

Revenue Ruling

Ruling Number	: PUB-FG-2014-1
Title	: First Home Owner Grant Administrative Penalties
Subject	: First Home Owner Grant
Legislative Reference	: <i>First Home Owner Grant Act 2000</i>
Previous Ruling	: N/A
Date of Ruling	: This ruling will apply for any grants recalled on or after 18 February 2014

Preamble

The *First Home Owner Grant Act 2000* (the FHOG Act) is the Act under which the First Home Owner Grant (FHOG) Scheme in Tasmania is administered. Any failure to comply with the conditions of a grant, where one has been paid, can lead to the imposition of administrative penalties. This ruling explains when penalties may be applied.

Ruling

Section 38 of the FHOG Act provides the Commissioner of State Revenue with the ability to recall the payment of a first home owner grant from a grant recipient and to impose a penalty if:

- 1) A grant recipient makes a false or misleading statement during the application process, either intentionally or unintentionally, and as a consequence of the misleading statement a grant is paid (under Section 38(2)).
- 2) A grant recipient fails to comply with a condition of the grant (for example the residency requirement) and fails to repay the grant in a specified period of time (Section 38(3)). *To note:* a penalty will not be imposed if a grant recipient, who does not comply with residency requirements, contacts the State Revenue Office (SRO) in writing and repays the grant within 14 days from the time they first become aware that they were unable to comply.

The FHOG Act gives the Commissioner the discretion to apply any penalty provided it does not exceed the amount the grant recipient is required to repay (that is, not greater than 100 per cent – refer to Section 38(2) and (3) of the FHOG Act).

The decision to apply an administrative penalty under the FHOG Act, and the amount of penalty applied, is made by the Commissioner on a case-by-case basis, taking into account various facts and circumstances, including:

- a) the nature and extent of the grant recipient's culpability;
- b) the reason for the grant recipient's failure to meet their obligations; and
- c) the level of cooperation and disclosure given by the grant recipient before and during an investigation.

The following matrix sets out the rates of administrative penalty applied in different circumstances:

CULPABILITY MATRIX		Disclosure and behaviour during investigation			
		(A) Base rate	(B) Voluntary Disclosure before investigation	(C) Disclosure during an investigation	(D) Concealment and Hindrance
Culpability leading to non-compliance	1. Reasonable care	0%	0%	0%	n/a
	2. Negligence	25%	5%	20%	30%
	3. Intentional disregard	75%	15%	60%	100%

The matrix looks at two primary considerations:

1) The level of culpability of the grant recipient leading to the non-compliance

It is first necessary to determine what the grant recipient's culpability was leading to the non-compliance.

Culpability is described in the matrix as being:

Reasonable care

A grant recipient will be considered to have taken reasonable care if they gave appropriate and serious attention to complying with the obligations imposed under the FHOG Act. If a grant recipient has exercised reasonable care, an administrative penalty will not be imposed. More information relating to what the Commissioner will consider to be reasonable care, as well as an example of reasonable care, is contained in the Appendix to this ruling; or

Negligence

The Commissioner will consider a grant recipient to have been negligent in not meeting their obligations under the FHOG Act where they fail to take the degree of care a reasonable person would have done in the same circumstances. More information relating to what the Commissioner will consider to be negligence, as well as an example of negligence, is contained in the Appendix to this ruling; or

Intentional disregard

The Commissioner will consider that a grant recipient has shown intentional disregard of a requirement under the FHOG Act if the grant recipient made a deliberate act or omission to obtain or keep the grant in circumstances where they knew they were not entitled to receive or keep it. More information relating to what the Commissioner will consider to be intentional disregard, as well as an example of intentional disregard, is contained in the Appendix to this ruling.

The categories of culpability are set out in the left hand column of the table. The base rate of penalty shown in column (A) corresponding to the relevant category of culpability will be the default rate of penalty applied.

2) The grant recipient's behaviour prior to and during an investigation

The rate of penalty applied may be adjusted from the base rate, either increased or decreased, depending upon the level of disclosure, concealment, hindrance or cooperation provided by the grant recipient either prior to or during an investigation.

