

FIRST HOME OWNERS ACT 1983

- MULTIPLE OCCUPANCY DEVELOPMENTS

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ADVICE

OPINION

AUSTRALIAN GOVERNMENT SOLICITOR
D.X. 444,
SYDNEY

Attn: Mr I. Craigie

1. In this matter my Instructing Solicitor acts for the Department administering the First Home Owners Act, 1983 ("FHO Act").

2. The Act provides for financial assistance to persons who have entered into contracts for the purchase of dwellings or contracts for the construction of dwellings or who have commenced the construction of dwellings on land situate in Australia.

FHO S

3. The express object of the Act is to encourage and assist persons to purchase or build their own homes, and, in the construction and the administration of the Act regard shall be had to that object.

4. Advice is sought in relation to the application of the Act to persons constructing or arranging the construction of a first home in areas which are broadly described as "multiple occupancy" areas.

5. In New South Wales, particularly in the north eastern section, there have developed a number of areas where persons seeking an "alternative lifestyle" have come to live. The New South Wales Government has encouraged this development to some extent by providing planning frameworks within which development is permissible with Council consent.

6. One reason why young people particularly are attracted to these areas is that it enables them to set up a first home of their own at a relatively modest cost. Accordingly, they are persons whom the First Owners legislation is designed to assist.

7. Some doubts have arisen as to whether the machinery drawn up to give effect to the multiple occupancy developments would give rise to a subdivision within the meaning of S.4 of the Local Government Act, 1919 (as amended) so as to require the elaborate procedures set out in Part XII of the Act to be followed before the land can be lawfully subdivided.

8. I have been briefed with sets of documents which set up the legal machinery and also with a copy of a Draft State Environmental Planning Policy for New South Wales concerning Dwelling Houses in Rural Areas (Multiple Occupancy).

9. If under the legislation which applies in New South Wales a multiple occupancy agreement does give rise to a "subdivision" within the meaning of the Local Government Act then it is necessary for such subdivision to be approved under that Act and the Environmental Planning and Development Act.

10. The development consent under the Environmental Planning and Assessment Act concerns strictly town planning considerations applicable to multiple occupancy development whereas the subdivision controls under Part XII of the Local Government Act are concerned with various

circumstances which are fully set out in Sections 332 and 333 of that Act.

11. The concern of my Instructing Solicitor is whether the ownership legal mechanisms set out constitute illegal subdivisions pursuant to the Local Government Act, 1919 and whether assistance under the FHO Act could be provided in respect of them in the event of such illegality.

12. My advice is sought on a number of specific questions in relation to the five legal arrangements which have been placed before me.

13. The relevant provisions of the Local Government Act, 1919 are as follows:

"S.4 'Subdivision,' 'subdivide,' and similar expressions mean and refer to dividing land into parts, whether the dividing is -

- (a) by sale conveyance transfer or partition; or
- (b) by any agreement dealing or instrument inter vivos (other than a lease for a period not exceeding five years without option of renewal) rendering different parts thereof immediately available for separate occupation or disposition; or
- (c) by procuring the issue of a certificate of title under the Real Property Act, 1900, in respect of a part of the land;

but do not include -

- (a) any division of land by following the boundaries of lots or portions in a Crown plan; or
- (b) by severance of land by the opening of a public road; or
- (c) any division of land upon disposal by the Crown made either before or after the commencement of this Act; or
- (d) any division of land in accordance with the boundaries of lots in any subdivision lawfully made either before or after the commencement of this Act."

"Land' includes a mine, and also includes any river, watercourse, or inland water, tidal or non-tidal."

PART XII

TOWN PLANNING

Division 2 - New Roads and Subdivision

327.(1) Subject to the provisions of this Act a public road shall not be opened, and in a case where a subdivision provides for the opening of a public road land shall not be subdivided until--

- (a) an application in respect thereof accompanied by plans and specifications thereof has been approved under this Act; and
- (b) the roads have been constructed and drained to the satisfaction of the council in accordance with the approved application, plans, and specifications, and with any conditions attached to any such approval; and
- (bi) where the Tribunal has made a requirement referred to in subsection (1) of section 342BG in respect of the subdivision--that requirement has been complied with; and
- (c) the applicant has placed in the road permanent survey marks in the position and manner and of the character prescribed; and

- (d) the town or shire clerk has certified to the applicant that the requirements of the Act have been complied with ...

...

- (e) a plan of the road or of any subdivision containing the road (such plan bearing the signatures of all necessary parties, a statement containing such particulars as may be necessary to identify the title to the land comprised in such plan, and the aforesaid certificates) has been registered in the office of the Registrar-General.

Paragraph (c) shall not apply, and shall be deemed never to have applied, where the road to be opened, or the road provided for in the subdivision, is a lane or pathway nor to a widening of a public road.

