

# Revenue Rulings

## Section 48 – The Commissioner’s power to require repayment and impose penalty

*First Home Owner Grant Act 2000*

Revenue Ruling FHOG.002

Ruling history	
Ruling no.	FHOG.002
Status	Current
Issued date	May 2012
Replaces	-

### Preamble

A first home owner grant (FHOG) is payable on an application if the applicant complies with the five eligibility criteria set out in sections 8 to 12 of the *First Home Owner Grant Act 2000* (the Act) and enters into, and completes, an eligible transaction as defined in section 13 of the Act. An explanation of these requirements and obligations is contained in the FHOG Application Form and Lodgement Guide.

The State Revenue Office, as part of its role in administering the Act, conducts investigations to ensure that applicants comply with the Act.

If as a result of an investigation it was found that an applicant does not comply with the Act, the Commissioner of State Revenue (the Commissioner) may require repayment of the FHOG and impose a penalty. An applicant is liable to pay interest on any unpaid amount or penalty.

The purpose of this Ruling is to explain how the Commissioner will approach the imposition of administrative penalties, and the calculation of interest, under section 48 of the Act.

Administrative penalties and interest play an integral role in the administration of the Act by:

- (a) deterring people from attempting to access the FHOG when they are not eligible
- (b) encouraging people to repay the FHOG when they do not meet the requirements of the Act
- (c) compensating the Government for the financing costs incurred due to the late repayment of a FHOG, and
- (d) deterring ineligible applicants from retaining, or delaying the repayment of, the FHOG.

The Commissioner may also prosecute applicants

who have committed offences under the Act for example, by making a false or misleading statement in, or in connection with a FHOG application. The purpose of the offence provisions is to deter and punish FHOG offenders with fines and imprisonment. The offence provisions are not discussed in this Ruling.

### Ruling

Under section 48 of the Act, the Commissioner may, by written notice, impose a penalty not exceeding the amount an applicant is required to repay if:

- (a) as a result of an applicant’s dishonesty, an amount is paid by way of a FHOG (section 48(2)), and
- (b) an applicant (or former applicant) fails to make a repayment required by section 48(1) of the Act or by the conditions of the FHOG (section 48(3)).

In deciding whether to impose a penalty, and if so, the quantum of it, the Commissioner considers the circumstances of each case.

#### **Section 48(2) penalty: as a result of an applicant’s dishonesty, an amount is paid by way of a FHOG**

In deciding whether or not to impose a penalty under section 48(2) of the Act, the Commissioner must initially be satisfied that:

- (a) the applicant has been dishonest at the time of making his or her application. In doing so, the Commissioner may consider the applicant’s behaviour subsequently to draw inferences about that person’s state of mind at the time of making the application; and
- (b) a FHOG was paid as a result of that dishonesty.

The Commissioner applies the common law test of 'dishonesty' set out by the High Court in *Peters v the Queen* (1998) 192 CLR 493. In applying the *Peter's* test, a FHOG will have been paid as a result of the applicant's dishonesty if, for example:

- (a) as a question of fact, the applicant:
  - (i) made a false or misleading statement in connection with an eligibility criterion for the FHOG – for example, providing incorrect personal details such as name or date of birth or citizenship/permanent residence; not declaring a spouse or domestic partner; not declaring the previous receipt of a FHOG; or not declaring a prior relevant interest in residential property, and
  - (ii) knew or believed that the statement was false or misleading, and
  - (iii) intended to obtain the FHOG by the making of the statement, and
- (b) that conduct amounts to dishonest conduct according to the standards of ordinary, decent people. There is no need for the Commissioner to consider whether the applicant (subjectively) knew or believed the conduct to be dishonest according to the standards of ordinary, decent people.

