Queensland Law Society

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Office of the President

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Our ref: WD: PDLC

Mr Mark Jackson
Commissioner for State Revenue
Office of State Revenue
Queensland Treasury

By email: [redacted]

Dear Mr Jackson

First Home Owner Grant – Chee v Commissioner of State Revenue [2020] QCAT 231

I write at the request of members to raise concerns about the application and interpretation of certain aspects of the First Home Owner's Grant (FHOG) in light of a recent decision of the Queensland Civil and Administrative Tribunal.

This correspondence has prepared with the assistance of the QLS Property and Development Law Committee, whose members have substantial expertise in this area.

QLS is seeking urgent clarification of the Commissioner's interpretation and application of the FHOG provisions following the recent decision in *Chee v Commissioner of State Revenue* [2020] QCAT 231 (*Chee*).[1]

Eligibility for the FHOG is usually a determining factor in a first home buyer's decision to buy a 'new home'. The availability of the FHOG influences a buyer's decision about price and finance options. It is critical that a first home buyer is able to accurately determine whether or not the transaction is eligible for the FHOG prior to contract. If the buyer erroneously believes they are entitled to the FHOG but it is refused, or required to be repaid, the buyer may find themselves in financial difficulty and may be unable to complete the contract leading to termination of the contract and a claim for damages by the seller.

In *Chee,* the buyer was purchasing a home from a builder. No one had occupied the home prior to the sale, but the builder had used it as a display home. The buyer's claim to the FHOG was refused by QCAT on the basis the property was 'previously sold as a place of residence' and therefore not a 'new home'. The basis of this decision was that at the time the land was transferred by the developer of the land to the builder, a residence was constructed, and therefore, despite the reference in their contract of sale to vacant land, the property was sold

[1] https://www.queenslandjudgments.com.au/case/id/344872

as a residence. The member relied on the fact the Form 24, which accompanied the transfer, indicated the current use as 'dwelling' and not vacant land.

The impact of this reasoning is that if a developer and builder structure their legal arrangement so that the land is transferred to the builder after completion of a home, the property is sold as a residence by the developer, despite the fact the description in the contract is vacant land and the price paid equates to the value of the land without improvements. The home will no longer be a new home under the definition, despite the fact no one has ever lived in the home.

We understand that the Commissioner's delegates are applying the reasoning in *Chee* to situations where the Form 24 lodged for any prior transfer of the land to the builder states the current use as 'dwelling'. This approach puts the buyer of a property and their legal advisers at a significant disadvantage.

First, there will be no easy way for a buyer to identify if the property was previously sold to the builder as a dwelling. Where the home is being used as a display home this may place the buyer and their adviser on notice, but extending this approach to situations where the builder may have owned the property for only a short time without using it, or even in the extreme to a contemporaneous settlement from the developer to the builder to the buyer make it extremely difficult for a buyer to determine eligibility. Standard conveyancing practice does not include investigating the details of a previous sale to the builder and even if inquiries were made, a copy of the Form 24 cannot be publicly searched.

Secondly, the eligibility test on the OSR website does not adequately explain, for a lay person, the meaning of 'previously sold as a residence'. All of the questions relate either to the status of the buyer or whether the property was previously occupied. Further, *Public Ruling FHOGA000.1.6 Meaning of 'home', 'new home' and 'residential property'* provides no example of the sale of a display home or similar example to alert the buyer to the potential problem. The ruling is potentially misleading by indicating that a home, moved from another site and placed upon the land will, once completed, be a new home for the purpose of the grant. The example focusses on whether the home was used as a residence not the details of the previous sale.

QLS queries whether this approach achieves the intention of the FHOG scheme.

In *Chee* the member refers to the policy intent of the 'new home' grant changes in 2012 as aiming to boost the housing construction sector and that this intent was achieved when the home was first built and transferred. In our view this conclusion is too narrow. In the First Reading of the *Fiscal Repair Amendment Bill* on 11 September 2012, Hon. TJ Nicholls referred to "an increased grant for first home buyers purchasing a new home will benefit first home buyers and boost the housing construction sector". This benefit was stated in contrast to the low benefits achieved for housing affordability where an existing home was purchased. Clearly the policy is intended to benefit both buyers and the construction industry through the provision of new affordable housing stock.

QLS requests that OSR clearly publicise its interpretation of sections 5 and 6 of the *First Home Owner Grant and Other Home Owner Grants Act 2000* and how it will be applied in the circumstances arising in *Chee*.

It is critical for our members to have a clear understanding of OSR's approach. Our members are generally only consulted on property sale contracts after the contract is signed. If there is likely to be an issue with their client's eligibility for FHOG because of the arrangements between the preceding developer and builder, our members must be able to advise their client immediately.

If the description on the Form 24 is to be determinative, our members will find it near impossible to advise their clients of the position unless the seller (builder) has provided the information to the buyer. Currently there is no legal obligation on a seller to do so.

We welcome any guidance that you can issue to the profession to ensure that they can properly advise their clients in such a situation.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

[redacted]

Luke Murphy
President