(2) In the case where a subdivision does not provide for the opening of a public road, land shall not be subdivided until--

[(a) - (c) Sets out a similar procedure to be followed to that under sub-paragraph (1)]

(3) Nothing in this section shall be deemed to render any agreement to sell, let or otherwise dispose of any land illegal or void by reason merely that it is entered into before an application in respect of the subdivision has been approved by the council, but the agreement shall be deemed to be made subject to such approval being obtained."

S.327AA

"(2) Notwithstanding the provisions of subsection (12) of section 196 of the Conveyancing Act, 1919, where any land is included in a current plan, that land shall not be disposed of by way of sale, conveyance, transfer, partition or lease (other than a lease for a period not exceeding five years without option of renewal) unless the land is a lot or portion

shown in the current plan and the Registrar-General may refuse to register any instrument evidencing any disposition that contravenes the provisions of this subsection."

14. Sections 332 and 333 as mentioned above set out an elaborate framework of considerations to be considered by the Council before granting subdivision approval under Part XII of the Local Government Act.

15. The relevant provisions of the First Home Owners Act, 1983 are as follows:

"4. (1) In this Act, unless the contrary intention appears--

'approved interest' means--

- (a) an estate in fee simple;
- (b) an interest as purchaser of an estate in fee simple from the Crown in right of a State or of the Northern Territory where payment of the purchase price is to be made by instalments over a period of years;
- (c) an estate for life approved by the Secretary for the purposes of this Act;
- (d) a lease for a term of years if the Secretary is satisfied that the lease gives reasonable security of tenure to the lessee for a substantial period;
- (e) a licence or right of occupancy from the Crown in right of the Commonwealth, of a State or of the Northern Territory if the Secretary is satisfied that the licence or right of occupancy gives reasonable security of tenure to the licensee or holder of the right;

- (f) an interest of the kind referred to in section 11; or
- (g) any other interest declared by the regulations to be an approved interest for the purposes of this Act;"

'rural property' means land used wholly or substantially for carrying on the business of primary production."

"9. (1) A reference in this Act to purchase, or to ownership, in relation to land or an undivided share in land, shall be read as a reference to purchase or ownership, as the case may be, otherwise than as trustee, of an approved interest in the land or in the undivided share, as the case may be.

(2) A reference in this Act to purchase, or to ownership, in relation to a dwelling, shall be read as a reference to purchase or ownership, as the case may be, otherwise than as trustee, of--

- (a) whether or not the dwelling is a dwelling of a kind referred to in paragraph (b)—the land on which the dwelling is, or is to be, erected; or
- (b) where the dwelling is, or is to be, a part of a building or is, or is to be, one of two or more dwellings separately erected on a single parcel of land--
 - (i) an approved interest in the dwelling in pursuance of a law of a State or internal Territory that enables the holding or enjoyment by different persons of proprietary rights in respect of different parts of that building or of different buildings erected on that parcel of land, as the case may be;
 - (ii) shares in the capital of a body corporate that is the owner of the land on which the dwelling is, or is to be, erected, being shares that entitle the holder to a right of occupancy (whether

under a lease or otherwise) in respect of the dwelling where the Secretary is satisfied having regard to such matters as the Secretary considers relevant, that the value of the holder's interest in the shares is not less than the value of the holder's interest in the dwelling; or

- (iii) an undivided share in the land on which the dwelling is, or is to be erected."

"11. Where

- (a) on or after 1 October 1983, a person has, or persons together have--

- (i) entered into a contract for the construction by a building-contractor, on land situated in Australia, of a dwelling the construction of which commenced on or after that date; or
- (ii) commenced to construct a dwelling on land situated in Australia, otherwise than through a building-contractor; and

- (b) the Secretary is satisfied that the land forms part of a rural property owned by another person (whether that other person holds the land as a trustee or not) who has given permission to the first-mentioned person or persons to occupy the dwelling when completed,

then, for the purposes of this Act, that permission shall be deemed to create an interest in the land in favour of that first-mentioned person or those first-mentioned persons, and the first-mentioned person or those first-mentioned persons shall be deemed to be the owner or owners of that interest."

"12. (1) Where--

- (a) a person holds an interest in land, or in a dwelling, in trust for any other person

or persons (in this sub-section referred to as the 'beneficiary' or 'beneficiaries', as the case may be); or

(b) a person has, alone or together with any other person or persons, entered into a contract for the purchase of land or a dwelling, and an interest in the land or dwelling is to be held by the first-mentioned person in trust for any other person or persons (in this sub-section also referred to as the 'beneficiary' or the 'beneficiaries', as the case may be), not being any of the persons who so entered into the contract,

and the Secretary is satisfied that the beneficiary or beneficiaries will become the owner or co-owners of the interest referred to in paragraph (a) or (b), as the case may be, the beneficiary or beneficiaries shall, for the purposes of this Act, be deemed to be the owner or co-owners of the interest referred to in paragraph (a) or to have entered into the contract for the purchase of the land or dwelling, as the case may be."

