

FIRST HOME OWNER GRANT AMENDMENT BILL 2004

EXPLANATORY MEMORANDUM

The purpose of this Bill is to amend the *First Home Owner Grant Act 2000* ("the FHOG Act") to improve the equity and efficiency of the first home owner grant scheme. The measures proposed in this Bill are designed to ensure that the grant is available to genuine first home buyers.

On 12 May 2004, in his second reading speech to the Revenue Laws Amendment Bill 2004, the Treasurer announced that the Government intends to introduce legislation to amend the FHOG Act so that an applicant for the grant will not only be required to occupy the home for which the grant relates within 12 months after completion of the eligible transaction as the principal place of residence, but will also be required to occupy that residence for a continuous period of six months.

It was also stated that it was intended to restrict access to the grant to persons who are 18 years of age or more.

The Revenue Laws Amendment Bill 2004 contains amendments to the first home owner rate of stamp duty which is aligned with the FHOG Act. The stamp duty amendments and the current amendments to the FHOG Act are intended to be linked and have an operative date of 1 July 2004, regardless of the ultimate date of passage of this Bill.

Specifically, the First Home Owner Grant Amendment Bill 2004 introduces a requirement that an applicant must be at least 18 years of age. The Commissioner may exempt an applicant from this requirement where he is satisfied that the applicant intends to comply with the residence requirements and that the application does not form part of a scheme to circumvent the requirements of the Act. All States and Territories have now moved to include an age-related criterion. It is estimated that the measure to restrict access to the grant to persons at least 18 years of age will reduce the amount of first home owner grant payments by \$0.1 million per year.

Currently, the FHOG Act does not specify a minimum period of occupancy required for eligibility for the grant. The Bill introduces a new requirement that an applicant must occupy the home as a principal place of residence for a continuous period of six months commencing within 12 months after the completion of the eligible transaction. The Commissioner may approve a longer period in which to commence residence, or a shorter period of occupation, where there are good reasons for doing so. These provisions are consistent with recent amendments enacted in other jurisdictions.

The Bill also provides for the payment of a grant where a previous grant has been repaid under the conditions on which it was made. The Commissioner may, in exceptional circumstances, determine that a subsequent grant is payable where the previous grant has been repaid, but the conditions of the earlier grant were not strictly adhered to. However, an applicant who has

been convicted of an offence under the FHOG Act or a corresponding law is not eligible for a grant.

The confidentiality provisions are clarified by the Bill so that information obtained under the FHOG Act may only be disclosed for the purposes of legal proceedings under the FHOG Act, a corresponding law, or a taxation law.

The offence provision is amended in view of advice received from the State Solicitor's Office. An offence is committed where a person provides information that is false or misleading. It will be a defence for the person to prove that they did not know that the information was false or misleading, and that the information was not recklessly provided.

This legislation will ensure that genuine first home buyers will benefit from the grant and reduce the potential for abuse of the first home owner grant scheme.

PART 1 - PRELIMINARY

This Part contains the title of the Act and the relevant commencement provisions.

Clause 1: Short title

This clause provides that this Act may be cited as the *First Home Owner Grant Amendment Act 2004*.

Clause 2: Commencement

This clause provides the commencement dates for Parts of the Act.

Subclause (1) provides that the Act comes into operation on the day it receives the Royal Assent, subject to subsection (2).

Subclause (2) provides that Parts 2 and 3 are deemed to have come into operation on 1 July 2004.

PART 2 - AMENDMENTS

Part 2 seeks to amend the *First Home Owner Grant Act 2000*.

Clause 3: The Act amended

This clause provides that the amendments contained in this Part are to the *First Home Owner Grant Act 2000*.

Clause 4: Section 3 amended

This clause amends section 3 by deleting the definition of “**residence requirement**” and inserting the following self-explanatory definitions in the appropriate alphabetical positions:

- “**residence requirements**”;
- “**required residence period**”;
- “**take-up period**”; and
- “**the home**”.

Clause 5: Section 8 amended

This clause amends section 8(2) by deleting the reference to sections 10(2) or 13(2) and inserting instead references to sections 9A(2), 10(2) and 13(6).

This amendment provides that, despite the requirement for each applicant to comply with the eligibility criteria for the grant, an applicant need not comply with the requirement to the extent that he or she is exempt under sections 9A(2), 10(2) and 13(6). This reflects the inclusion in the FHOG Act of the new age-related criterion.

Clause 6: Section 9A inserted

This clause inserts the new section 9A.

9A. Criterion 1A - applicant to be at least 18 years of age.

Subsection (1) provides that an applicant for a grant must be at least 18 years of age.

Subsection (2) provides that the Commissioner may exempt an applicant from the requirement to be at least 18 years of age, subject to the Commissioner being satisfied with the conditions

of paragraphs (a) and (b).