Voluntary disclosure prior to an investigation

The base rate of penalty will be decreased if the grant recipient makes a voluntary disclosure of non-compliance to the Commissioner before an investigation commences. The reduced penalty rates for such circumstances are shown in column (B) in the matrix on the previous page.

For example, a grant recipient who is considered to have been negligent, but has made a voluntary disclosure prior to an investigation, would have the base rate of penalty (25 per cent shown in column (A)) reduced to 5 per cent (shown in column (B)). More information relating to voluntary disclosure prior to an investigation is contained in the Appendix to this ruling.

Disclosure during an investigation

The base rate of penalty will also be reduced if the grant recipient immediately and fully discloses all relevant information to the Commissioner during an investigation. The reduced penalty rates for disclosure during an investigation are shown in column (C) in the matrix on the previous page.

For example, a grant recipient who is considered to have been negligent, but has made a voluntary disclosure during an investigation, would have the base rate of penalty (25 per cent shown in column (A)) reduced to 20 per cent (shown in column (C)). More information about disclosure during an investigation is contained in the Appendix to this ruling.

Concealment and hindrance

The base rate of penalty will be increased if during an investigation the grant recipient conceals information relevant to the investigation or otherwise hinders an investigation into non-compliance. The increased penalty rates for hindrance and concealment are shown in column (D) in the matrix on the previous page.

For example, a grant recipient who is considered to have been negligent, and has hindered the Commissioner's investigation, would have the base rate of penalty (25 per cent shown in column (A)) increased to 30 per cent (shown in column (D)). More information relating to concealment and hindrance is contained in the Appendix to this ruling.

Taking into account these factors, the Commissioner will impose a level of administrative penalty at a rate shown in the matrix, either at the base rate, or at an increased or decreased rate depending upon the grant recipient's behaviour before or during the investigation.

A grant recipient is able to object to the imposition of penalty (Section 25) and also to seek a court's review of that decision (Section 27).

Debt recovery

If a FHOG grant is recalled, the SRO will issue a notice (under Section 38) requiring the recipient to repay the grant and documenting any penalty that has been imposed.

If the amount required to be repaid has not been paid by the due date set out in the notice:

- the debt will be referred to the SRO Debtor Management Unit for debt recovery action (unless the recipient has contacted the SRO to enter into a payment arrangement); and
- interest on the outstanding debt may be imposed under Section 39 of the FHOG Act at the market rate plus premium rate. More information about market and premium rates of interest is available in the *Interest and Penalty Tax* revenue ruling at www.sro.tas.gov.au.

Unpaid debts that are being managed by the Debtor Management Unit may also be referred to a collection service or the Director of Public Prosecutions.

Application of this ruling

This Revenue Ruling applies for all grants recalled on or after 18 February 2014.

More information

Contact the SRO's Legislation, Communication and Review Section, revenueview@treasury.tas.gov.au or phone (03) 6166 4400.

You can download a copy of this ruling from www.sro.tas.gov.au menu.

All rulings must be read in conjunction with the 'Explanation and Status of Revenue Rulings' available on the SRO website, www.sro.tas.gov.au/resources/rulings.



J C Root
Commissioner of State Revenue

18 February 2014

About the appendix

The appendix (beginning next page) forms part of the revenue ruling. It contains examples of when the Commissioner will consider that a person has taken reasonable care, acted negligently or acted with intentional disregard. There are also examples of what will be considered voluntary disclosure, disclosure during an investigation, and hindrance and concealment.

Contacting the State Revenue Office**Website**

www.sro.tas.gov.au

Email

taxhelp@treasury.tas.gov.au

Phone

(03) 6166 4400

(weekdays, 9:00am to 5:00pm)

1800 001 388

(toll-free for Tas-based callers outside the '62' area)

Post

The Commissioner of State Revenue, GPO Box 1374, Hobart TAS 7001

Reception

Ground floor

Salamanca Building Parliament Square
4 Salamanca Place HOBART TAS 7000

(weekdays, 9:00am to 5:00pm)

APPENDIX

Reasonable care

Reasonable care requires a grant recipient to make a reasonable attempt to meet their obligations under the FHO Act.

The Commissioner will generally be satisfied that reasonable care has been taken by a grant recipient where they have taken the same care in fulfilling their obligations that could be expected of a reasonable person in similar circumstances.

