaction that will allow an applicant to qualify for the grant.

Subclause (1) provides a definition of an **"eligible transaction"**.

The definition covers the purchase of established residences, a contract for a home to be built, and the construction of a home by an owner builder. Notably, an eligible transaction must occur on or after 1 July 2000 for the grant to be paid.

Subclause (2) clarifies that a contract for the purchase of a home as described by subclause (1)(a) includes contracts for the acquisition of a relevant interest in land on which a home is built. Without this clause, certain contracts would not be covered by the definition of "eligible transaction". For example, the purchase of shares described by clause 6(1)(g) would not normally be classified as a "contract for the purchase of a home".

Subclause (3) provides a transitional anti-avoidance provision to prevent the true date of a transaction being manipulated to allow access to the grant after 1 July 2000. This clause provides, subject to the Commissioner's declaration under subclause (4), that the following contracts will not be eligible transactions:

- contracts for the purchase of a home where an option to purchase exists before 1 July 2000 to allow the purchaser to purchase the home or the vendor to require the purchaser to purchase the home; and
- contracts for a comprehensive home building contract where either party had a right or option prior to 1 July 2000 to require the other party to enter into the contract.

It should be noted that the terms **"option to purchase"** and **"comprehensive home building contract"** are defined in clause 3.

In the case of a contract to build, it should be noted that certain activity (eg. preparation of plans) can precede the contract without affecting eligibility. The following types of pre-construction arrangements would generally not be considered to circumvent the scheme requirements:

- where the pre-construction arrangement between a builder and intended purchaser allows each party to walk away from the other party at any time without having to sign a contract to build; and
- the pre-construction activity pursuant to that arrangement could be undertaken prior to a binding contract executed after 1 July 2000.

Subclause (4) provides that certain contracts may be excused from the operation of subclause (3) where the Commissioner is of the opinion that the contract does not have the effect of circumventing limitations on, or requirements affecting, eligibility for, or entitlement to, a grant.

Subclause (5) provides a definition of **"commencement date"** for the purposes of the Bill. This definition is relevant in defining the period within which an applicant is able to apply for the grant.

Subclause (6) provides a definition of **"completed"** in relation to an eligible transaction. This definition is also relevant in defining the period within which an applicant is able to apply for the grant. It is also relevant to the payment of a grant, which can only be made under clause 8(1)(b) when the transaction is completed.

Subclause (7) provides special requirements dealing with the purchase of moveable homes and eligibility requirements.

Generally, a grant will be paid for the purchase of a moveable home when the home is ultimately affixed to land in which the applicant has a relevant interest, and is ready for occupation as a place of residence. This will generally require the home to be connected to all relevant services, including power, water and sewerage or septics.

In this case, the applicant is treated as if they were an owner builder, meaning that completion occurs when the moveable building is ready for occupation as a place of residence.

The commencement date of the transaction for the purchase of a moveable home is taken to be the contract date of the purchase of the home.

Subclause (8) provides a definition of **"consideration"** for an eligible transaction. This is relevant to determine the amount of the grant under clause 19, particularly where the consideration may be less than $7,000.

Clause 15: Application for grant

This clause sets out the requirements for making a first home owner grant application.

Subclause (1) provides that a grant application is to be made to the Commissioner. Where appropriate delegations are in place, the application will be able to be made to financial institutions or other persons under an administration agreement (see clause 37).

Subclause (2) provides that an application is to be in a form approved by the Commissioner and is to contain all information required by him. A pro forma application form will be available for this purpose. Certain types of documentation will be required to be submitted at the time of application, including citizenship or residency papers where appropriate.

Subclause (3) provides the Commissioner with the power to request any information necessary to determine the application. Until all required information is supplied, the Commissioner will not approve the payment of the grant.

Subclause (4) provides that information supplied in support of an application may be required to be evidenced by a statutory declaration, or supported by other evidence if considered necessary by the Commissioner. It should be noted that statutory declarations will not be used as a matter of course, but to verify information where anomalies may be detected.

Subclause (5) provides the period for making an application. This begins at the commencement date of the eligible transaction (see clause 14(5)) and ends 12 months after the completion of the eligible transaction (see clause 14(6)).

Subclause (6) provides the Commissioner with the ability to accept an application prior to the commencement date. This may be necessary where approval is required by an applicant prior to the purchase of a property at auction.

Notably, there is no ability to extend the period for making application. It is considered that 12 months from completion is sufficient to allow persons to make application. Furthermore, the grant has been widely publicised and is likely to be promoted by financial institutions during the course of finance approval. Extension of the period beyond 12 months would severely limit the Commissioner's ability to verify the details associated with the application.

Subclause (7) provides that an applicant may amend an application with the Commissioner's consent. This may be necessary where settlement details change or other minor variations are made prior to completion.

Clause 16: Interested persons

This clause sets out who is required to be a party to an application for a grant.

Subclause (1) provides that all interested persons must be applicants, unless specifically excluded by regulation. For example, if a home is being purchased in joint names, both parties are required to be applicants. This clause prevents the grant being paid in circumstances where an eligible applicant applied for the grant, but a non-eligible applicant did not.

It is intended to prescribe two specific exclusions under this subclause to cover situations involving "purple titles", and also shared equity purchases where the Ministry of Housing or State Housing Commission are involved in the transaction.

Subclause (2) provides that an applicant must be an interested person. This requirement means that a person cannot be an applicant unless the person holds, or will hold, a relevant interest in the home for which the grant is sought.

Subclause (3) provides a definition of **"interested person"** for the purposes of the section. The use of the term **"owner"** as defined in clause 3 should be noted.

Clause 17: Application on behalf of person under legal disability

This clause allows first home owner applications to be made by a guardian on behalf of a person with a legal disability.

Subclause (1) authorises a guardian to make an application on behalf of a person with a legal disability. As noted above, **"guardian"** is a defined term under clause 3. It should be noted that a grant would not be allowed unless the guardian making the application meets the requirements set out in paragraph (a) or (b) of that definition.

Subclause (2) provides that for the purposes of determining eligibility, it is the person with the legal disability who is considered to be the applicant (eg. that person must meet all the criteria set out in clauses 9 to 13).

Clause 18: Commissioner to authorise payment of grant

This clause provides the circumstances in which the Commissioner is to authorise the payment of the grant.

Subclause (1) provides that the grant must be paid where the Commissioner is satisfied that the grant is payable.

Subclause (2) provides that payment of the grant may be authorised where completion of an eligible transaction has not yet occurred if:

- good reasons exist for the prepayment; and
- the interests of the State can be adequately protected by conditions if completion does not occur within a reasonable time.

It is envisaged that this provision will be utilised to authorise the payment of the grant at settlement where an established home is purchased and a financial institution has been involved under a clause 37 administration agreement in the application process. Under the restrictions in clause 14(6), completion does not occur until the purchaser is registered on the title as the owner. It is considered that this requirement can be overridden where a financial institution is involved in the settlement process, due to their title registration practices and the infrastructure in place under the clause 37 agreement.

Where no such financial institution is involved, the grant would not be paid until proof of registration is provided, due to the risk involved that registration may not occur.