16. The first question on which I am asked to advise is as follows:

- (1) Do the legal structures or arrangements adopted under cases A, B, C and D referred to in the Index of Documents amount to a "subdivision" of land within paragraph (b) of the definition of that term in section 4 of the Local Government Act 1919 (NSW)?

17. Although the question is by no means free from doubt and there is no authority squarely in point it is my view that the dealings or arrangements adopted under cases

A, B, C and D briefed to me to amount to a subdivision of land within paragraph (b) of the definition of subdivision in the Local Government Act.

18. The relevant wording is that "subdivision" means and refers to dividing land into parts whether the dividing is by any agreement dealing or instrument inter vivos (other than a lease for a period not exceeding five years without option of renewal) rendering different parts thereof immediately available for separate occupation or disposition. To come within the exemption from the definition it is necessary to establish that there is a lease for a period not exceeding five years.

19. In relation to the first set of documents briefed to me which concern the Trust which comprise a Deed of Trust, a Deed of Lease, Application for units, and a Unit Certificate, I consider that the documents together constitute a dealing or arrangement inter vivos rendering different parts of the land immediately available for separate occupation or disposition. The Deed of Trust relates to land (as distinct from a building on the land) and provides in paragraph 15(b) that the areas of land numbered 1 to 128 on a plan shall be leased to a unitholder and that part of the land shall be set aside for sole occupation by a unitholder or unitholders. There is provision in clause

15(d) for a lease to be granted to each unitholder allowing that unitholder to solely occupy part of the said lands numbered on the plan annexed thereto as coincides with his name. Since exclusive possession is conferred I consider that there is a "lease" as opposed to a mere licence. The Deed of Lease provides for a lease of a specified portion of the land for a period which is less than five years. Thereafter by clause 8 of Section 1 of the Lease the lessee will hold over as a lessee from year to year on the same terms as are set out in the lease with either party being able to terminate the lease upon one year's notice in writing. In form therefore there is a lease for a period less than five years with a holding over from year to year. However, there is a proviso to clause 8 as follows:

"Provided that the lessor shall not be entitled to serve such notice whilsoever the lessee complies with the covenants on his part herein contained and remains the owner of the unit in the trust hereinbefore recited to be owned by the lessee and allocated to this lease."

20. By Section 2 clause 6 the lessee can only use the demised premises or permit the same to be occupied or used as a private dwelling house area for the lessee and his family or for any agricultural or grazing pursuit as may be approved by the lessor.

21. Section 2 clause 12 provides that the lessee will not part with possession, sub-let or withhold any part of

the demised premises without the lessor's written consent. Under clause 13 in the event that the lessee should die during the term of the lease the Board of Directors or the other lessees holding units in the trust shall not unreasonably withhold consent to any transfer of the unit or the lease as the lessee may make in his Will through the acts of his or her administrator or executor to a financially responsible member of the lessee's immediate family.

22. Section 3 clauses 1(f) and (g) there is power reserved to the Board of Directors of the lessor by 75% majority to terminate the lease.

23. Having regard to the above clauses and reading the Lease and the Trust Deed together it is not possible in my view to categorise the lease as being a lease for a period not exceeding five years because it cannot be terminated while the lessee complies with the covenants and remains the owner of the unit in the trust. The lease is analagous in my view to a lease for life however it cannot be categorised as such in my opinion having regard to the power of the lessor under Section 3 clause 1(f) to terminate the leases.

24. Accordingly, I consider that it is difficult to precisely state the duration of the lease but I do not

consider that it can be described as "a lease for a period not exceeding five years without option for renewal".

25. I consider that the lease renders different parts of the land immediately available for separate occupation or disposition because clauses of the lease to which I have referred to above make it quite clear that the lessees are to have exclusive and sole rights to occupy certain portions of the total area of land.

26. It could no doubt be argued that the lease is one for less than five years because it is expressed to be for a period between two to three years with a holding over clause from year to year. However, the Proviso to Section 1 clause 8 to the effect that the lessor shall not be entitled to serve a notice of termination while the lessee complies with the covenant and owns the unit, takes the lease out of the category of being one for a term of less than five years. This restraint on the lessor from serving a notice effectively converts the term in my view to one which is capable of being for a period in excess of five years.

27. Although the documents are not identical in substance I take the same view in relation to the documents which are set out under (B). In particular 2(a)(i) and (ii) make it clear that there shall be leases

to members of the company of areas designed for sole occupation and although the lease uses the same drafting device as the "A" documentation in granting a term with a year to year holding over clause and with a restraint on the giving of notice terminating the holding over, I am of the opinion that the lease cannot be described as one for a term of less than five years. It is clear from the documentation that the lessee is intended to have exclusive occupation of the area leased.