This means that although the standard of care is measured objectively, it does take account of the grant recipient's circumstances. It also takes into consideration whether there were circumstances outside the grant recipient's control that resulted in a failure to comply with the obligations of the grant.

Without limitation, the Commissioner would expect reasonable care on the part of a grant recipient to mean that they:

- a) read the application form and lodgement guide before making the application for the grant;
- b) if required, had the material explained to them by a person reasonably capable of reading, understanding and communicating the content of the material; and
- c) made reasonable enquiries with the SRO to clarify any uncertainty they may have had about the nature and extent of their obligations in relation to the grant.

The Commissioner considers that a grant recipient's declarations, when applying for the grant, indicate that they are aware of the eligibility criteria including a) the residency requirements of the grant and, b) their obligations to notify the Commissioner and repay the grant if they are unable to comply.

If a grant recipient relies on information given by the SRO's registered agents (including registered financial institutions and Service Tasmania), and the information is incorrect, the grant recipient **has not** taken reasonable care. The obligation is on the grant recipient to read the information in the application form, and if any part needs clarification, they are encouraged to contact the SRO or seek legal advice.

What is relevant is whether a reasonable person in similar circumstances would have acted in the same way. The test does not depend on the grant recipient's intentions nor does it rely on the benefit of hindsight.

Examples include:

- genuine, reasonable and demonstrated belief of compliance with residency requirements or conditions of the grant; or
- genuine, reasonable and understandable belief that a statement made was, although in error, believed to be true at the time of the declaration.

Example of taking reasonable care

Mary applies for and receives the grant in anticipation of complying with the residency requirements.

She then has to move interstate for work purposes. The property was being leased out when she purchased it (with six months remaining on the lease) and she was intending to move in after the lease expired.

Mary contacts the SRO when she discovers that she is unable to meet the residency requirements, and although she is not able to immediately repay the grant amount, she enters into an arrangement with the SRO to repay the grant.

In this instance, a **0 per cent administration penalty** is applied because Mary has taken reasonable care by advising the Commissioner of her inability to meet her obligations and by taking steps to repay the grant.

Negligence (failure to take reasonable care)

A person has acted negligently if, although acting honestly, they have not conducted themselves in a way expected of a reasonable person under similar circumstances. This requires a comparison between the actions of the grant recipient and the actions expected of a reasonable person in similar circumstances. If a reasonable person would have taken additional care in meeting the requirements under the FHOG Act, failure to do so means the grant recipient has been negligent.

Examples include:

- failing to check the accuracy of information provided, or misinterpretation of the eligibility criteria; or
- failing to check with the SRO the accuracy of the grant recipient's assumptions.

Example of acting negligently by not declaring a spouse

John purchases a property as his first home and moves in immediately with his girlfriend of two years. On his original application, John did not include his girlfriend as a spouse because he thinks the word 'spouse' only includes a husband or wife.

It is discovered by the SRO that John's girlfriend has received a grant for a property she had previously purchased.

In this instance, a starting base rate of **25 per cent administrative penalty** is applied because John has been negligent by not complying with the conditions of the grant. It is negligent behaviour because John failed to consider the extent to which his girlfriend might constitute his "spouse" for the purposes of the FHOG Act. This is the case even though John may not have acted dishonestly (it could be argued that there is a general misconception surrounding the meaning of the term spouse).

The final rate of penalty applied would depend on any reduction or increase in the base rate of penalty applied due to the level of disclosure and cooperation given, or lack thereof, by John during the investigation.

Intentional Disregard

The Commissioner will be satisfied that the grant recipient has intentionally disregarded their obligations where there is evidence that the grant recipient was aware of the obligations and made a conscious decision to ignore them anyway¹.

Examples include:

- information provided at the time of application which is intended to hide ineligibility for the grant;
- knowledge of prior interest or spouse's prior interest in another property; or
- never realistically intending to comply with the grant conditions (for instance, the house was already leased for the duration of the residency period) but applied for the grant anyway.

Example of intentional disregard by providing a false name

Matthew has applied for the grant using his brother's name 'Zeke'. His brother lives in the UK and Matthew has previously had a prior interest in a property.