Clause 19: Amount of grant

This clause provides that the amount of the grant is $7,000 or the amount of the consideration for the eligible transaction, whichever is the lesser. A definition of "consideration" is provided in clause 14(8).

Clause 20: Payment of grant

This clause sets out the methods by which the grant may be paid.

Subclause (1) provides that the amount is to be paid by electronic funds transfer (EFT), by cheque, or in any other way the Commissioner considers appropriate. It is likely that EFT payments will be the favoured method used by the Commissioner at this stage.

Subclause (2) provides that the grant is to be paid to the applicant or another person by direction of the applicant in writing. Where the grant is contractually directed to form part of the deposit associated with loan funds, it is likely that this amount may be directed to the applicant's financial institution.

Clause 21: Payment in anticipation of compliance with residence requirement

This clause sets out circumstances where the Commissioner may authorise the payment of the grant prior to the applicant satisfying the requirement to reside in the property.

Subclause (1) provides that the Commissioner can authorise the payment of the grant prior to all applicants taking up residence in the home if the Commissioner is satisfied that each occupant intends to comply with the requirement within 12 months of completion, or a longer period approved by the Commissioner.

Subclause (2) provides that where a grant is paid in anticipation of the residence requirement being met, the payment is made subject to conditions. These conditions require the applicant to notify the Commissioner in writing of any non-compliance and repay the grant within 14 days of the relevant date. It should be noted that the 14-day requirement to repay the grant under this clause is shorter than the repayment requirement specified in clause 51(4). This is because the applicant will have had the benefit of the grant in most cases for at least 12 months before being required to make the repayment.

Subclause (3) provides a definition of **"relevant date"**. The two separate periods are necessary to ensure the grant is repaid in circumstances where the applicant becomes aware that they will not be able to meet the residence requirement prior to the 12-month period allowed. One example would be where the applicant sells the property, prior to taking up residence within the 12-month period.

Subclause (4) provides that where there is more than one applicant, all applicants have a joint and several liability to notify the Commissioner of non-compliance and repay the grant. However, where one applicant notifies the Commissioner or repays the grant, both or all are taken to have complied with the requirement.

Subclause (5) provides an offence for a person who fails to comply with the requirement to notify the Commissioner of the non-compliance with the residence requirement and repay the grant. A maximum penalty of $20,000 is applicable.

Clause 22: Commissioner may impose conditions

This clause allows the Commissioner to impose conditions on the payment of a grant and sets out requirements ancillary to those conditions.

Subclause (1) provides that the Commissioner can make the payment of the grant subject to appropriate conditions.

An example of one condition that may be used concerns the payment of the grant in circumstances where spouses are separated within the meaning of clause 7(2). It is considered appropriate that the payment of the grant in these cases should be subject to a condition requiring repayment if the spouses resume living together as a couple within a specified period, such as 12-months. This

will ensure that the grant cannot be obtained by contrived separation agreements seeking to excise a non-eligible spouse from the application.

Subclause (2) provides a requirement for the applicant to give notice of non-compliance with the conditions associated with the grant and repay the amount within the period specified in the condition. In the absence of a period for repayment, clause 51(4) would require the amount to be paid within 28 days.

Subclause (3) provides that where there is more than one applicant, all applicants have a joint and several liability to notify the Commissioner of non-compliance with a condition and repay the grant. However, where one applicant notifies the Commissioner or repays the grant, both are taken to have complied with the requirement.

Subclause (4) provides an offence for failure to comply with a condition imposed by the Commissioner, whether that condition was imposed under this clause or any other in the Act. A penalty of up to $20,000 is provided.

Clause 23: Death of applicant

This clause allows an application to remain valid where an applicant dies before the application can be decided.

Subclause (1) provides that an application does not lapse on the death of an applicant if no decision on it has been made prior the applicant's death.

Subclause (2) provides that an application is to be treated as follows upon the death of the applicant:

- if the application involved 2 or more applicants, the surviving applicants are to be treated as the sole applicants;
- if the applicant was a sole applicant, the grant is to be paid to the estate of the deceased.

Subclause (3) provides that if the deceased was not able to occupy the home as a principal place of residence prior to death, the Commissioner can presume the residence requirement to be met if satisfied that the deceased intended to use the property as a principal place of residence within 12 months of completion of the eligible transaction.

Clause 24: Power to correct decision

This clause allows for the Commissioner to correct a decision on an application after it has been made and provides mechanisms to deal with the consequences of that correction.

Subclause (1) provides that the Commissioner may vary or reverse a decision on an application of his own volition if he is satisfied that the decision was incorrect.

Subclause (2) provides a limited power for the Commissioner to proceed with the payment of the grant where he has discovered an incorrect decision prior to

the payment of the grant. The payment may be made where reversal of the decision is likely to prejudice the applicant or another person who has acted on the approval. The payment is made in these circumstances subject to a condition that it is repaid by the applicant. It is envisaged that this could occur where a purchaser has proceeded to settlement on the basis of the grant, and its removal would jeopardise the sale and expose the purchaser to civil action by the vendor for failing to proceed with the sale.

Subclause (3) provides a 5-year limitation on the Commissioner's power to vary or reverse a decision.

Subclause (4) overrides the 5-year limitation in subclause (3) if the Commissioner is satisfied that the decision to pay the grant was made on the basis of false or misleading information. In this scenario, the decision to reverse or vary the grant can be made at any time.

Clause 25: Notice of decision

This clause sets out the requirements placed on the Commissioner to notify applicants of the decision on a grant.

Subclause (1) provides that the Commissioner must give the applicant written notice of a decision to:

- pay or refuse the grant; or
- vary or reverse an earlier decision on the grant.

For practical purposes, it is likely that the majority of notices regarding the payment of the grant will be made to applicants by financial institutions under a delegation by the Commissioner.

Subclause (2) provides that where the grant is not subject to conditions, the actual payment will be sufficient notification for the purposes of subclause (1). It should be noted that most grants would have a residence requirement condition attached that must be met after settlement has proceeded. Accordingly, there will be a limited number of cases where this provision will operate.

Subclause (3) provides that the Commissioner is required to give reasons for any refusal to pay the grant, or for any variation or reversal of the application decision.

Clause 26: Definitions

This clause provides definitions of **"decision on the application"** and **"objector"** for the purposes of the objection and appeal clauses.

Clause 27: Right to object and procedure for making objections

This clause sets out the rights of an applicant for a grant to object to a decision on a grant application by the Commissioner and the method for making the objection.

Subclause (1) provides a right for an applicant to object to a decision on the application by the Commissioner under the Bill. A **"decision on the application"** is defined in clause 26(1) and would include a decision to:

- disallow the grant;
- reverse an earlier decision;
- require the applicant to repay the grant; and
- impose a penalty.

Subclause (2) sets out the practical requirements that must be satisfied for an applicant to lodge a valid objection.

The objection must:

- be in writing;
- set out in a detailed form the grounds of the objection; and
- be lodged with the Commissioner.

Clause 28: Time for lodging objection

This clause sets out the timing arrangements for the lodgement of an objection.

