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| <b>REVENUE CIRCULAR FHOG001.1</b>  |
| Offences, Penalties and Interest – <i>First Home Owner Grant Act 2000 and Criminal Code 2002</i> |
| Issue Date: 17 June 2011   |
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## Preamble

1. This circular provides details of the criminal offence and administrative penalty provisions in the *First Home Owner Grant Act 2000* (FHOG Act).
2. This circular also provides details of the serious criminal offences of making, giving or producing false or misleading statements, information or documents in Part 3.4 of the *Criminal Code 2002* (Criminal Code).
3. Full details of the First Home Owner Grant Scheme are set out in the FHOG Application Form on the ACT Revenue Office website at [www.revenue.act.gov.au](http://www.revenue.act.gov.au).

## Circular

### Criminal offences in the FHOG Act

4. The criminal offences in the FHOG Act are **strict liability offences**. This means the prosecution is not required to prove knowledge, intention, recklessness or negligence. So long as the prosecution establishes that a person or organisation failed to act as required by the relevant provision in the FHOG Act, the person or organisation is likely to be convicted.
5. Strict liability is employed in the First Home Owner Grant Scheme to ensure the integrity of its regulatory aspects, and to protect revenue.
6. Under Part 2.3 of the Criminal Code, a mistake of fact defence expressly applies to each strict liability offence.

### Failure to inform Commissioner of noncompliance with residential requirements (section 20)

7. The grant is paid in anticipation of the residential requirements being complied with. If the applicant fails to notify the Commissioner that he or she has not complied with the requirements within 14 days of the end of the residential compliance period **or** the date on which it becomes apparent to the applicant the requirements will not be complied with, **whichever occurs earlier**, the applicant commits an offence. **Strict liability applies to this offence.**

Maximum Penalty: 50 Penalty Units

#### **Failure to inform Commissioner if first home owner grant cap exceeded (section 20)**

8. The grant is paid in anticipation of the transaction not exceeding the total value permitted by the first home owner grant cap. If the applicant fails to notify the Commissioner that the total value of the transaction has or will exceed the cap, within 14 days of becoming aware that the cap has been or will be exceeded, the applicant commits an offence. **Strict liability applies to this offence.**

Maximum Penalty: 50 Penalty Units

#### **Failure to inform Commissioner of non-compliance with grant conditions and to repay grant (section 21)**

9. If the Commissioner imposes a condition on a grant, and the applicant fails to notify his or her non-compliance with that condition **and** to repay the grant within the period specified in the condition, the applicant commits an offence.
10. For multiple applicants, each applicant is individually liable but compliance by any one applicant is regarded as compliance by all. **Strict liability applies to this offence.**

Maximum Penalty: 50 Penalty Units

#### **Failure by financial institution or person to comply with prescribed conditions in administration agreement (section 36)**

11. If the Commissioner enters into an administration agreement with a financial institution or person and the agreement includes prescribed conditions, and the institution or person fails to comply with those conditions, the institution or person commits an offence. **Strict liability applies to this offence.**

Maximum Penalty: 50 Penalty Units

#### **Failure to comply with notice to provide information, attend for examination, produce record or other document (section 39)**

12. If the Commissioner gives notice to a person to provide information, attend and give evidence, or produce a record or other document, and the person fails to comply with the notice within time or to give evidence, the person commits an offence. **Strict liability applies to this offence.**

Maximum Penalty: 50 Penalty Units

13. A person subject to direction under section 39 is not excused from doing so by the privilege against self-incrimination; however, under section 43 the person is immune from prosecution for evidence obtained through complying with the direction **except** if he or she is prosecuted for an offence, including the failure to give information or providing false or misleading information.

#### **Failure to comply with requirement of authorised officer (section 45)**

14. A person must comply with a requirement made of the person by an authorised officer under Division 3.2 of the FHOG Act (Investigations). **Strict liability applies to this offence.**

Maximum Penalty: 50 Penalty Units

15. A person does not commit an offence arising from the entry of an authorised officer into premises **unless** the prosecution establishes that the officer identified himself or herself at the material time and warned the person that a failure to comply was an offence.

#### **Failure by third-party debtors to comply with notices (section 49D (1))**

16. If the Commissioner issues a written notice ('recovery notice') to a third-party debtor for a grant recipient to pay a recoverable amount, the third-party debtor commits an offence if he or she fails to comply with the notice.

Maximum Penalty: 50 Penalty Units

17. The court may, in addition to imposing a penalty on a third-party debtor convicted of an offence under this provision, order the debtor to pay the Commissioner an amount not more than the recoverable amount.