28. In relation to the documentation briefed to me and described as "C" it is clear that the lease is intended to provide for exclusive occupation and use of a site set opposite the lessee's name.

29. The documentation referred to as "C" comprises a deed between the owners of a parcel of land who are registered proprietors as tenants in common in equal shares of a parcel of land. They propose to apply to the Council of the City of Lismore for rezoning of the land to permit its use for a multiple occupancy. The deed provides in clause 2 that each of the owners shall at all times whilst they remain as a registered proprietor of the land have the exclusive possession use and enjoyment of the site set out opposite his or her name in the First Schedule. By clause 3 the owners (the parties named in the First Schedule) shall have the right in common with

other owners to use and occupy the common areas shown on the site plan as common areas. Again, I consider this to be an agreement for a period which does not satisfy the requirements of the proviso to the definition in Section 4 which is quoted above. The period is an indefinite one and the right to occupy exclusively exists during an indefinite period and could not be accurately described as being a period of less than five years.

30. In relation to the documentation described as "D" there is a deed dated 10 March, 1985 by the Co-Operative Society Pty. Limited and the holders of shares in that Society who by exclusive possession use and enjoyment of specified lots is given to the shareholders. There is no fixed term the lessee has an entitlement to exclusive possession use and enjoyment for an indefinite period. Again, in my view this not come within the exception to the definition of subdivision to which I have referred above.

31. The fifth document which is referred to as "G2" in the fifth set of documents which is referred to as "G1-G3" does not in my view constitute a subdivision. These documents relate to the use of part of "a building". In Re Lehrer and The Real Property Act, 1900 6 LGRA 122 Mr Justice Jacobs expressed the view that the lease for a period in excess of five years of the upper part of a

building did not amount to a subdivision of land within the meaning of Section 4 of the Local Government Act. In the course of his judgment His Honour made the following statements:

"My conclusion is that the word 'land' at common law prima facie includes buildings on the soil, but is not appropriate to describe the building alone or any part thereof, even if it be the subject of an interest in realty separate from the soil itself." (127)

"There are other sections of the Act which distinguish specifically between land and building - see for example sections 518, 519 and 524 - but I do not find it necessary to do more than refer to them. For all these reasons I am of the opinion that a lease for more than five years of a part of a building distinctly from the soil does not effect a subdivision within the meaning of section 4 of the Local Government Act."

32. It is clear from the plan which has been briefed which is designated "G3" that unit 20 in respect of which the right to occupy is given by the deed is one section of a single building.

33. Accordingly, for the reasons given I am of the opinion that the documents A, B, C and D effect a "subdivision" within the meaning of section 4 of the Local Government Act. I do not consider that documentation G1-G3 does give rise to such a "subdivision".

34. The second question is:

- (2) If yes to (1), in each of the cases referred, is there a breach of the provisions of the Local Government Act, and in particular Part XII?

35. In my view the provisions of the Local Government Act have not been complied with and to that extent there is a breach in respect of the documentation A, B, C and D.

36. The third question is:

- (3) If yes to (2), is the "agreement dealing or instrument" creating the subdivision illegal; if illegal, is the "agreement dealing or instrument" void, and if so to what effect?

37. Section 327(3) expressly provides that nothing in that Section shall be deemed to render any agreement to sell, let or otherwise dispose of any land illegal or void but the agreement shall be deemed to be made subject to such approval being obtained. Accordingly, it would be open to the purchasers and/or the vendor to put in an application to the Council seeking approval to the subdivision. I therefore answer question (3): No. However, in some instances the specific planning legislation may prohibit subdivisions for the purpose of multiple occupancies. In these cases I consider that

since the Zoning prohibits the subdivision then it will be illegal.

38. The fourth question is:

- (4) Does the fact that 'development' of the land has been approved, particularly in a case where to consent does not expressly prohibit subdivision, affect the answer to questions (2) and (3) and if so, how?

39. No, because the consent to the subdivision as development of the land under the Environmental Planning and Assessment Act does not amount to a consent to the subdivision of the land under Part XII of the Local Government Act.

40. The fifth question is:

- (5) Would the proposed State Policy (document F) if enacted affect the answer to questions (1) and (3) above and if so, how?

41. Yes, because that draft policy expressly prohibits subdivision. See Clauses 6(1)(a), 9(1) and note the reference to a single allotment of land in clause 2(a).

42. The sixth question is:

- (6) If the above arrangements create illegal subdivisions does it follow that such arrangements may not be relied upon as a basis of entitlement to assistance under the FHO Act?

43. Yes. If dwellings are constructed by individuals pursuant to arrangements or dealings which effect a "subdivision" without approval I consider that the appropriate course would be to refuse assistance under the Act until satisfactory evidence could be produced that approval to subdivision had been granted or that the relevant provision of the legislation had been amended to permit legal mechanisms such as those briefed to me to be carried out without the necessity for subdivision approval under Part XII of the Local Government Act.