Subclause (1) provides a 60-day time period for the lodgement of an objection from the date the notice of a decision was given to the applicant. In each case, administrative arrangements ensure that the date of the decision is clearly highlighted to enable an applicant to identify the commencement of the objection time period.

Subclause (2) provides the Commissioner with the ability to extend the 60-day time period for the lodgement of an objection.

Subclause (3) provides that an application to the Commissioner for extending the objection time period must set out fully and in detail the reasons the applicant is seeking the extension. Extensions would generally be granted where any reasonable request is made.

Clause 29: Consideration of objection

This clause provides a summary of the factors that are to be taken into account by the Commissioner when considering and deciding an objection.

Subclause (1) provides that an objection will be decided by the Commissioner on the basis of the grounds stated in the written objection by the applicant, and any other relevant written material that is provided with the objection.

Information that is obtained by the Commissioner in the course of investigating the objection will also be considered by him in determining the objection. This would allow submissions made during the course of a meeting with the applicant or the applicant's agent and the Commissioner to be taken into consideration, where that information can be fully substantiated by those parties.

Subclause (2) places the onus of establishing that a decision is incorrect on the applicant.

Clause 30: Decision on objection

This clause sets out the obligations with which the Commissioner must comply when he decides an objection.

Subclause (1) provides that the Commissioner may determine an objection by confirming, varying or reversing the decision on the application. This power allows the application to be completely reconsidered by the Commissioner.

Subclause (2) provides that the Commissioner is required to give the applicant notice of the decision on the objection, and where the objection is disallowed, he is required to give the applicant reasons for the decision on the objection. In most circumstances, it is these grounds that form the basis of any further appeal to the Local Court.

Subclause (3) provides that where the objection decision results in the reversal of a decision not to pay the grant, interest on the amount payable is to be paid. The interest is to be calculated from the date of the lodgement of the objection to the date on the decision of the objection.

The prescribed rate will be set out in the Regulations. Under other legislation administered by the Commissioner, the amount is calculated with reference to the judgment debt rate of the Supreme Court. At present, this is set at 6% per annum and it is likely that this method of determination and rate will be adopted.

Clause 31: Right of appeal

This clause sets out an applicant's right of appeal when he or she is dissatisfied with the Commissioner's decision on an objection.

Subclause (1) provides that an applicant who is not satisfied with the Commissioner's decision on an objection has a right of appeal to the Local Court. This Court was considered to be the most appropriate, given the amount in dispute in each case would usually be less than $7,000.

Subclause (2) provides that an appeal must be commenced within 60 days after the date on which notice of the decision is given to the applicant.

Subclause (3) provides that the court may extend this period on application by the applicant.

Clause 32: Hearing and determination of appeals

This clause sets out the jurisdiction under which appeals under this Bill can be heard and how the appeals are to be determined.

Subclause (1) provides that the Local Court has jurisdiction to hear and decide appeals under this Bill. The proceedings must be conducted in accordance with

any Local Court rules, or where none are applicable, as directed by the court. The appeal is to be a rehearing unless otherwise ordered by the court.

Subclause (2) provides the court with the power to confirm, vary or reverse the Commissioner's decision on an objection and make consequential or ancillary orders. This includes an order for costs.

Subclause (3) provides that the decision on an appeal under this clause is final. This means no further right of appeal is available to a higher court.

Subclause (4) provides for the payment of interest in a similar manner to that provided in clause 30(3). The time period over which the interest is payable is adjusted to take account of the further period of the appeal.

Clause 33: Basis on which Commissioner may act

Subclause (1) provides that even though an objection or appeal has been lodged with the Commissioner or the Local Court, this does not suspend the obligation of the applicant to repay the grant, penalty, interest or fee by the due date. If the objection has not been determined prior to the due date for payment, the amount outstanding is still required to be paid.

However, in these circumstances the applicant is able to apply under clause 52 for an extension of time to make payment or enter into an instalment arrangement. The terms of the arrangement may allow the applicant to defer payment until the date the objection or appeal is decided. It should be noted that these arrangements are subject to the payment of interest by the applicant.

Subclause (2) directs the Commissioner to take any action necessary to give effect to the appeal decision. This may be the payment of the grant or proceeding with recovery action, depending on the decision.

PART 3 – ADMINISTRATION

Clause 34: Administration of Act

This clause sets out the relationship between the Commissioner and the Minister. Section 12 of the *Interpretation Act 1984* provides that the "Minister" is the Minister of the Crown to whom administration of the Act is committed by the Governor. It is intended that the *First Home Owner Grant Act 2000* will be included in the portfolio of the Minister Assisting the Treasurer.

It was considered desirable to set out the relationship between the Commissioner and the Minister in regard to the administration of this Bill. This is considered appropriate as there is not, nor should there be, Government or political intervention in the administration of these payments.

This provision will statutorily remove any doubt that the Commissioner could be subject to Ministerial control or direction in the administration of the Bill. This principle is not explicitly stated in the existing taxation Acts administered by the Commissioner, however, the general administration power in each of those Acts has been interpreted on the basis of the principles explicitly stated in this Bill.

It should be noted that this power does not remove any responsibility the Commissioner has to report to the Minister on the efficacy of the laws or the efficient administration of the State Revenue Department.

Clause 35: Delegation

This clause provides delegation powers, allowing certain functions and powers of the Commissioner to be exercised by other persons. The provisions should be read in conjunction with sections 58 and 59 of the *Interpretation Act 1984*, which provide additional delegation powers in respect of all Western Australian Acts.

Subclause (1) enables the Commissioner to delegate any of his functions under this Bill. However, this subclause prevents him from delegating the following powers:

- the actual power of delegation under this clause; and
- the power to give a specific authorisation in respect of investigation matters set out in clauses 42(3), 43(1)(a) and 45(2). This restriction has been included as a control mechanism over the exercise of the powers under these clauses.

Subclause (2) provides a list of persons to whom the Commissioner may delegate functions under the Bill. These include:

- any person employed or engaged in the administration or enforcement of the Bill, another Act administered by the Commissioner (eg. *Stamp Act 1921*) or an Act under which the Commissioner performs statutory functions (eg. *Perth Parking Management Act 1999*);
- an authority or person administering a corresponding law (ie. the First Home Owner Grant legislation in other jurisdictions); and
- persons with whom the Commissioner has entered into an administration agreement under clause 37. It is intended that the majority of financial institutions operating in Western Australia will operate under these arrangements, although participation is on a purely voluntary basis.

Subclause (3) provides that a delegate cannot sub-delegate functions unless the delegation to them from the Commissioner expressly authorises them to do so. This ensures that appropriate controls are maintained by the Commissioner in respect of the performance of functions under the Bill.

Subclause (4) provides that a delegated function, when performed by a delegate, is taken to have been performed by the Commissioner for the purposes of the Bill. This ensures that Departmental officers have appropriate powers to perform the day-to-day operations required under the Bill.

Subclause (5) provides an automatic presumption in terms of the performance of functions by a delegate under a delegation. The delegate is taken to have acted in accordance with the delegation unless the contrary is shown.

