

COMMISSIONER'S GUIDELINE

CG-HI-008:

Separated spouses

Guideline History

Version	Issued	Dates of effect	
		From:	To:
1	28 August 2007	28 August 2007	31 December 2007
2	2 January 2008	1 January 2008	Current

Purpose

This Guideline explains the factors considered by the Territory Revenue Office (TRO) in exercising its discretion to disregard the marriage of separated spouses for the purpose of determining their eligibility for the first home owner grant (FHOG) and the stamp duty first home owner concession (FHOC).

Background

People are spouses if they are validly married under the *Marriage Act 1961* (Cth). Two people are in a de facto relationship if they are not married but have a marriage-like relationship or, if they are either Aboriginal or Torres Strait Islander, they are married according to the customs and traditions of the particular community of Aboriginals or Torres Strait Islanders with which either person identifies (see Commissioner's Guideline CG-HI-004: *De facto relationships*).

Two of the eligibility criteria of the FHOG and FHOC are that the applicant and their spouse or de facto partner must not have previously:

- 1) a. in the case of the FHOC, held a relevant interest¹ in a residential property where either of them has occupied the property as their place of residence;² or
 - b. in the case of the FHOG, either:
 - i. held a relevant property interest in residential property before 1 July 2000; or
 - ii. held a relevant interest³ in a residential property after 1 July 2000 where either of them has occupied the property as their place of residence;⁴ or
- 2) received and retained the FHOG or FHOC.⁵

¹ See section 88(1) of the *Stamp Duty Act* for the meaning of 'relevant interest'.

² See section 89(1)(e) of the *Stamp Duty Act*.

³ See sections 5(2), (3) and (4) of the *First Home Owner Grant Act* for the meaning of 'relevant interest'.

⁴ See section 11 of the *First Home Owner Grant Act*.

⁵ See section 10 of the *First Home Owner Grant Act* and section 89(1)(d) of the *Stamp Duty Act*.

These criteria also apply to a spouse or de facto partner whether or not they are an applicant for the FHOG and /or FHOC.

If these criteria are not satisfied, the applicant is ineligible for the FHOG and FHOC. For more information on the eligibility criteria, refer to Commissioner's Guideline CG-HI-001: *First Home Owner Concession and Principal Place of Residence Rebate* and the first home owner grant application form F-HI-001: *First Home Owner Grant*.

Married persons remain spouses despite separation

People who are married remain spouses until the marriage is legally dissolved. An applicant must include their spouse's details in their application despite the fact they may have separated and have no intention of resuming cohabitation.

Discretion to disregard a marriage

The requirement to include a spouse's details in an application can have unintended consequences where the parties are separated, but not divorced. The following provides an example of this scenario.

Bill and Joan are married but have separated with no intention of resuming cohabitation. Neither has previously owned a home.

If Bill purchased a home, subject to satisfying the remaining criteria of the home incentive schemes, he may be eligible for the FHOG and FHOC. However, his ownership would disqualify Joan from receiving the FHOG or the FHOC until their marriage was legally dissolved.

To recognise this inequity, TRO has the discretion to disregard an applicant's spouse for the purposes of determining the applicant's eligibility for the grant, if satisfied that the parties have genuinely separated and have no intention of resuming cohabitation.⁶ The discretion can only be exercised by TRO at the time of determining the application. Furthermore, the onus is on the applicant to satisfy TRO that they are separated from their husband or wife and have no intention of resuming cohabitation.

Legal test of separation

The phrase 'married but not cohabiting with the person to whom the applicant or conveyee is married' has its ordinary meaning in the context of the breakdown of a marriage. It is directed at the effective severance of the marital relationship, rather than directed at the physical separation of the spouses from living together in a particular dwelling.

Accordingly, physical separation of the parties to a marriage is neither necessary nor a sufficient condition to establish that they are not cohabiting for the purposes of the home incentive schemes. For example, married persons often do not regard themselves as separated in a marital sense, even though they are living apart for a period of time. An example of this is where a member of the Australian Defence Force is separated from their spouse due to an international assignment.

⁶ Section 6 of the *First Home Owner Grant Act* and section 88(2) of the *Stamp Duty Act*.
CG-HI-008
Page 2 of 5

Before exercising the discretion to disregard a marriage, TRO must be satisfied that the following three elements exist to establish that married persons are not cohabiting.

- 1) An intention on the part of at least one of the married persons to sever or to not resume the marital relationship.
- 2) Action upon that intention.
- 3) Unequivocal communication of that intention to the other person.