44. The seventh question is:

- (7) Do the structures referred to in attachments A, B, C and D create interests recognised by the FHO Act?

45. In my opinion yes as to A and B if the Secretary is satisfied that the lease gives reasonable security of

tenure to the lessee for a substantial period. See the definition of approved interest in Section 4(1) paragraph (d). It does seem to me that in relation to documents A and B there is a lease for a term of years with reasonable security of tenure for a substantial period. It would therefore be open to the Secretary to be satisfied on this matter. In relation to document C I consider that it could be properly described as being an estate in fee simple. Compare DGSS v. Townsend 57 ALR 220. As to D I consider that this gives exclusive possession and therefore a lease for an indefinite period. As to G(2) this confers a right to occupy for life and could be considered as a life interest or estate.

46. The eighth question is:

- (8) Advice generally.

47. It is my view that the legal mechanisms adopted in four of the cases (A - D) placed before me effect "subdivisions" within the definition in Section 4 of the Local Government Act. Accordingly, until the approval of the Council has been given to such subdivision then the arrangements do not comply with Part XII of the Local Government Act because they constitute a letting of land before an application in respect of the subdivision has been approved by the Council. This means that any

building which is to take place on the land, in respect of which consent must be obtained under Part XI of the Local Government Act will take place on parcels of land created by an arrangement which is in breach of the Local Government Act Part XII. In these circumstances it is my view that the grant authority is justified in requiring that there be shown to the full compliance with the requirements of the Local Government Act and the Environmental Planning and Assessment Act before grants are made.

48. In the Draft State Environmental Planning Policy concerning multiple occupancy clause 14 provides for the suspension of certain laws. Wide power is given in Section 28 of the Environmental Planning and Assessment Act, 1979 to provide that legislation shall not apply to certain types of development. This power would in my view be wide enough to enable Part XII of the Local Government Act to be made inapplicable in relation to multiple occupancy developments. An amendment could be made to clause 14 of the Draft Policy to this effect. A consequential amendment would be necessary to other Clauses of that Policy also.

49. Since the New South Wales Government clearly is in favour of such development taking place as is evidenced by a number of Interim Development Orders having been made

specifically relating to such development particularly in the north eastern sector of the State I consider the appropriate course would be for it to make any necessary amendments to the proposed State Environmental Policy which would exempt legal arrangements of the type in question from the necessity to comply with the procedures laid down in Part XII of the Local Government Act.

Brian Tamberlin

 Brian J. Tamberlin *Q.C.*

SELBORNE CHAMBERS:

6 December, 1985

PA 712 Keep if you wish



ADMINISTRATIVE APPEALS TRIB

Home Deposit Assistance - prior ownership of a house property by one of the applicants - whether that former property constituted a principal place of residence - extent of time used for that purpose - whether property could be taken to be a dwelling for the purposes of s. 18; Re Becze followed - suitability of dwelling in context of prescribed persons and their family.

Words and phrases - "dwelling"

Home Deposit Assistance Act 1982 ss. 3,4,15,18
Administrative Appeals Tribunal Act 1975 s. 37
First Home Owners Act 1983 s. 4

Hobbs v London and South Western Railway Co. (1875)
L.R 10 QB 111.
Wood v Wood (1947) P.103
Re D.R. Owen and The Secretary Department of Environment, Housing and Community Development No. 77/124 (decided 16 August 1978)
Re Mrs V.G. No. V85/390 (decided 4 April 1986)
Re Lumanovski and the Director - General of Social Security No. V82/120 (decided 29 October 1982)
Re Becze and the Secretary Department of Housing and Construction No. N85/289 (decided 12 May 1986)

DECISION AND REASONS

Re : AMANDA GAYE AND PETER JOHN BLOM
And : THE SECRETARY, DEPARTMENT OF HOUSING AND
CONSTRUCTION
No. N/85/520
Tribunal : MR B.J. McMAHON (SENIOR MEMBER)
DATE : 2ND JUNE, 1986

ADMINISTRATIVE APPEALS TRIBUNAL)
)
GENERAL ADMINISTRATIVE DIVISION)

NO. N85/520

Re : AMANDA GAYE AND
PETER JOHN BLOM

Applicant

And : THE SECRETARY,
DEPARTMENT OF HOUSING
AND CONSTRUCTION

Respondent

DECISION

Tribunal : MR B.J. McMAHON (SENIOR MEMBER)

Date : 2 JUNE 1986

The decision under review is affirmed.

(sgd.) B.J. McMahon.