Subclause (6) provides the powers in this clause and clause 37 are not to limit the Commissioner's ability to act through his officers and agents in the normal course of business.

Clause 36: Authorised investigators

This clause provides powers to appoint authorised investigators and issue an identity card.

Subclause (1) provides that a person may be appointed by the Commissioner to be an authorised investigator. Although investigators already undergo an intensive training program, it is intended that further training will be provided to all authorised investigators due to the nature of the powers capable of being exercised under this Part.

Subclause (2) provides that an identity card is to be issued by the Commissioner to each authorised investigator. An authorised investigator is required to show an identity card on request when exercising powers while on premises for investigation purposes or to obtain a warrant.

Subclause (3) provides that an identity card must state that the person identified by the card is an authorised investigator for the purposes of the Bill. In addition, the card must include a photograph of the delegate. These requirements are considered appropriate for identification purposes.

Subclause (4) requires that the delegate must return the identity card to the Commissioner when the appointment is revoked. A penalty of up to $20,000 is applicable for failure to return the card.

Clause 37: Administration agreements

This clause sets out the arrangements under which the Commissioner may delegate certain functions to financial institutions or other persons under this Bill. Negotiations have been underway in Western Australia for some time to allow the first home owner grant to be processed and paid by financial institutions. Final approval for payment of the grant will remain with the Commissioner. A significant amount of development work has already been done on an Australia-wide basis to allow computerised processing of the grants in conjunction with financial institutions. It is expected that this system will be fully operational by 1 July 2000.

Subclause (1) provides that the Commissioner may enter into an administration agreement to delegate functions to a financial institution or other person relating to the first home owner grant scheme. The agreement may provide for conditions that the financial institution or other person is required to meet in carrying out delegated functions. It should be noted that the *Interpretation Act 1984* provides that a "function" includes a "power".

Subclause (2) provides that the agreement must include within it those conditions that are prescribed by the Regulations. These conditions are likely to include matters such as:

- the expected degree of diligence to be exercised by a financial institution in examining eligibility documentation (eg. citizenship papers); and
- the level of security expected to be maintained over passwords necessary for the financial institution to access the first home owner grant computer system.

Subclause (3) provides that the conditions prescribed may also include record keeping requirements and details concerning the retention of interest on amounts received by financial institutions.

Subclause (4) provides the ability for the Commissioner to terminate an administration agreement, at his discretion, at any time.

Clause 38: Investigations

This clause sets out the circumstances when the Commissioner is authorised to conduct an investigation.

The circumstances listed cover the necessary scope to allow proper administration of the Bill, including the bona fides of applications, matters relating to objections, whether eligibility criteria have been met, whether conditions have been complied with and any other matter related to the administration of this legislation or First Home Owner Grant Acts in other jurisdictions.

Clause 39: Cross-border investigations

This clause provides powers in relation to investigations conducted by authorised investigators of other jurisdictions in this State. It also provides the mechanism for Western Australian authorised investigators to conduct investigations on behalf of other jurisdictions.

It should be noted that the corresponding powers in the First Home Owner Grant Acts of other jurisdictions would authorise:

- the Western Australian Commissioner of State Revenue to conduct investigations in other jurisdictions; and

- the Commissioners in other jurisdictions to conduct investigations on behalf of the Western Australian Commissioner of State Revenue.

Subclause (1) provides that the Commissioner may, at the request of another authority administering a First Home Owner Grant Act, carry out investigations under this Part for the purposes of the interjurisdictional law.

For the purposes of this clause, the Commissioner may authorise the corresponding Commissioner to carry out an investigation under this Part for the purposes of, for example, the Victorian *First Home Owner Grant Act 2000*.

Subclause (2) provides that the Commissioner may delegate powers of investigation under the Western Australian Bill to another authority or a person nominated by that authority.

Clause 40: Power of investigation

This clause provides the Commissioner with the ability to obtain information and have it provided in a written or oral form by issuing a notice. Failure to comply with the notice is an offence.

Subclause (1) allows the Commissioner to require a person to provide oral or written answers to specified questions or to produce relevant material in the person's possession or control. **"Relevant material"** is defined in clause 3.

Subclause (2) provides that a requirement by the Commissioner under this clause may be made orally, if an oral response is required or if a written answer is required, in writing. In most cases, this power is used while authorised investigators are on premises during an investigation or audit. However, persons who have an appropriate delegation from the Commissioner can also use it in the course of desk investigations.

Subclause (3) provides that a person must provide answers to questions that are verified by a statutory declaration if requested to do so. This power currently appears in many taxation Acts and is exercised only where there is an indication that such action is warranted.

Subclause (4) provides that it is an offence for a person to fail to comply with a requirement of a notice within the time specified in the notice. The Commissioner may approve a further period within which a person can comply. A penalty of up to $20,000 is provided. It should also be noted that the offence provision in clause 47 of the Bill is capable of being applied where the relevant material provided under this clause is known to be false or misleading.

Clause 41: Power to require person to attend for examination

This clause provides a power to enable the Commissioner to require a person to attend for examination. Equivalent powers to this are currently found in the majority of Acts administered by the Commissioner.

Subclause (1) provides that the Commissioner may require a person to attend at a given time and place before an authorised investigator for examination in respect of a subject that has been specified in a notice.

Subclause (2) provides that notice of the requirement under subclause (1) is to be made in writing and given to the person required to attend. It should be noted that the notice could be delivered by any of the methods set out in clauses 61 and 62 of this Bill.

Subclause (3) provides that the time and place for examination must be reasonably convenient for the person required to attend for examination under this clause.

Subclause (4) provides that a notice requiring the person to attend for examination may include a requirement that the person bring and produce to the authorised investigator relevant material which is in the person's possession or control and relates to the subject of the examination. For example, the person may be required to produce copies of common household accounts and other evidence to prove they have met the residence requirement in the Bill.

Subclause (5) provides that an authorised investigator who is conducting an examination may exercise certain powers. These:

- may require the person attending for examination to make an oath or affirmation to answer all questions truthfully. The authorised investigator may administer the oath or affirmation for that purpose;
- may require the person to answer questions that are relevant to the subject of the examination. Where the authorised investigator has consented, the person is required to answer questions relevant to the subject put to the person by another person who is present at the examination. This could include, for example, another employee of the Department or a Special Constable with delegated powers; and
- may require the person to produce for examination by the authorised investigator relevant material that is in the person's possession at the examination.

Subclause (6) provides that a person who fails to comply with the requirements of this clause commits an offence. A penalty of up to $20,000 is provided.

Subclause (7) provides that the Regulations can provide for the payment of fees to witnesses and the payment of expenses to persons who attend for examination under these provisions.

Clause 42: Entry of premises

This clause provides powers in relation to the entry of premises by authorised investigators. Special provisions are included to deal with access to residential premises. The terms **"premises"** and **"authorised investigator"** are defined in clause 3. It should be noted that the first mentioned definition includes vehicles, allowing access to relevant material located in cars and other vehicle types.

Subclause (1) provides that an authorised investigator may enter and remain on the premises to exercise powers of investigation. These powers must be used for the investigation purposes set out in clause 38 and are subject to the limitations provided in subclause (2).

