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Public Ruling First Home Owner Grant Act: PENALTY AMOUNTS

A public ruling, when issued, is the published view of the Commissioner of State Revenue (the Commissioner) on the particular topic to which it relates. It therefore replaces and overrides any existing private rulings, memoranda, manuals and advice provided by the Commissioner in respect of the issue(s) it addresses. Where a change in legislation or case law (the law) affects the content of a public ruling, the change in the law overrides the public ruling—that is, the Commissioner will determine the tax liability or eligibility for a concession, grant or exemption, as the case may be, in accordance with the law.

What this ruling is about

1. The *First Home Owner Grant Act 2000* (the FHOG Act) provides for the payment of the first home owner grant (the grant) on application by qualifying applicants.
2. Section 47(1) of the FHOG Act empowers the Commissioner to, by written notice, require an applicant or former applicant (the applicant) for the grant to repay amounts paid in response to a grant application that are paid in error (error amount).
3. A grant amount will be paid in error when payment is made on the basis of information or documents provided in the application for the grant, indicating that all criteria for entitlement to the grant under the FHOG Act have or will be met, but those criteria are not in fact met.
4. Under s.47(2) and s.47(3) of the FHOG Act, the Commissioner may impose a penalty (penalty amount) of not more than the error amount.¹ A penalty amount is an administrative sanction for certain conduct by applicants.
5. The Commissioner may impose a penalty under s.47(2) of the FHOG Act, where the error amount has been paid because the applicant provided statements or documents, in relation to the application for the grant, containing information the applicant knew to be false or misleading in a material particular, in contravention of ss.42(1) and 43(1) of the FHOG Act (the honesty obligations).
6. The Commissioner may impose a penalty under s.47(3) of the FHOG Act, where the applicant fails to repay an error amount on written notice from the Commissioner under s.47(1) of the FHOG Act, or as otherwise required by the conditions of the grant² (the repayment obligations).

¹ For example, if a grant of \$15,000 had been paid in error, the applicant may, by written notice, be required to repay the \$15,000, plus potentially a maximum penalty amount of a further \$15,000.

² See, for example, ss.22, 22A and 23 of the FHOG Act.

7. This public ruling sets out the principles the Commissioner will apply in deciding whether or not to impose a penalty under the FHOG Act for breach of the honesty obligations or the repayment obligations, and in what amount.

Ruling and explanation

General principles

8. A penalty amount is an alternative to prosecution³ and acts as an incentive for compliance.
9. The decision as to whether to apply a penalty under the FHOG Act, and in what amount, is made by the Commissioner on a case-by-case basis, having regard to all relevant facts and circumstances including:
 - (a) the nature and extent of the applicant's culpability
 - (b) the reason for the applicant's failure to meet their obligations and
 - (c) that the purpose of the grant is to assist people buying or constructing a home to be used as their principal place of residence.
10. As a general principle, the penalty amount will increase:
 - (a) the higher the level of culpability attributable to the applicant's behaviour that triggers the requirement to pay a penalty amount and
 - (b) where applicable, the applicant's behaviour in failing to meet the obligations to repay the grant.
11. Attachments 1, 2 and 3 outline how the general principles apply in determining penalty amounts where there has been a breach of the honesty obligations or repayment obligations.

Section 47(2) of the FHOG Act—Penalty amount for breach of the honesty obligations

12. Section 47(2) of the FHOG Act provides that the Commissioner may impose a penalty if an error amount was paid because of a breach of the honesty obligations in relation to the application for the grant.
13. Under the honesty obligations, a person must not:
 - (a) provide to the Commissioner a document containing information the person knows is false or misleading in a material particular or
 - (b) state anything to the Commissioner that the person knows is false or misleading in a material particular.⁴
14. A 'material particular' for the purposes of ss.42(1) and 43(1) of the FHOG Act will include any matter that has an impact on an applicant's eligibility for the grant.

³ See s.51 of the FHOG Act.

⁴ Sections 42(1) and 43(1) of the FHOG Act

Example 1

Lucas previously held an interest in a property in Australia with other people. However, he believes that this should not prevent him from receiving the grant. Lucas applies for the grant and states on his application form that he has never previously owned a property in Australia.

15. Section 42(1) of the FHOG Act does not apply to a person who, when giving the document:
 - (a) tells the Commissioner or officer, to the best of the person's ability, how the document is false or misleading and
 - (b) if the person has, or can reasonably get, the correct information, gives the correct information to the Commissioner or officer.⁵
16. The penalty amount depends on the level of culpability triggering the breach.

Section 47(3) of the FHOG Act—Penalty amount for breach of the repayment obligations (failure to repay an error amount as required by written notice)

17. Section 47(1) of the FHOG Act enables the Commissioner to, by written notice, require the applicant to repay the error amount.
18. If the applicant fails to meet the requirement to repay the error amount, as required by written notice, the Commissioner may impose a penalty amount under s.47(3) of the FHOG Act.
19. The penalty amount depends on the level of culpability triggering the breach.