.....
B.J. McMAHON
Presiding Member

ADMINISTRATIVE APPEALS TRIBUNAL)
)
GENERAL ADMINISTRATIVE DIVISION)

No. N85/520

Re : AMANDA GAYE BLOM AND
PETER JOHN BLOM

Applicant

And : THE SECRETARY
DEPARTMENT OF HOUSING
AND CONSTRUCTION

Respondent

REASONS FOR DECISION

This is a review of a refusal of an application for assistance under the Home Deposit Assistance Act 1982 (the Act). The application was made on 24 October 1983 in respect of the purchase of a dwelling known as 78 Hoyle Drive, Blacktown. The applicants had entered into a contract to buy this property on 19 July 1983. The problem that confronted the applicants was that one of them, Peter John Blom, had previously owned a home jointly with his former wife, Leonie May, at 12 Peter Pan Avenue, Wallacia. Prima facie, this would be a bar to a grant by virtue of the provisions of s. 18 of the Act. The relevant parts are as follows:

"18. (1) A grant in respect of a dwelling shall not be made to a sole applicant if the applicant has, or to joint applicants if any of the joint applicants has or have, before the prescribed date, (whether alone or together with another person or other persons)-

(a) owned another dwelling in Australia; or

...

(2) Sub-section (1) does not apply in relation to the ownership of a dwelling, or the entering into a contract for the purchase of a dwelling, by a person or persons if the Secretary is satisfied that it would be unreasonable to regard that dwelling as the principal place of residence of the person or of those persons."

The "prescribed date" referred to in sub-section (1) is determined by reference to ss. 4(1) and 15 of the Act. In the case of persons contracting to purchase a home, it is the date of the purchase contract, in this case 19 July 1983.

There was no issue that Mr Blom had been a joint proprietor of the Wallacia home from 13 October 1977 until 1 September 1981, that is prior to the applicants' prescribed date. A copy of the relevant certificate of title formed part of the documents furnished pursuant to s. 37 of the Administrative Appeals Tribunal Act and this clearly corroborated that fact. It was not in any event denied by Mr Blom.

The first question to be decided, therefore, was whether it would be unreasonable to regard the Wallacia dwelling as the principal place of residence of Mr Blom. He gave evidence that he occupied the home jointly with his former wife Leonie for a period of six months from October 1977 to March 1978 when their marriage broke up. Their two small children lived with them during this period. Mr Blom moved out and lived with his sister and brother-in-law for a period of eighteen months, then with his parents until his marriage to his present wife, Amanda, in November 1981. From March 1978 when he left the Wallacia home, until December 1979, Leonie and the two children continued to live there. When she left, she flew back to New Zealand with the two children and the house remained empty until it was sold in July 1981.

During the six months that he lived at Wallacia the applicant, Mr Blom, had no other residence. In those

circumstances it is hard to see how the Wallacia property could not be regarded as his principal place of residence, if it was his only place of residence. The section is silent as to the extent of time that a property must be used for this purpose if it is to fall within the terms of sub-section (2). Would one day be enough? If not, would two days, or a week, or a month? Drawing a line is always a difficult task. As was said in Hobbs v London and South Western Railway Co. (1875) L.R. 10 QB 111 at 121:

"It is a vague rule, and as Bramwell, B, said it is something like having to draw a line between night and day; there is a great duration of twilight when it is neither night nor day; but on the question now before the court, they cannot draw the precise line, you can say on which side of the line the case is..."

More recently in Wood v Wood (1947) P 103 at 106, Lord Merriman put it this way:

"One can, of course, add grains of corn together, and there must come a time when they become a heap. You can say that it is impossible to know where to draw the line; yet you can say that one case or another must plainly be on the wrong side of any line you can possibly draw."

At one extreme, Smithers J. in Re D.R. Owen and the Secretary, Department of Environment, Housing and Community Development No. 77/124 16 August 1978, thought that any period of residence would be sufficient. He said:

"I do not doubt that the time with respect to which s. 18(2) speaks is any time before the prescribed date i.e. before the signing of the contract referred to in s. 15 (1)(a). It is not only the date of acquisition that may be relevant, and not only the instant immediately before the signing of the contract, but any time before the

prescribed date, namely, the date of the signing of the contract for the house the subject of the application for the grant."

Mr Blom's occupation of the house was for considerably longer than 'any time'. Wherever one draws the line, his case must fall on the wrong side of it. The period of residence in the present application (6 months) was the same as that considered in Re Mrs V.G. V85/390 4 April 1986. The Tribunal in that decision had no difficulty in accepting that residence for such a period fell within the terms of sub-section (2) of s. 18.

During his six months at Wallacia, the applicant lived with his wife and two children as a nuclear family. It did not appear from the evidence that Leonie had any other residence, nor did the children. The circumstances were quite different from those considered in Re Lumanovski and the Director-General of Social Security V82/120 29 October 1982, where several families intermingled within the same house on a tentative basis pending the migration of other members of the respective families. In the present case although with hindsight it may appear that long term plans of a family home of indefinite duration were not fulfilled, nevertheless looked at objectively, it cannot be denied that the applicant Mr Blom was "living" at Wallacia for an appreciable period of time. There was positive evidence that he did not "live" at any other residence. He presumably slept at Wallacia every night. The property was purchased as the principal family home, indeed the only family home in 1977.