Subclause (2) provides that the power of an authorised investigator to enter residential premises may be exercised at any reasonable time with the consent of the occupier of the premises.

An authorised investigator may also enter residential premises in accordance with an authorisation that is conferred by a warrant.

Where an authorised investigator believes that it is urgently necessary to enter residential premises to prevent destruction of or interference with relevant material, he or she may enter the premises without the consent of the occupier or without a warrant. However, the authorised investigator must have reasonable grounds for believing that it is urgently necessary to enter premises in these circumstances.

Subclause (3) provides suitable controls upon entering residential premises without consent or a warrant, as it is recognized that this power has the potential to infringe on civil liberties. For this reason, this clause requires that the authorised investigator must have the specific authorisation of the Commissioner before entering premises in this circumstance. The Commissioner cannot delegate this authorisation due to the restriction set out in clause 35(1)(b).

A similar provision, which met with the approval of the Parliament, was passed in the *Fuel Suppliers Licensing Act 1997*.

Subclause (4) provides that the authorised investigator is required to display his or her identity card (or a warrant where appropriate), to a person who is apparently in a position of authority on the premises or any other person on the premises.

This requirement must be exercised where the authorised investigator is requested by those persons to show the certificate or warrant.

Clause 43: Powers of authorised investigator on entry of premises

This clause sets out a number of powers that may be exercised by an authorised investigator while he or she is on premises.

Subclause (1) provides that the authorised investigator may search premises and examine anything on the premises. The authorised investigator is also able to open or break open anything on the premises. However, to break anything open he or she must have the specific authorisation of the Commissioner in the particular instance.

The authorised investigator is able to take possession of relevant material and can retain it as long as it is necessary to examine it, or examine and copy it, to determine its evidentiary value. The Commissioner may also retain the material where it is required for possible legal proceedings or for an investigation of eligibility into the first home owner grant.

Where relevant material on the premises cannot be conveniently removed, the authorised investigator is authorised to secure it against interference.

An authorised investigator may also require a person on the premises to:

- state his or her full name and address;
- answer questions which are relevant to the investigation, by providing verbal or written answers as directed;
- produce relevant material in their possession or control;

- operate or permit the authorised investigator to operate equipment or facilities on the premises, where the action is necessary for the purposes of an investigation. This would include, for example, computer equipment and other data storage facilities; and
- give other assistance to an authorised investigator which he or she reasonably requires to carry out his or her functions. This may include, for example, sufficient lighting and reasonable access to photocopying facilities.

These powers enable the authorised investigator to efficiently and properly conduct the investigation while on premises.

Subclause (2) provides that it is an offence for a person to fail to comply with an authorised investigator's request. A penalty of up to $20,000 is provided.

Subclause (3) provides that when requested to do so, an authorised investigator who takes anything from premises must make out a receipt for the material taken and give it to the occupier of the premises.

If the authorised investigator takes anything from premises and there is no person present at that time, the authorised investigator is required to make out a receipt (in a form approved by the Commissioner) and leave it in an envelope addressed to the occupier in a prominent position on the premises.

In practical terms, this is unlikely to occur, however, after gaining access to premises it is possible that a small operation, such as a real estate agency, may leave the premises and allow an authorised investigator to continue an audit. It is necessary in these circumstances for the authorised investigator to indicate what relevant material has been taken.

Subclause (4) provides that the receipt for relevant material taken must be in a form approved by the Commissioner. Generally this will provide a description of the material taken, however, it is unlikely to be a prescriptive list of every item where voluminous records are impounded.

Subclause (5) provides that the Commissioner must ensure reasonable access to anything he takes by the person entitled to possession of it. If the Commissioner takes original documents, the Commissioner may allow access to a photocopy of the document, rather than the original.

Subclause (6) provides that if an authorised investigator takes possession of anything under this provision, the Commissioner is required to ensure that it is returned to the person entitled to possession of it:

- after the prosecution is completed or discontinued if the material was taken for these purposes;
- after eligibility for the grant has been determined or an amount found to be repayable is recovered; and
- in all other cases, within 28 days after it was taken.

Clause 44: Warrants

This clause provides for a warrant to be issued for the purposes of an investigation. It should be noted that this provision would usually apply in respect of access to residential premises. However, it could also be used, for example, in the course of an investigation where the Commissioner enters premises under clause 42(1).

Subclause (1) provides that a justice may issue a warrant permitting an authorised investigator to enter premises at a specified time or within a period stated in the warrant. The warrant may also permit the authorised investigator to exercise powers of search and investigation set out under the Bill.

In order to issue the warrant, the justice must be satisfied by a complaint on oath that it is reasonably necessary for the authorised investigator to enter the premises for an authorised purpose. A "justice" is defined by the *Interpretation Act 1984* to be a Justice of the Peace.

Subclause (2) provides that an authorised investigator must produce his identity card (which shows his authorisation) to obtain a warrant.

Subclause (3) provides that the authority given under a warrant may be exercised by an authorised investigator upon whose application the warrant was made or by any other authorised investigator.

Clause 45: Use of force

This clause provides that in certain circumstances, an authorised investigator may use force in the exercise of certain investigation powers.

Subclause (1) provides that an authorised investigator can use reasonable force to enter premises under clause 42 or to exercise the powers set out in clause 43(1)(a), (b) and (c).

Subclause (2) provides that in circumstances where the use of force is likely to cause damage to property, the authorised investigator must obtain the specific authorisation of the Commissioner before exercising the use of force. This has been limited to circumstances where the use of reasonable force is likely to cause property damage because it could otherwise be construed to mean that an authorised investigator would require the Commissioner's authorisation to turn a key in a lock or to open an unlocked door.

Subclause (3) provides that no liability is incurred by the Commissioner as a result of injury or damage arising from the use of reasonable force under this Part. This liability indemnity would also cover the powers in clauses 42 and 43(1).

Clause 46: Self incrimination

This clause abrogates the self-incrimination defence and requires a person to answer questions or produce material, despite the fact that it may be self-incriminatory.

Subclause (1) provides that a person is unable to rely on the grounds that information would tend to incriminate the person or make them liable to a penalty.

In this circumstance, the person cannot use the above grounds to refuse to answer a question, to provide information in another manner or to produce relevant material under the investigation provisions.

Subclause (2) provides a limitation on how information obtained under subclause (1) can be used by the Commissioner.

In this instance, such information is admissible in proceedings for the offences in this Bill against the person who provided the information or produced the relevant material or offences arising out of the false or misleading nature of the answer or material (such as perjury). However, the material cannot be used for offences under any other Acts.

PART 4 – MISCELLANEOUS

Clause 47: False or misleading information and documents

This clause provides an offence where a person provides false or misleading information or documents.

Subclause (1) states that a person who knowingly provides false or misleading oral or written information to the Commissioner or an authorised investigator commits an offence.

It also provides that a person who knowingly gives a document to the Commissioner or an authorised investigator that is false or misleading in a material particular commits an offence.

A penalty is provided of up to $20,000.