Matthew manages to put together all the relevant (but fraudulent) documentation, and receives the grant. On being detected by the SRO, the grant is recalled and, as the case is so serious, Matthew is referred for prosecution.

In this instance, a starting base rate of **75 per cent administrative penalty** is applied because Matthew has intentionally made false statements in order to receive the grant. The final rate of penalty applied would depend on any reduction or increase in the rate of penalty applied due to the level of disclosure and cooperation, or lack thereof, given by Matthew during the investigation.

¹ 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.

Voluntary disclosure before an investigation

A voluntary disclosure is an **unprompted** communication received from a grant recipient **before** an investigation commences which provides sufficient information for the Commissioner to determine the nature and extent of the grant eligibility and assess the correct grant payable.

It is prudent to apply a certain level of penalty to ensure the integrity of the scheme is upheld. A penalty is still applied because the grant recipient may have gained a financial advantage by having access to monies to which they are otherwise not entitled.

As such, in instances of voluntary disclosure, the base penalty amount is reduced by 80 per cent (for example a 25 per cent base rate would be reduced to 5 per cent). This encourages a grant recipient to voluntarily disclose any false declaration or issue about their eligibility for the grant.

Example of penalty applied where there has been a voluntary disclosure before an investigation

Sally realised that she negligently failed to declare a spouse in her FHOG application. Her spouse had previously owned a residence, and therefore Sally was not eligible to receive a grant payment. Sally had provided misleading information in her application, although it was unintentional.

Sally contacted the SRO with additional and relevant information that would assist with the investigation, and answered all questions openly and honestly.

As a result of her voluntary disclosure, a **5 per cent administrative penalty** is applied.

Disclosure during an investigation

This disclosure is a communication from a grant recipient **after** the commencement of an investigation. It provides sufficient information for the Commissioner to determine the nature and extent of the grant eligibility and assess the correct grant payable without the need for further enquiry or investigation.

A grant recipient simply conceding or agreeing with information already identified during an investigation is not considered disclosure. Disclosure occurs when new, unprompted information is provided by a grant recipient which enables the Commissioner to make a decision on grant eligibility without any further investigation.

The disclosure must be made fully and honestly, and must be in writing. The disclosure behaviour is taken to be the first action of the grant recipient. In other words, if a grant recipient continually hinders an investigation, then later concedes and discloses the relevant information, this is taken to be concealment or hindrance of an investigation, not a disclosure (because the 'disclosure' was not the recipient's first action).

In such circumstances, a reduction of base penalty by 20 per cent (for example from 25 to 20 per cent or from 75 per cent to 60 per cent) would be appropriate.

Example of a disclosure during an investigation

It was discovered by the SRO that Darren acted negligently in his failure to declare a spouse in his FHOG application. His spouse had previously owned a residence, and therefore Darren was not eligible to receive a grant payment.

Once contacted, Darren wrote to the SRO and provided all the information required to enable the Commissioner to make an assessment of eligibility without further investigation or contact.

As a result, the **administrative penalty** imposed was reduced from 25 per cent to **20 per cent**.

Concealment and Hindrance

Concealment of information or hindrance during an investigation means a deliberate or intentional act or omission by a grant recipient during the course of an investigation that hinders or prevents the Commissioner from establishing the nature or extent of a grant recipient's eligibility for the grant.

This consideration has nothing to do with the level of a grant recipient's culpability on obtaining the grant, rather it looks at their behaviour during the course of an investigation.

Examples include:

- deliberately damaging or destroying relevant information;
- deliberately omitting information from any response or giving false information;
- failing to respond to the Commissioner (without reasonable excuse); or
- hindering or obstructing an authorised officer from determining the nature of their eligibility.

Example of concealment or hindrance during an investigation

The SRO discovered that Barry acted negligently by failing to declare a spouse in his FHOG application. His spouse had previously owned a residence, and therefore Barry was not eligible to receive a grant payment.

Once contacted, Barry did not provide the SRO with the relevant information, and what he did provide was late. He also threw away some documents that could have acted as evidence and actively sought to hinder the Commissioner from completing the investigation.

As a result of his concealment, Barry's **administrative penalty** was increased from 25 per cent to **30 per cent**.