Paragraph (a) provides that for the exemption to apply the Commissioner must be satisfied that the applicant intends to comply with the residence requirements to the extent that the applicant is required to do so. This provides for the circumstance in which the Commissioner approves a longer take-up period, or a shorter required residence period.

Paragraph (b) provides that for the exemption to apply the Commissioner must be satisfied that the application does not form part of a scheme to circumvent limitations on, or requirements affecting, eligibility for, or entitlement to, a first home owner grant.

Subsection (3) sets out the factors which the Commissioner must take into account when deciding whether to exempt an applicant from the requirement to be at least 18 years of age.

Paragraph (a) provides that the Commissioner must take into account the circumstances in which the eligible transaction was entered into, including any financial or familial arrangements.

Paragraph (b) provides that the Commissioner must also take into account the circumstances in which the application is made, including the role and involvement of a guardian, trustee or other person acting with, or on behalf of, the applicant, including the eligibility of the guardian, trustee, or other person, for a first home owner grant.

In circumstances where a minor makes an application for a grant, the Commissioner must be satisfied that the application is made by, or on behalf of, an applicant who, but for the age requirement, would genuinely be entitled to the grant. This is to ensure that advantage is not taken of a minor's eligibility for a grant by adults who are themselves ineligible for the grant. This provision serves to protect a minor's right to a grant upon attaining majority where he or she has not previously owned a residential property.

Clause 7: Section 11 replaced

This clause repeals section 11 and inserts a new section which sets out the criterion relating to eligibility where the applicant or applicant's spouse or de facto partner has received another grant.

11. Criterion 3 - except in certain circumstances, applicant or

applicant's spouse or de facto partner must not have received another grant

Section 11(1) provides that, subject to subsection (2), an applicant ("**the applicant**") is ineligible if the applicant or his or her spouse or de facto partner has been a party to another application under this Act or a corresponding law and received the grant. This first or earlier grant is designated as "**the other grant**". Accordingly, in the case of joint applicants, where one applicant is eligible, but his or her spouse, or de facto partner has previously received a grant in Western Australia or another jurisdiction, both parties are ineligible.

Section 11(2) provides that, subject to certain conditions, an applicant who has received an earlier grant is not ineligible for a grant.

Section 11(2)(a) provides that the applicant is not ineligible if the grant was received, but later paid back under the conditions on which it was made. 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. An example of this would be where an applicant received a grant, but ultimately did not reside in the home, notified the Commissioner of that fact within the time required, and repaid the grant.

Section 11(2)(b) provides discretion for the Commissioner to determine that an applicant is not ineligible in limited circumstances where the other grant was repaid.

Section 11(2)(b)(i) sets out the first condition on which the Commissioner may exercise his discretion to determine that an applicant is not ineligible for another grant. For the discretion to be applied, the applicant for the other grant must have notified the Commissioner, or, if the other grant was under a corresponding law, the authority responsible for administering that corresponding law, that a requirement relating to residence in the home for which the other grant was paid, had not been complied with. The reference to a corresponding law ensures that a person who applies for a grant in Western Australia, having received an earlier grant in another jurisdiction, is subject to the same eligibility criteria as a person who had received the earlier grant in Western Australia.

Section 11(2)(b)(ii) sets out the second condition on which the Commissioner may exercise his discretion to determine that an applicant is not ineligible for another grant. For the discretion to

be applied, the other grant must have been paid back.

Section 11(2)(b)(iii) sets out the third condition on which the Commissioner may exercise his discretion to determine that an applicant is not ineligible for another grant. For the discretion to be applied, the Commissioner must be of the opinion that the circumstances do not warrant the applicant being ineligible. For example, the Commissioner may exercise this discretion where, of her own volition, an applicant for the earlier grant has notified the Commissioner of her non-compliance with the residence requirements and has done so before the commencement of any audit activity initiated by the Commissioner.

Section 11(3) provides that for the purposes of section 11(2) a grant is only considered to have been repaid when the amount of the grant has been repaid as well as any penalty or interest payable in relation to the grant.

The following example illustrates the application of this provision.

Example

Kim receives a grant for an established home which is currently let to a tenant. She intends to move into the home in three months' time when the tenant's lease expires. After two months Kim receives a lucrative 12 month work contract in another State which she accepts. She decides to continue to rent out the house in her absence.

In this situation, Kim has 30 days from the day she first becomes aware that she will not reside in the home to notify the Commissioner and make arrangements to repay the grant.

However, due to the upheaval of her move, it is 32 days after her decision to move interstate that Kim writes to the Commissioner to advise of her non-compliance with the residence requirements. She includes a cheque for the amount of her grant with her letter.