Subclause (2) provides a rebuttable presumption, such that the person who provided the information or record is presumed to have known the information was false or misleading, unless the contrary is established.

Subclause (3) provides a definition of **"document".** This definition is consistent with the definition of "record" in the *Stamp Act 1921*.

Clause 48: Obstructing or misleading Commissioner or authorised investigator

This clause provides an offence in relation to obstructing or misleading an authorised investigator.

Subclause (1) provides that a person who hinders or obstructs the Commissioner or an authorised investigator in carrying out functions under the Bill commits an offence. A penalty of up to $20,000 is provided.

Subclause (2) provides that a person who misleads the Commissioner or an authorised investigator in a way that may affect the carrying out of the authorised investigator's functions under this Bill commits an offence. A penalty of up to $20,000 is also provided.

Subclause (3) provides a definition of **"authorised investigator"** for the purposes of this clause.

Clause 49: Evidence

This clause allows the Commissioner to attest evidentiary certificates that provide evidence of the facts listed. The certificates may be used in any legal proceedings.

Subclause (1) provides that a certificate may be issued to certify that the grant was paid to a person named in the certificate on a particular date and is evidence of the payment.

Subclause (2) provides that a copy of a penalty notice issued under the Bill is admissible as evidence of the imposition of the penalty.

Subclause (3) provides that a copy of a notice issued by the Commissioner requiring payment or repayment of an amount is evidence that the requirement was made and the amount was outstanding at the date of the notice.

Clause 50: Presumption of regularity

This clause allows certain presumptions to be made regarding the Commissioner's authority in respect of any legal proceedings.

Subclause (1) provides that proceedings that are taken in the name of the Commissioner are presumed to have been authorised by him, in absence of evidence to the contrary.

Subclause (2) provides that in legal proceedings, compliance by authorised investigators with the requirements of the Bill is presumed, in the absence of evidence to the contrary.

Clause 51: Commissioner may require repayment and impose penalty

This clause provides the ability for the Commissioner to require the grant to be repaid and impose penalties in certain circumstances.

Subclause (1) provides that the grant must be repaid by an applicant if a written notice is issued by the Commissioner and:

- the amount was paid in error (eg. a processing error was made by the Commissioner and a person received the grant when they were not entitled to it);
- the Commissioner reverses a decision under which the amount was paid in circumstances other than an error in the payment (eg. false or misleading information was provided to the Commissioner and it was later discovered during an audit); and
- a condition upon which the payment was made is not met by the applicant within the period allowed (eg. a non-eligible spouse recommenced living as a couple with a spouse who received the grant within a conditional period (see clause 7(2)).

Subclause (2) provides the Commissioner with the ability to apply a 100% penalty where the grant was paid to an applicant on the basis of false or misleading information. In this case the person would be required to pay the Commissioner up to $14,000, being the repayment of the grant under subclause (1), (up to $7,000) and the penalty (up to $7,000).

The imposition of the penalty is an administrative matter and is not in any way related to the person being successfully prosecuted for an offence. The Commissioner is also able to impose an amount of less than $7,000 if that is considered appropriate in particular circumstances (ie. the clause has its own in-built remission ability).

Subclause (3) provides an alternative penalty, which is akin to a "late payment" penalty under most taxation statutes where an amount required to be paid is not received by the due date. This is a 100% maximum penalty that can be imposed at a lesser amount in the same circumstances as the penalty under subclause (2).

Subclause (4) provides that the grant must be repaid or a penalty paid within 28 days of the date appearing on a notice given to the applicant. This time period may be extended under the extension and instalment arrangements in clause 52 of the Bill.

Subclause (5) provides a limitation on the penalties applicable under subclauses (2) and (3), such that a penalty can only ever be a maximum of 100% of the grant amount. Where a penalty has already been imposed under subclause (2), the Commissioner would proceed straight to recovery action where the amount is not paid by the due date, rather than impose a further penalty under subclause (3).

Clause 52: Arrangements for instalments and extensions of time

This clause sets out the arrangements by which the Commissioner may approve an extension of time to repay the grant or allow the applicant to enter into an instalment arrangement.

Subclause (1) provides that the Commissioner may approve a written arrangement that extends the time for a person to repay the grant or provides for the repayment to be made in specified instalments.

The requirement for the arrangement to be in writing ensures that both the Commissioner and the applicant are aware of their obligations in respect to the payment arrangements.

Subclause (2) provides that any application made by an applicant to the Commissioner in respect of a repayment arrangement must set out the reasons why more time is required to make the payment. Despite the fact that an application to the Commissioner must include this information, subclause (1) is drafted in such a manner that where the Commissioner considers it appropriate to do so, he would be able to approve a repayment arrangement of his own volition without an application being made.

Subclause (3) provides that a repayment arrangement may include conditions providing for the payment and the remission of interest. The interest on a repayment arrangement will be generally charged at a prescribed rate, which will be set out in the Regulations.

It is intended that the rate would be determined in the same manner as currently implemented for similar provisions in taxation Acts administered by the Commissioner. These rates are now set at 2% above the upper rate quoted on bank overdrafts of less than $100,000 published in the Reserve Bank of Australia Bulletin.

Interest can also be charged at an alternative rate agreed to by the Commissioner and the applicant.

The repayment arrangement may also include other conditions the Commissioner considers appropriate.

Subclause (4) sets out the circumstances where the Commissioner may amend a repayment arrangement. This may occur with agreement by the applicant, or where the conditions of the arrangement provide for the Commissioner to amend the arrangement in given circumstances.

Subclause (5) provides that the Commissioner may cancel a repayment arrangement where payment is not made in accordance with the arrangement or the person fails to comply with other conditions of the arrangement.

Both the amendment and cancellation of a repayment arrangement are required to be made by the Commissioner giving notice to the applicant.

Subclause (6) provides that where a repayment arrangement is cancelled, the amount outstanding under the arrangement and any interest applicable, becomes due and payable from either the date of cancellation or the original due date for payment (whichever is the later).

This clause is necessary so that recovery action can be commenced on a quantified debt.

Subclause (7) provides that despite cancellation of a repayment arrangement, the interest will continue to accrue at a prescribed rate or other agreed rate on the amount outstanding until it is paid.

Clause 53: Recovery of certain amounts

This clause provides the ability to recover amounts required to be repaid, penalties and other miscellaneous amounts under this Bill.

Subclause (1) authorises the recovery of grants, penalties, interest and amounts equal to the registration fee payable for the lodgement or removal of a memorial.

Subclause (2) provides that where an amount is required to be paid or repaid by two or more applicants, the liability for that amount is to be joint and several.

Subclause (3) provides that the amounts listed in subclause (1) are recoverable as a debt due by the Commissioner in a court of competent jurisdiction.

Clause 54: Writing off liability

This clause provides powers for writing off the whole or part of an amount that is repayable under this Bill.

Subclause (1) provides that the Commissioner is able to write off an outstanding amount if he is satisfied that action or further action to recover the amount is not practicable or is unwarranted. This power is intended for use where there is little prospect of successful recovery and the cost of the recovery action is higher than the amount being recovered.