If the Commissioner is satisfied that the FHOG has been paid as a result of the applicant's dishonesty, the factors that the Commissioner will take into account in order to decide whether to impose a penalty and if so, the quantum of that penalty are:

- (a) the degree of dishonesty;
  - The Commissioner will regard dishonest statements about information directly concerning the eligibility criteria as evidencing a higher degree of dishonesty as opposed to matters which may be of lesser significance such as the applicant's personal particulars
- (b) the deterrent effect of the penalty
- (c) the candour of the applicant in his or her response to compliance enquiries
- (d) whether the FHOG has been repaid, and
- (e) penalty decisions in previous cases involving similar circumstances. For example, previous section 48(2) penalty decisions made by the

Commissioner in the first instance, those made on an objection, and on review by the Victorian Civil and Administrative Tribunal and tribunals in other jurisdictions.

**Section 48(3) penalty: an applicant (or former applicant) fails to make a repayment required under section 48(1) of the Act or the conditions of the FHOG**

Section 20 of the Act specifically deals with authorising payment of the FHOG in anticipation of compliance with the residence requirement. The payment is made on condition that, if the residence requirement is not complied with, the applicant must within 14 days after the end of the period allowed for compliance:

- (a) give written notice of that fact to the Commissioner, and
- (b) repay the amount of the FHOG.

Section 21 of the Act also allows the Commissioner to authorise the payment of the FHOG on certain conditions. Such a condition may require the applicant to give notice of the non-compliance with the condition within a period stated in the condition; and repay the FHOG within a period stated in the condition.

Under section 48(1) of the Act, the Commissioner may, by written notice, require an applicant (or former applicant) for a FHOG to repay an amount paid on the application if the amount was paid in error, or the Commissioner reverses the decision under which the amount was paid for any other reason.

To decide whether or not to impose a penalty under section 48(3) of the Act, the Commissioner must initially be satisfied that an applicant (or former applicant) has failed to make a repayment required under section 48(1) of the Act, or the conditions of the FHOG.

Being so satisfied, the factors that the Commissioner will take into account in deciding whether to impose a penalty under section 48(3) of the Act and if so, the quantum of that penalty are:

- (a) the surrounding circumstances including the intention of the applicant in relation to fulfilment of the eligibility criteria or other conditions of the FHOG

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- (b) the reasons for the failure to comply with the eligibility criteria or other conditions of the FHOG
  - (c) the truthfulness of the original statements made by the applicant in his or her application for the FHOG
  - (d) whether the applicant has complied with the eligibility criteria or other conditions of the FHOG to some extent
  - (e) the deterrent effect of the penalty
  - (f) the candour of the applicant in his or her response to compliance enquiries
  - (g) whether the FHOG has been repaid, and
  - (f) penalty decisions in previous cases involving similar circumstances. For example, previous section 48(3) penalty decisions made by the Commissioner in the first instance, those made on an objection, and on review by the Victorian Civil and Administrative Tribunal and tribunals in other jurisdictions.

#### **Objections to penalty imposed under section 48**

An applicant (or former applicant) who is dissatisfied with a decision to require the applicant (or former applicant) to pay a penalty imposed under section 48 of the Act may lodge a written objection with the Commissioner within 60 days after the date of the notice of decision. The grounds for the objection must be stated fully and in detail, and must be in writing. On an objection, the objector has the onus of proving the objector's case.

#### **Interest**

An amount or penalty under section 48 of the Act is payable by the date specified in the written notice from the Commissioner.

Under section 48(5) of the Act, an applicant (or former applicant) is liable to pay interest on any unpaid amount that is required to be repaid under section 48(1) or on any penalty imposed under sections 48(2) or (3). That interest is calculated on a daily basis from the end of the last day for payment until the day it is paid at the interest rate from time to time applying under Division 1 of Part 5 of the *Taxation Administration Act 1997*.

Section 48(6) of the Act allows the Commissioner to remit interest by any amount he considers appropriate.

**Please note that rulings do not have the force of law. Each decision made by the State Revenue Office is made on the merits of each individual case having regard to any relevant ruling. All rulings must be read subject to Revenue Ruling GEN.001.**