After the 12 month posting, Kim returns to Western Australia and decides to buy a new home, rather than move into the house that she continues to rent out. As she did not comply with the conditions on which the earlier grant was made, she is not eligible for another grant, despite never having resided in her "first" home, nor having benefited from a first home owner

grant.

In this situation, the Commissioner may determine that the circumstances do not warrant Kim being ineligible for a grant for the new home.

Clause 8: Section 12 amended

This clause amends section 12(3) so that an applicant is ineligible if, before the commencement date of the eligible transaction to which the application relates, the applicant or the applicant's spouse or de facto partner held a relevant interest in residential property in the State or an interest in residential property in another State or Territory that is a relevant interest under the corresponding law, and occupied the property as a place of residence before 1 July 2004, or for a continuous period of at least 6 months that began on or after 1 July 2004.

This clause ensures parity with the new six month residence requirement with which applicants must comply where the commencement date of the eligible transaction is on or after 1 July 2004. It also preserves the existing provision where an applicant has, prior to the commencement of the eligible transaction to which the application relates, occupied a residential property.

Example A

Brett purchased a residential unit for investment purposes in January 2003, but resided in it for four months in that year. He did not apply for the grant as he considered this to be an investment property, not a home.

Under the FHOG Act prior to these amendments, Brett would be ineligible for a grant in respect of another residential property which he intended to make his first home. He is ineligible because he occupied the unit as a place of residence. However, he may have been eligible for a grant in respect of the unit, as the FHOG Act at that time did not set any minimum required period of residence.

The amending provision provides that he is still ineligible for a grant.

Example B

Tom purchased a residential unit for investment purposes in January 2004.

If he does not reside in the unit until after 1 July 2004 and then only occupies the unit for a period of four months, he may be eligible for a grant in respect of another residential property which he intends to make his first home.

Unlike Brett, Tom would not be eligible for a grant in respect of the unit because he would not meet the new residence requirements if he only occupied the unit for four months.

Clause 9: Section 13 replaced

This clause repeals section 13 and inserts a new section which sets out the residence requirements.

13. Criterion 5 - residence requirements

Subsection (1) provides that an applicant for a first home owner grant must occupy the home as his or her principal place of residence for the required residence period.

Subsection (2) defines “**required residence period**” for the purposes of subsection (1) to be a continuous period of at least 6 months, or a shorter period as approved by the Commissioner under subsection (3).

Subsection (3) provides that if the Commissioner believes there are good reasons for which the applicant cannot comply with a residence period of six months, the Commissioner may approve, for the purposes of subsection (1), a shorter period than six months.

Subsection (4) provides that the applicant must begin the required residence period within the take-up period. The “**take-up period**” is defined in subsection (5). For the majority of applicants this will mean that the six month residence period must be commenced within 12 months after completion of the eligible transaction.

Subsection (5) defines “**take-up period**” for the purposes of subsection (4) to be the period of 12 months after completion of the eligible transaction, or a longer period as approved by the Commissioner for a particular applicant.

Subsection (6) provides an exemption from the residence requirements 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 for the required residence period

and good reasons must exist for the other applicant to not meet this criterion.

Clause 10: Section 13A inserted

This clause inserts a new section 13A in Part 2 Division 2.

13A. Criterion 6 – applicant must not have been convicted of an offence under this Act

Section 13A provides a new eligibility criterion which renders an applicant ineligible for a grant if the applicant has been convicted of an offence under this Act or a corresponding law.

Clause 11: Section 21 amended

Subclause (1) repeals section 21(1), (2), and (3) and inserts a new section 21(1), (2) and (3).

Subsection (1) provides that the Commissioner may authorise the payment of a grant prior to all applicants taking up residence in the home or, if occupancy has commenced, prior to the completion of the required residence period, if the Commissioner is satisfied that each occupant intends to comply with the residence requirements to the extent that they are required to do so. This provides for the circumstance in which the Commissioner approves a longer take-up period, or a shorter required residence period.

Subsection (2) provides that where a grant is paid in anticipation of the residence requirements 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 30 days of the relevant day, or make an application under section 52(2) for the Commissioner to approve an arrangement for the repayment of the amount of the grant.

Subsection (3) provides a definition of “**relevant day**” for the purposes of subsection (2). The four separate periods are necessary to ensure that the Commissioner is notified that the residence requirements will not be complied with and repayment of the grant, or an arrangement to repay the amount of the grant, is made. The relevant day depends on which of the residence requirements will not be met, and when the applicant becomes aware that the residence requirements will not be met.

Paragraph (a) defines the relevant day as the day after the day

on which the take-up period ends in the case where the applicant does not take up residence.

Paragraph (b) defines the relevant day as the day on which the applicant first becomes aware that he or she will not take up residence.

Paragraph (c) defines the relevant day as the day on which the applicant stops using the home as the applicant's principal place of residence in the case where the applicant has commenced occupancy of the home, but does not comply with the required residence period.