Subclause (2) provides that writing off an amount does not extinguish the liability or prevent later proceedings to recover the amount. These provisions afford similar treatment to the debt that applies through accounting conventions to bad debts in a commercial environment.

Subclause (3) provides that the Commissioner's decision to write off a liability or not to write off a liability is not one that can be challenged by appeal, through judicial review or otherwise challenged in proceedings.

Subclause (4) provides that the clause is to be read subject to the *Financial Administration and Audit Act 1985* (FAAA). That Act limits the Commissioner's powers in relation to the amounts that are capable of being written off by the Commissioner. Instructions under the FAAA provide appropriate approval levels for writing off debts to persons such as the Commissioner, Minister and Governor.

Clause 55: Lodgement of memorial and creation of charge

This clause provides the ability for the Commissioner to lodge a memorial against certain types of relevant interests to secure a debt owed under the Bill. It should be noted that only some of the relevant interests described in clause 6(1) would be capable of having a memorial lodged against them.

Subclause (1) provides that the Commissioner may lodge a memorial over a relevant interest where the grant, a penalty or interest is not repaid by the due date. The relevant interest over which the memorial is lodged must be the relevant interest that related to the payment of the grant.

Subclause (2) provides that the memorial creates a charge on the relevant interest that secures the amount outstanding once the Registrar registers the memorial.

Subclause (3) provides that the Registrar cannot register a dealing in the relevant interest, if the memorial provides for this to occur. The Registrar is required to reject an instrument submitted for registration in these cases unless the Commissioner's consent is obtained or the registration of the memorial has been cancelled.

Subclause (4) provides that the Registrar must cancel the memorial on application by the Commissioner or on application by a person holding an instrument signed by the Commissioner releasing the secured interest. This will occur once the Commissioner has received full payment of the amounts outstanding.

Subclause (5) provides that the Commissioner must notify all holders of registered encumbrances over the relevant interest of the registration of the memorial. This should take place when the memorial is registered but failure to do so does not invalidate the registration of the memorial.

Subclause (6) provides a definition for the term **"registered"** in this section.

Clause 56: Priority of charge

This clause governs the priority of a charge created by the registration of a memorial under these provisions.

Subclause (1) provides that the charge created by the memorial is a first charge on the relevant interest and has priority over all other mortgages, charges and encumbrances on the relevant interest.

Subclause (2) provides that where another charge on that particular relevant interest already ranks as a first charge under another Act, the priority of the charge created by the memorial under this Bill is to be determined according to the order in which the documents that created the charges were lodged.

Clause 57: Release of relevant interest from charge

This clause contains powers in relation to the release of a relevant interest from a registered charge (ie. the removal of a memorial).

Subclause (1) provides that where a memorial is registered, the Commissioner is required to release the relevant interest from the memorial upon payment of the amount secured by that encumbrance.

Subclause (2) provides direction to the Registrar and requires him to release the relevant interest from the memorial upon production of the appropriate instrument of release.

Clause 58: Order for sale of relevant interest

This clause provides the circumstances in which the Commissioner may make an application to the Supreme Court for an order for the sale of a relevant interest where an amount secured by a memorial remains unpaid.

Subclause (1) provides that if the amount has remained unpaid for 18 months or more after the registration of a memorial, the Commissioner is able to apply for an order to the Supreme Court for the sale of the relevant interest to satisfy the outstanding liability.

Subclause (2) provides that at least 6 months prior to the Commissioner making an application to the Supreme Court for the order for sale of the relevant interest, he is required to publish a notice that he intends to apply for the order.

The notice must be published in a newspaper that generally circulates throughout Western Australia and another newspaper that generally circulates throughout Australia.

This subclause also provides that if the Commissioner is aware of the whereabouts of the owner of the relevant interest, he is required to give notice of the intended application by written notice to the owner.

Furthermore, the Commissioner must also give notice to the holders of registered encumbrances over the relevant interest, if the Commissioner knows that person's whereabouts. This has been inserted to ensure that other encumbrance holders are aware of the order and can seek to have their interests protected.

Subclause (3) provides that upon an application being made for an order for the sale of the relevant interest, the Supreme Court may order the sale and make incidental orders. The orders may:

- concern how the sale is to be conducted;
- authorise an officer of the Court to execute appropriate documents and to do anything else necessary to effect the sale and conveyance of the relevant interest;
- authorise the Registrar to do anything necessary to register a purchaser's title, despite the fact that a certificate of title or other ownership document may not be produced to the Registrar;
- direct that the proceeds of sale are to be dealt with in a certain manner (note that this is subject to the provisions of subclause (5)); and
- deal with costs of proceedings and other incidental matters.

Subclause (4) provides that a relevant interest remains subject to any lease, easement or other encumbrance after a Supreme Court order to discharge the relevant interest from any mortgage has taken place. This reinstates the rights of

encumbrance holders where no monetary obligation is secured by a registered encumbrance.

Subclause (5) provides that the proceeds of the sale of the relevant interest are to be applied in the following manner:

- in the first instance, for the payment of the costs of the sale;
- in the second instance, in payment of costs of proceedings as far as costs are, by the order of the Court, to be paid out of the proceeds of the sale;
- in the third instance, in discharge of the outstanding liability which was secured by the statutory encumbrance; and
- in the fourth instance, in discharge of any outstanding monetary liability which was secured by a mortgage or other encumbrance securing a monetary obligation.

Any remaining balance is to be applied as directed by the Court.

Clause 59: Charge not to limit other means of enforcing payment

This clause provides that the Commissioner is not restricted to solely proceeding with recovery action through the registration of a memorial (ie. where a memorial is registered, the Commissioner may still proceed to recover the debt by other methods, such as through an appropriate court action).

Clause 60: Commissioner may require fees to be reimbursed

This clause allows any fees associated with the recovery of the grant or penalty amounts through the registration of a memorial to be recovered from the Commissioner.

Subclause (1) provides that the Commissioner may require the applicant to pay an amount equal to any fees paid by the Commissioner for the lodgement or removal of a memorial. The requirement must be made by written notice to the applicant.

Subclause (2) provides that any amount payable under subclause (1) must be paid within 28 days after the notice is given to the applicant. It should be noted that the service requirements set out in clauses 61 to 64 of this Bill, when read in conjunction with sections 75 and 76 of the *Interpretation Act 1984*, set out the methods by which a notice may be delivered to the applicant.

Clause 61: Service on joint applicants or agent or representative

This clause sets out a number of scenarios that deem the Commissioner to have served documents.

Subclause (1) provides a deemed method of service where notices or other documents are served on joint applicants, namely that service on one joint applicant is taken to be service on all other joint applicants.

Subclause (2) provides that a notice or document is deemed to be served if it is served on an agent with apparent authority to act and accept service of the notice or a person who lodged an application to which the notice or document relates.

Clause 62: Method of service by Commissioner

This clause sets out the appropriate mechanisms by which a notice or other document may be served by the Commissioner. These powers legislatively provide that a notice is validly served using the methods currently available to the Commissioner to deliver notices under the statutes administered by him.