I cannot see how it can be successfully argued that it would be unreasonable for the respondent to regard the Wallacia

dwelling as the principal place of residence of Mr Blom during the period contemplated by the section. It clearly was his principal and only place of residence at that time.

The real issue that arises is whether the Wallacia property could be taken to be a dwelling for the purposes of s. 18.

Section 4(4) of the Act is in the following terms:

"(4) For the purposes of this Act, a dwelling shall not be taken to be a dwelling, in relation to a person or persons, if the Secretary is satisfied that it would be unreasonable to regard that dwelling as suitable for the purposes of constituting the principal place of residence of the person or persons."

As the sub-section is linked by its terminology with s. 18(2) it seems to me that the enquiry should be limited, in considering the suitability of the premises, to the period during which the applicant regarded the property as his principal place of residence, that is from October 1977 to March 1978.

Mr Blom and Leonie purchased the home for \$21,750. It was of fibro construction with a tin roof. It was on an average sized block of land and had a garden which had been created by the previous owners. It had basic amenities such as electricity, running water, hot water and a septic service. It was undoubtedly very small. Its size was subsequently estimated by a council inspector to be 70 square metres. It contained 1 1/2 bedrooms, (a master bedroom and a small child's bedroom) and a combined bathroom and laundry. Mr Blom gave evidence that it was in poor repair and was damp. The continuous dampness had caused

part of the ceiling to sag. He also gave evidence that there was seepage from the septic tank whenever there was an excessive use of water. He had been informed by the people to whom the house was subsequently sold that they were required to build certain extensions on to the house in order to meet the specifications of their Building Society. Nevertheless he was not aware of any outstanding notice from the local council during his ownership, requiring any works to be done in or about the property.

His evidence was supported by way of letters from three persons, Mrs Lalor, Mr Rogers and Mrs Sloan. These letters were in the following terms omitting formal parts:

"In relation to the residence at Peter Pan Ave, Wallacia in my opinion the inside of the house wasn't big enough for a family of four. The size of the rooms were very small all the rooms in the house were small in fact, but what remains vivid in my mind were the children's rooms it was only big enough for double bunks thats all, and then I saw what was called the master bedroom that was at the end of the hallway in between the kid's room and bathroom, the house I feel was only suitable for one person, the only thing this house had going for it was the block of ground it was standing on and at the time Mr Blom sold the property the "only" thing of value was the land, also the outside of the house had a lot left to be desired. In closing the house in question wasn't worth living in with a family."

Mrs S.E. Lalor,
33 Windrush Crt.,
St Clair 2759

"The accommodation at the above address was cramped, in size only 6 1/2 squares. The front door opened straight onto the kitchen and eating area, to the left was the lounge room, to the right a hall which had to be used as the master bedroom. This hall accessed the rest of the house, a bedroom large enough only for a double bunk, a combined laundry, toilet and shower which led to the back yard.

Continuous dampness had caused damage to the eastern side of the house, the ceiling and walls were bowing and the window sills in the lounge and bedroom rotting, and

a musty smell always evident. Considerable corrosion was eating into the corrugated iron roof and the guttering.

I visited the house several times, and to me, it did not appear to be suitable or fit, long term family accommodation."

Mr L.J. Rogers,
190 Joseph Banks Drive,
Kings Langley 2147

"In regards to the condition of the ex-residence of Mr Peter Blom. In the few times that I saw the house it was obvious to me that the house was in very poor condition, being very, very run down and the overall appearance of the house was in my opinion in a bad state of repair.

I thought that the interior of the house wasn't much better and my first thought was that it was far too small for two children as the bedroom that they shared was barely big enough for the bunk bed which they slept in. What was supposed to be the main bedroom was only the hallway between the children's bedroom and the laundry which all there was room for was the double bed. The bathroom and laundry were both together which really isn't very hygenic.

In short, my opinion of the house was that it was not suitable for a family to live in.

A. Sloan
6 Tyson Place,
Emu Plains 2750

Mrs Sloan gave oral evidence but did not elaborate greatly upon the terms of her letter.