Paragraph (d) defines the relevant day as the day on which the applicant who has commenced occupancy of the home first becomes aware that the required residence period will not be met in the case where the applicant becomes aware that he or she will not comply with the required residence period.

Subclause (2) deletes the references to subsection (2)(a) and (b) in section 21(4) and inserts references to subsection (2)(d) and (e) so that in the case of a joint application, each joint applicant is individually liable, within 30 days after the relevant day, to give written notice of non-compliance with the residence requirements and repay the amount of the grant, or make an application under section 52(2) for the Commissioner to approve a repayment arrangement. However, compliance by any one or more of the joint applicants is taken to be compliance by both or all of them.

Subclause (3) repeals section 21(5) and inserts section 21(5) and (5a).

Section 21(5) provides that the Commissioner may, by written notice, impose a penalty on an applicant if the applicant does not repay the amount of the grant, or make an application under section 52(2) for the Commissioner to approve a repayment arrangement within the 30 day period mentioned in subsection (2). A penalty may be imposed if the applicant does not repay the amount of the grant in accordance with an arrangement approved under section 52(2) for the purposes of subsection (2).

Section 21(5a) specifies that the amount of a penalty imposed under subsection (5) is not to exceed the amount that the applicant is required to repay under subsection (2). This ensures that the maximum penalty which can be imposed is no greater

than an amount equal to that of the grant.

Clause 12: Section 23 amended

This clause repeals section 23(3) and inserts a new section 23(3) which provides an exemption from the residence criterion where an applicant dies prior to complying with the residence requirements.

Section 23(3) provides that if the deceased applicant did not take up residence, or was not able to occupy the home as a principal place of residence for a continuous period of six months (or a shorter period approved by the Commissioner) prior to death then, if the Commissioner is satisfied that the applicant intended to comply with the residence requirements, the residence requirements are met.

Clause 13: Section 47 amended

This clause amends section 47.

Subclause (1) deletes the reference to “knowing the information or document to be” false or misleading and provides that it is an offence to provide information that is false or misleading.

Subclause (2) repeals section 47(2) and inserts a new section 47(2) which sets out the defences for proceedings brought under section 47(1).

Section 47(2)(a) sets out the first defence available to a person charged for an offence against this section. It is a defence for a person to prove that they did not know that the information or document was false or misleading in a material particular and they were not reckless as to whether the information or document was false or misleading in a material particular.

Section 47(2)(b) sets out the second defence available to a person charged for an offence against this section. It is a defence for a person to prove that, when providing a document, the person advised the Commissioner, or authorised investigator, that the document was false or misleading in a material particular.

Under the amended section 47 it is an offence to provide information recklessly to the Commissioner or an authorised investigator. For example, where a couple makes a joint application for a grant, both applicants must ensure that the information provided on the application form is true and

correct. An applicant, who, without reading the application form completed by his or her spouse, merely signs the document, will have no defence against the offence provision of section 47(1), as the information would have been provided recklessly. Previously, a prosecution for an offence against such a person may not have been successful where the applicant could claim that they did not know that the information was false, or that they had not read the application.

Clause 14: Section 65 amended

This clause amends section 65(2)(c) to specify that a person who is subject to a duty of confidentiality under this section is not able to record, disclose, or make use of information or material obtained, except for the purposes of legal proceedings or reports of legal proceedings which arise out of matters taken under the *First Home Owner Grant Act 2000*, a taxation Act as defined in the *Taxation Administration Act 2003*, or a corresponding law.

PART 3 - TRANSITIONAL PROVISIONS

Part 3 provides transitional provisions relating to the amendments to the eligibility criteria for the grant.

Clause 15: Definitions

This clause provides that a term used in this Part that is defined in the *First Home Owner Grant Act 2000* has the same meaning in this Part as it has in that Act.

Clause 16: Application of amendments to minimum age requirements

This clause provides specifically that, despite the amendments effected by section 6 of this Bill, relating to the minimum age requirement of 18 years, the *First Home Owner Grant Act 2000* as in force immediately before the commencement of that section continues to apply in relation to an eligible transaction the commencement date of which is before 1 July 2004. This means that an applicant who enters into an eligible transaction, the commencement date of which is prior to 1 July 2004, is not subject to the minimum age requirement.

Clause 17: Application of amendments to residence requirements

This clause provides specifically that, despite the amendments effected by section 9 of this Bill, relating to the residence requirements, the *First Home Owner Grant Act 2000* as in force immediately before the commencement of that section continues to apply in relation to an eligible transaction the commencement date of which is before 1 July 2004. This means that an applicant who enters into an eligible transaction, the commencement date of which is prior to 1 July 2004, is not subject to the new residence requirements.