It should be noted that sections 75 and 76 of the *Interpretation Act* include provisions relating to service, and that any mention of words such as "give" (eg. clause 40(2)(b) within the body of this legislation are taken to operate under the service methods outlined in this legislation.

Subclause (1) lists the methods of service available to the Commissioner, which include where it is:

- given personally to the person;
- left for the person at the person's place of residence or business;
- addressed to the person and sent by prepaid post (including document exchange), providing the address is one which has appeared on correspondence addressed to the Commissioner or is otherwise notified to the Commissioner;
- left for collection by the person or their agent in the Commissioner's collection box;
- faxed or sent by computer transmission to a facsimile or electronic mail address, providing the address is one which has appeared on correspondence addressed to the Commissioner or is otherwise notified to the Commissioner; and
- been agreed by the person to be served, in any manner communicated.

Subclause (2) provides that the use of a particular method of service in one instance does not prevent the Commissioner from using another method of service in another circumstance.

Subclause (3) provides that where a notice or document is not served personally, it is deemed to have been served on the business day following the day on which it was sent to, or left for, the person to whom is was addressed.

However, subclause (4) provides that where the document is sent by post outside Western Australia but within Australia, a further 4 business days is allowed. If the document is sent by post outside Australia, a further 10 business days is allowed.

Clause 63: Service of court process

This provision provides powers authorising specific methods of service of court process. Similar powers are currently found in the *Land Tax Assessment Act 1976* and the *Pay-roll Tax Assessment Act 1971*.

Court process is taken to have been duly served when it is sent by prepaid post to a last known address within or outside Australia of the person being served, or if notice of the document is given in accordance with the court's directions.

This method may only be instituted where the person being served has not notified the Commissioner of an address within Western Australia at which the document may be served.

Clause 64: Other enactments not limited

This clause provides that the service powers in this Division are additional to any other statutory provision that provides for the service of documents. Examples of such provisions occur in the *Interpretation Act 1984*, the *Justices Act 1902* and the *Justices (Service of Summonses By Post) Regulations 1982*.

Clause 65: Confidentiality

This clause inserts provisions placing obligations on the Commissioner and other persons to maintain secrecy in relation to information that is provided or obtained.

Subclause (1) provides that persons engaged in the administration of the legislation (past or present) are to be subject to a duty of confidentiality. Any other persons to whom the information or material is disclosed or who gain access to the information, either directly or indirectly, in another manner must maintain the confidentiality.

For example, the duty of confidentiality would apply to clerical staff of the State Revenue Department who are not directly involved with grant applications, but may nevertheless have access to confidential information.

Subclause (2) provides that a person who is subject to a duty of confidentiality under this clause is not able to record, disclose or make use of information or material obtained.

The following circumstances are excluded from this requirement:

- where the information is for a purpose related to the administration or enforcement of this Bill, a similar statute of another jurisdiction, another Act administered by the Commissioner or under which the Commissioner exercises statutory functions or a taxation law. Taxation laws are defined to include the majority of other Acts administered by the Commissioner or similar laws in other jurisdictions;
- where the person to whose affairs the information relates authorises the disclosure; and
- for the purposes of legal proceedings or reports of legal proceedings which arise out of matters taken under the above Acts.

Subclause (3) includes a number of specific exceptions relevant to criminal investigations and other matters. These are:

- the disclosure of information or material in connection with the investigation or prosecution of a criminal offence. This includes the ability to provide information to the Director of Public Prosecutions for a State or the Commonwealth;
- an officer of the police force of the State or the Commonwealth;
- an officer of the Australian Securities & Investment Commission; and
- an officer of another law enforcement agency established under State or Commonwealth law where the Regulations permit them to receive confidential information.

This subclause also authorises:

- the disclosure of statistical or other information which is not reasonably expected to lead to the identification of the person to whom it relates; and
- the disclosure of information or material in other circumstances permitted by the Regulations.

It is intended that the following exceptions will be prescribed:

- the provision of information relating to policy considerations or financial arrangements to the Western Australian Treasury Department;
- the provision of information to other Government departments or Ministers to assist in the administration of Government assistance schemes related to first home owners. This includes the Ministry for Housing, the Ministry for Fair Trading, the Minister to whom the administration of this Act is delegated by the Governor, the Minister for Housing and the Minister for Fair Trading; and
- the ability to freely exchange information between the Commissioner and his delegates.

Subclause (4) provides that information disclosed lawfully under subclause (2) is subject to restrictions imposed under any other Act. This places an obligation on the parties involved to maintain the general confidentiality of the information.

Subclause (5) provides that where information is lawfully disclosed, that the recipients may further disclose information, providing the disclosure is for the purpose for which the disclosure was made. For example, if the information was provided to allow the Treasury Department to formulate policy, the information can be used by the Treasury Department to the extent necessary to achieve that purpose. Similarly, if the information was provided to the police for a criminal investigation, it could be disclosed in the course of court proceedings for that purpose.

Subclause (6) provides that a court cannot require a person who is subject to a duty of confidentiality to give evidence or to produce a document, except in proceedings arising out of the lawful disclosure of information.

Subclause (7) provides definitions of **"confidential information"** and **"State"**. Importantly, the first mentioned definition provides that information relating to a first home owner applicant's spouse is protected, even though the spouse may not be an applicant.

Clause 66: Time for commencing prosecutions

This clause provides the mechanism in relation to timing for commencement of prosecutions. A prosecution for an offence under this Bill can be commenced within five years of the date the offence is alleged to have been committed.

Clause 67: Protection from liability for wrongdoing

This clause provides a statutory exemption for the Commissioner and the Crown from any liability arising out of things done under the Bill and is a standard clause used in legislation of this nature.

Subclause (1) provides that a person is not liable for anything done in performance or purported performance of functions under the Bill. This protection from liability would cover things performed by the Commissioner, authorised investigators or persons to whom functions have been delegated by the Commissioner.

Subclause (2) provides an exemption from liability for the Crown for any liability that might arise as a result of things done under subclause (1). This exemption is considered appropriate given that the functions under this Bill are of a public benefit nature.

Subclause (3) provides that the protection provided by this clause is not limited to matters arising solely as a result of subclause (1). For example, the clause would apply even where the act by the person could have occurred in the course of a general administrative function that is not specifically authorised by the Bill.

Subclause (4) provides that a reference in the clause to do anything also includes an omission to do anything. This would provide protection for the Commissioner in circumstances where, for example, an approval of the grant is delayed and settlement of a property is delayed.

Clause 68: Appropriation of Consolidated Fund

This clause authorises the appropriation of the Consolidated Fund to fund the payment of the grant to first home owners.

Clause 69: Regulations

Subclause (1) provides that the Governor is able to make regulations prescribing all matters that are required or permitted by this Bill to be prescribed. It also allows regulations to be made which are necessary or convenient to carry out or give effect to this Bill.

Subclause (2) provides that a regulation may create offences and provide for penalties not exceeding $5,000 in respect of those offences.

Clause 70: **Review of Act**

This clause is a standard provision inserted into most new legislation requiring a review of the operation and effectiveness of the Act after 5 years of operation. The provision requires the preparation of a report that must be tabled in each House of Parliament.