Section 47(3) of the FHOG Act—Penalty amount for breach of the repayment obligations (failure to repay the grant as required by a condition of the grant)

20. Section 47(3) of the FHOG Act provides that the Commissioner may impose a penalty if an applicant fails to make a repayment required under the conditions of the grant.
21. The penalty amount depends on the level of culpability triggering the breach and the applicant's behaviour in failing to meet the obligations to repay the grant. A repayment is late if not made in the time allowed under a condition of the grant.

The conditions

22. Section 22(2)(b) of the FHOG Act provides that an applicant must repay the grant where it is paid in anticipation of compliance with the residence requirements under s.15 of the FHOG Act⁶ and those requirements are not complied with.

⁵ Section 42(2) of the FHOG Act

⁶ Under s.15 of the FHOG Act, the applicant must occupy the home to which the application relates as their principal place of residence for at least 6 months, starting within 1 year of completion of the eligible transaction, subject to the Commissioner's discretion to approve a shorter occupation period, extend the period that occupation must start within or exempt the applicant from meeting the residence requirements.

Example 2

Jordan is paid the grant in anticipation of compliance with the residence requirements. He commences renovating the property and stays overnight regularly in an attempt to complete the renovations promptly. However, Jordan's principal place of residence is elsewhere. After 6 months of such occupancy, he completes the renovations and sells the property. Jordan has not satisfied the residence requirements in these circumstances and is required to repay the grant.

23. Repayment under s.22(2)(b) of the FHOG Act must be made within 14 days or the earlier of the following:
- (a) the end of the period allowed for compliance with the residence requirements or
 - (b) the date on which it first becomes apparent that the residence requirements will not be complied with during the period allowed for compliance.⁷
24. Section 22A(2)(b) of the FHOG Act provides that an applicant must repay the grant within 28 days of completion of the relevant transaction where the grant is paid before completion of the relevant transaction and on completion:
- (a) the unencumbered value of the new home or other home, subject of the transaction, results in the transaction not being an eligible transaction under s.5(7) of the FHOG Act
- or
- (b) the consideration for the transaction results in the transaction not being an eligible transaction under s.5(8) or s.5(9) of the FHOG Act.
25. Section 23(1) of the FHOG Act provides that the Commissioner may authorise payment of the grant on the reasonable conditions the Commissioner considers appropriate. Under s.23(2) of the FHOG Act, the Commissioner may impose a condition on an applicant to repay the grant within a stated period.

Culpability categories

26. In considering the application of a penalty amount, the Commissioner will consider the applicant's behaviour against three culpability categories (1 to 3), as follows.

Culpability category	Applicant behaviour
1	Applicant breached their obligations despite acting <i>with reasonable care</i> .
2	Applicant <i>negligently or inadvertently</i> breached their obligations.
3	Applicant <i>intentionally disregarded</i> their obligations.

⁷ Section 22(3) of the FHOG Act

Culpability category 1—Reasonable care

27. Reasonable care requires the applicant to make a reasonable attempt to meet their obligations under the FHOG Act and the First Home Owner Regulation 2010 (the FHOG Regulation).
28. The Commissioner will generally be satisfied that reasonable care has been taken by the applicant where the applicant has taken the same care in fulfilling their obligations that could be expected of a reasonable person in the applicant's circumstances.
29. Without limitation, the Commissioner would expect reasonable care on the part of an applicant to mean, at a minimum, that the applicant has:
 - (a) prior to making the application, read the application form and lodgement guide for the grant or had these materials explained to them by a person reasonably capable of reading, understanding and communicating the content of the material to the applicant and
 - (b) made reasonable inquiries with the Commissioner to clarify any uncertainty the applicant may have as to the nature and extent of their obligations in relation to the grant.
30. The Commissioner considers that an applicant's declarations in their application for the grant indicate that they are aware of the eligibility criteria, including the residence requirements, of the grant and their obligations to notify the Commissioner and repay the grant in the event the eligibility criteria are not complied with.

Example 3

Gabrielle is paid the grant in anticipation of compliance with the residence requirements. She occupies the property for 7 months before vacating. Gabrielle believes she has satisfied the residence requirements and does not repay the grant. However, she was unaware that her solicitor was 2 months late in lodging the transfer of title in her name. Accordingly, Gabrielle has not satisfied the residence requirements because she has only occupied the home for 5 months after completion of the eligible transaction. The Commissioner would be satisfied that Gabrielle took reasonable care in the circumstances.

Culpability category 2—Negligence

31. The Commissioner will consider an applicant to have been negligent in meeting their obligations under the FHOG Act or FHOG Regulation where they fail to take the degree of care a reasonable person would have done in the circumstances.

Example 4

Gabrielle is paid the grant in anticipation of compliance with the residence requirements. On completion of the relevant transaction, Gabrielle occupies the residence for 5 months before vacating due to an unexpected change of circumstances. She discovers that the Commissioner has discretion to exempt applicants from the residence requirement or approve a shorter period. Gabrielle believes that her circumstances would qualify for the discretion, but does not contact the Commissioner to clarify if the discretion would be exercised.