## **Administrative penalties and interest in the FHOG Act**

### **Power to require repayment of grant and impose penalty (section 47)**

18. Under the FHOG Act, the Commissioner may require an applicant to repay a grant if it was paid in error or the grant decision is reversed. Repayment may also be required from a third party when a grant is paid in error.
19. If the Commissioner requires an applicant to repay a grant, and the applicant fails to do so, the Commissioner may impose a penalty of not more than the amount of the grant paid.
20. If a grant is paid because of an applicant's dishonesty the Commissioner may impose a penalty of not more than the amount of the grant paid.
21. If a penalty is imposed, it is payable in addition to the amount of the grant that is repayable. This means that both the grant and the penalty must be paid.

### **Interest in relation to repayments (section 48)**

22. Under the FHOG Act, interest is payable on a grant when it is required to be repaid. Interest is payable in addition to the repayment of both the grant and any penalty imposed.
23. More specifically, interest becomes payable if any of the following occur:
  - (a) the grant is repayable due to a failure to comply with the residence requirements;
  - (b) the grant is repayable due to a failure to comply with the FHOG cap;
  - (c) the grant is repayable due to a failure to comply with any conditions imposed;
  - (d) the grant was paid in error;
  - (e) the Commissioner reverses the decision under which the grant was paid.
24. Interest is calculated on a daily basis and at the rate prescribed by section 26 of the *Taxation Administration Act 1999*, (see Revenue Circular **GEN009 Interest** for further detail about section 26).
25. Interest continues accruing daily until outstanding amounts are paid in full. Depending on the circumstances, interest begins accruing on one of the following dates:
  - (a) if the residence requirements have not been complied with—the day that the period for complying with the residence requirements ends, or the day non-compliance with the residence requirements first becomes apparent, whichever is earlier; or
  - (b) if the Commissioner has imposed conditions on the payment of the grant—the day notice of non-compliance with a condition was given to the Commissioner; or
  - (c) if the grant was paid in error or the decision to pay it is reversed—the day the grant was paid.
26. Under section 49 of the FHOG Act the Commissioner also has a discretion to remit or refund all or part of an amount of interest paid or payable by a person.

### **Criminal offences in the Criminal Code**

27. Making, giving or producing false or misleading statements, information or documents in or in relation to an application for a grant under the FHOG Act is a serious offence under the Criminal Code.
28. Refer to Part 2.2 of the Criminal Code for the meaning of words, including “knowledge” and “recklessness”.
29. Refer to Part 3.4 of the Criminal Code for the complete offence provisions relating to false and misleading statements, information and documents.
30. Several offences involve **absolute liability**. This means the prosecution does not have to prove any of the fault elements for any of the physical elements of the offence **and** the defence of mistake of fact is not available. Absolute liability does not make any other defence unavailable.

### **Making false statements on oath or in statutory declarations (section 336A)**

31. A person must not knowingly make a false statement on oath or in a statutory declaration. “Oath” includes an affirmation.

Maximum Penalty: 500 Penalty Units, imprisonment for 5 years, or both

**Making false or misleading statements knowingly (section 337) (1)**

32. A person must not knowingly make a statement (orally, in a document, or in any other way) that is false or misleading, or omit anything without which the statement is false or misleading, when applying for or claiming an entitlement or benefit, or to a person exercising a function under a territory law, or in complying with a territory law. **Absolute liability applies to this offence.**
33. See section 374 of the Criminal Code for an alternative verdict provision to the offence of making false or misleading statements under section 337 (1).

Maximum Penalty: 100 Penalty Units, imprisonment for 1 year, or both

**Making false or misleading statements recklessly (section 337) (3)**

34. A person must not recklessly make a statement (orally, in a document, or in any other way) that is false or misleading, or omit anything without which the statement is false or misleading, when applying for or claiming an entitlement or benefit, or to a person exercising a function under a territory law, or in complying with a territory law. **Absolute liability applies to this offence.**
35. Elements of the offence do not apply if the statement is not false or misleading in a material particular. The defence bears the evidential burden in these matters.

Maximum Penalty: 50 Penalty Units, imprisonment for 6 months, or both

**Giving false or misleading information (section 338)**

36. A person must not knowingly give false or misleading information, or omit anything without which the statement is false or misleading, to someone else, or to the Territory, or to a person exercising a function under a territory law, or in complying with a territory law. **Absolute liability applies to this offence.**
37. Elements of the offence do not apply if the statement is not false or misleading in a material particular or if the omission does not make the statement false or misleading in a material particular.
38. The Territory must take reasonable steps to tell the person about the existence of the offence in advance of the person giving the information. The words "Giving false or misleading information is a serious offence" are sufficient.

Maximum Penalty: 100 Penalty Units, imprisonment for 1 year, or both

**Producing false or misleading documents (section 339)**

39. A person must not knowingly produce a document that is false or misleading in a material particular to someone else in compliance with a territory law.
40. This provision does not apply if the person accompanies the document with a signed statement that the document is, to his or her knowledge, false or misleading in a material particular and identifies the particular.

Maximum Penalty: 100 Penalty Units, imprisonment for 1 year, or both

Signed

David Read  
Commissioner for ACT Revenue  
31 May 2011