TRO will compare and contrast the relationship that existed in the period prior to the time of the alleged breakdown of marriage with that which remains afterwards.

Matters considered to determine whether separation has occurred

To determine whether people are not cohabiting at the material time, TRO must take into account all the circumstances and facets of their relationship, using the diversity of relationships between married couples as a reference point, which may include unconventional relationships.

TRO must look at the composite picture obtained without isolating or over-emphasising individual factors, such as the financial aspects of the relationship, and taking into account the scope for differences in current attitudes and activities to determine whether those people have ceased cohabiting.

Generally, TRO will have regard to the following six broad categories in determining whether a married couple has ceased cohabitation. However, TRO will have regard to all the material facts of each case, treating the six categories set out below only as indicators.

- 1) The financial arrangements between the parties.
- 2) The arrangements put in place for the care of children.
- 3) Any sexual relationship that may exist between the parties.
- 4) The accommodation and domestic arrangements between the parties.
- 5) The social relationship between the parties.
- 6) The commitment between the parties.

The decision will not be made by treating these categories as a 'check list' and commenting on each item on the list.

The specific matters that TRO will take into account under these six broad categories and the type of information required to be provided is the same as that set out in Commissioner's Guideline CG-HI-004: *De facto relationships* (pages 3 to 6) as the same characteristics are used to determine whether a relationship is 'marriage-like'.

Separated parties living under the same roof

Where it is claimed that the applicant and their spouse have separated, but continue to live under one roof, there will be some difficulty in establishing when the separation commenced or even that it has occurred at all.

It is important to note that separation (or non-cohabitation) commences when the three elements discussed above are in existence. Consequently, separation cannot begin until all elements are present.

In these cases, the onus is on the applicant to satisfy TRO that the three elements of separation exist.

Applications

Applications for the exercise of the discretion to disregard a marriage must be made to TRO at the time of making application for the FHOG and/or FHOC. The application must be in the form of a statutory declaration addressing the matters referred to above. In addition, the statutory declaration must also include:

- 1) the full name and date of birth of the applicant's spouse;
- 2) the date they were married;
- 3) the date they separated;
- 4) their spouse's current address (if known); and
- 5) a statement to the effect that the applicant and their spouse have ceased cohabiting and have no intention of resuming cohabitation.

The application should be supported by all relevant evidence that supports the applicant's declaration, particularly where the parties are still living under the same roof. This may include declarations from third parties, evidence of commencement of divorce or maintenance proceedings or recognition of the parties' separation by government agencies, such as Centrelink.

Applicants who lodge a FHOG application through an approved agent (such as a bank) may seek a determination from TRO prior to lodging their application. In these circumstances, a copy of the completed application form must be lodged with TRO. In completing the application for the FHOG and/or FHOC, applicants must include their spouse's details, but are not required to obtain a separate declaration from their spouse unless TRO does not exercise its discretion to disregard the marriage.

Factors considered by TRO

TRO will have regard to the statutory declaration of the applicant and supporting evidence. It may also conduct inquiries with other parties, including the applicant's spouse, to satisfy itself that the parties have genuinely separated and have no intention of resuming cohabitation.

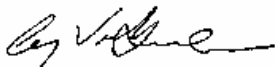
Factors that may influence TRO's decision include, but are not limited to the following.

- 1) Whether the parties are living apart and the period of separation. The longer the period, the more likely it will be regarded as a genuine separation with little prospect of cohabitation recommencing.
- 2) Where the parties are living under the same roof, whether that situation is intended to be temporary, long-term or even permanent. For example, a temporary arrangement could occur where one of the parties is looking for other accommodation or where the parties are in the process of disentangling their financial commitments.
- 3) Whether the parties have previously separated, but resumed cohabitation.
- 4) Whether the parties have commenced proceedings, including instructing their legal representative, to dissolve the marriage or to settle property and maintenance arrangements.
- 5) Whether the spouse of the applicant is ineligible for the FHOG and/or FHOC. In these circumstances, having regard to other factors, TRO would need to be satisfied that the separation is not a 'sham' to obtain the benefit of the FHOG and/or FHOC.
- 6) Whether the separation has been recognised by a government agency such as Centrelink.

Commissioner's Guideline CG-GEN-001, which sets out information on the revenue publication system, is incorporated into and is to be read as one with this Guideline. All Guidelines are available from TRO's website.

Date of effect

This version of the Guideline takes effect from 1 January 2008.



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COMMISSIONER OF TERRITORY REVENUE

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