Culpability category 3—Intentional disregard

32. In determining whether an applicant has intentionally disregarded their obligations under the FHOG Act or FHOG Regulation, the Commissioner considers the actual intentions of the applicant.
33. The Commissioner will be satisfied that the applicant has intentionally disregarded their obligations where information indicates that the applicant was aware of the obligations and made a conscious choice to ignore them.⁸ Intentional disregard can be inferred from the facts and surrounding circumstances.⁹

Example 5

Gabrielle is paid the grant in anticipation of compliance with the residence requirements. She does not comply with the residence requirements and makes attempts to disguise her non-compliance. Gabrielle does not repay the grant because she feels she has disguised her non-compliance with the residence requirements sufficiently enough to not be required to repay the grant.

Exceptional circumstances

34. No penalty amount will apply in circumstances where the Commissioner is satisfied that the applicant's failure to meet the honesty obligations or repayment obligations is due to exceptional circumstances.
35. Exceptional circumstances are matters or events outside of the applicant's control, such as death, serious illness or natural disasters directly affecting the applicant.
36. Examples of exceptional circumstances may also include matters or events that satisfy the Commissioner that the applicant's failure to meet the honesty obligations or repayment obligations is a result of coercion or undue influence upon the applicant.
37. To remove any doubt, financial hardship is not considered to be an exceptional circumstance.

Date of effect

38. This public ruling takes effect from 1 July 2018.

Elizabeth Goli
Commissioner of State Revenue
Date of issue: 29 June 2018

⁸ See Collier J in *Price Street Professional Centre Pty Ltd v Federal Commissioner of Taxation* [2007] FCA 345; 2007 ATC 4320; (2007) 66 ATR 1 at paragraph 43.

⁹ See, for example, *Weyers v Federal Commissioner of Taxation* [2006] FCA 818; 2006 ATC 4523; (2006) 63 ATR 268.

References

Public Ruling	Issued	Dates of effect	
		From	To
FHOGA047.1.4	29 June 2018	1 July 2018	Current
FHOGA047.1.3	1 July 2016	1 July 2016	30 June 2018
FHOGA047.1.2	11 October 2012	11 October 2012	30 June 2016
FHOGA047.1.1	1 December 2011	1 December 2011	10 October 2012

Attachment 1**Section 47(2) of the FHOG Act—Penalty amount for breach of the honesty obligations**

Culpability category	Circumstance	Penalty
1	Breach despite applicant taking reasonable care	0–10%
2	<p>Breach result of negligence or inadvertence, for example:</p> <ul style="list-style-type: none"> • failing to check the accuracy of information provided • misinterpretation of the eligibility criteria 	10–50%
3	<p>Breach result of intentionally and without regard, providing false and misleading information, for example:</p> <ul style="list-style-type: none"> • information provided intended to hide non-eligibility for the grant • premises were let or listed for letting during the period in which the intended occupation date occurred • the applicant knew of a prior relevant interest in property • the applicant used a false name or their maiden name • the applicant failed to disclose a spouse (marital or de facto) that previously owned property or received the grant • previous receipt of the grant 	50–100%

Attachment 2

Section 47(3) of the FHOG Act—Penalty amount for breach of the repayment obligations (failure to repay error amount as required by written notice)

Culpability category	Circumstance	Penalty
1	Breach despite applicant taking reasonable care; for example, honest and reasonable mistake	0–10%
2	Breach result of negligence or inadvertence, for example: <ul style="list-style-type: none"> • notice to repay is mislaid • failure to ensure sufficient funds are available at time of processing cheque or electronic payment 	10–50%
3	Breach result of intentionally and without regard failing to repay, for example: <ul style="list-style-type: none"> • no response to requirement to repay • applicant absconds without repaying the grant • refusal to repay the grant 	50–100%

Attachment 3**Section 47(3) of the FHOG Act—Penalty amount for breach of the repayment obligations (failure to repay grant as required by a condition of the grant)**

	Late repayment, but prior to notice of investigation	Repayment after notice of investigation	No repayment before written notice
<p>Culpability category 1</p> <p>Breach despite applicant taking reasonable care; for example, genuine and reasonable belief of compliance with the residence requirements or a condition of the grant</p>	5%	10%	25%
<p>Culpability category 2</p> <p>Breach result of negligence or inadvertence, for example:</p> <ul style="list-style-type: none"> • overlooking the obligation • failing to check, with the Commissioner, the accuracy of advice received • failing to check, with the Commissioner, the accuracy of assumptions made • genuine, but unreasonable belief of compliance with the residence requirements or a condition of the grant 	10%	25%	60%
<p>Culpability category 3</p> <p>Breach result of intentional disregard, for example:</p> <ul style="list-style-type: none"> • never intending to comply with a condition or requirement of the grant • disguising the fact that a condition or requirement of the grant has not been complied with 	25%	60%	100%