Section 4(4) is concerned with the physical fabric of the building. To come within its terms and to show that a dwelling should not be taken to be a dwelling, it would be necessary in my view to demonstrate that the property is so dilapidated, dangerous or sub-standard as not to be fit for habitation. This was the view adopted in Re Becze and the Secretary, Department of Housing and Construction N85/289 12 May 1986. The Tribunal in that case concerned itself almost

exclusively with the safety of the building. Had its stability been assured it would seem from a reading of this decision that the Tribunal would have been prepared to regard the dwelling as reasonably being described as a dwelling. At paragraph 21 the Tribunal said:

"I accept that it is not the intention of the Act to enable everyone to apply for a grant if they could come forward with the proposition that the first house that they had was not as nice as they would have liked. In this matter I have had the benefit of an inspection of the premises and of an affidavit from the purchaser who by chance was a builder. The facts that have come out in this matter are such that it seems to me quite clear that the residence concerned was unsafe and was likely to collapse. The house, dilapidated as it is, standing on secure foundations I would have been prepared to regard it as suitable for constituting the principal place of residence of the applicant. In my view the fact that it has been shown to be unsafe and liable to collapse makes it unreasonable to so regard the dwelling."

"Dwelling" as such is not defined in the Act. The only reference to it is in the negative considerations set out in s. 4(4). Perhaps as a result of the experience in working with this sub-section, the concept was expanded in the Act's successor, First Home Owner's Act 1983, s. 4(2) of which reads as follows:

"A dwelling shall not be taken to be a dwelling for the purposes of this Act unless the Secretary is satisfied that -

- (a) the facilities it provides are such that it is reasonable to regard it as the principal place of residence of a person or persons; and
- (b) if any building standards are applicable to it - it complies with those standards."

The terms of a subsequent Act of course cannot be regarded as binding, let alone conclusively binding in the

interpretation of a similar term in its predecessor. Nevertheless it seems to me that the types of physical considerations spelt out in the later legislation were inherent in the earlier section. We have to concern ourselves with a dwelling qua dwelling and determine whether it is "suitable for the purposes of constituting the principal place of residence of the person or persons." The facilities available were all of those regarded as normal, or even indispensable, in an Australian suburban house. Wallacia is a semi rural area. There was no evidence that the house was significantly inferior to others in the area in the matter of design, rather than repair. There was no evidence that it did not comply with relevant building standards. As Mr Blom and Leonie bought the house shortly before the commencement of the relevant period, borrowing from Rural Building and Investment Society as mortgagee to assist in the purchase, I consider that I am entitled to infer that the usual enquiries of the Council disclosed no irregularity. The house presumably was erected with Council's consent and conformed with then existing regulations. A later letter from the Council in answer to a query from the respondent did not disclose any outstanding notices. Mr Blom, in evidence, said he was not aware of any outstanding Council notice.

I would accept the argument that in determining whether the Wallacia home was suitable for the purpose of constituting the principal place of residence of Mr Blom, one would have to consider at the same time whether it was suitable for the purposes of constituting the principal place of residence of Leonie and of his two children. Although "person or persons" (being the applicants) are referred to in this sub-section, it

seems to me unreasonable to regard the applicant in isolation as if he were a single individual. If the premises were not suitable for occupation by a family with whom a person normally resided, then it would not be suitable for that person.

However, "suitable" does not mean "desirable". The Shorter Oxford English Dictionary defines it as "fitted for, adapted or appropriate to". To my mind that does not mean "felicitous, congenial or particularly well adapted to". If a house is fitted for, adapted or appropriate to the occupation of a family, then it must be regarded, from a physical point of view, as a dwelling, no matter how its amenities are in need of improvement.

The Wallacia home may have been small and may have been in some disrepair and may have developed drainage problems. Yet nonetheless at the time that Mr Blom and Leonie bought it in 1977 they clearly regarded it as suitable for the residence of themselves and their children. After Mr Blom left the premises in March 1978 Leonie continued to live there for 19 months with the children. It was argued that as she had nowhere else to go that fact could not be taken into account in assessing the suitability of the premises. I cannot accept this argument. In the first place, it is established that she did eventually go to New Zealand. There is no evidence that this course was not available to her at any time during the 19 months period. But more importantly I consider that the factors to be taken into account for the purposes of sub-section (4) of s. 4 are physical factors, which have bearing on the fabric of the building, the use to which it is being put and the use for which it was

designed. The property was undoubtedly designed as a dwelling (Shorter Oxford English Dictionary - "a place of residence; a dwelling place, habitation, house"). It was built for that purpose and used for that purpose. It was sold for that purpose and subsequently refurbished for that purpose. It may have been small and it may have had some physical imperfections. These would not in my view standing alone, be sufficient to justify a view of the dwelling not being a dwelling for the purposes of the Act.

The present Mrs Blom, Amanda, considers that such a conclusion would be unfair to her and the present children she has had with Mr Blom. She pointed out in evidence that Mr Blom had not applied for any grant in respect of the Wallacia property and that he had made no profit from its sale because of the need to repay many debts left over after the breakup of his former marriage. She also pointed out that she herself has not previously owned any dwelling either alone or jointly and that this is her first application. At the very least she considered that she should be entitled to half the grant provided for under the Act. Undoubtedly it was this sense of injustice that was responsible for the present application going as far as it has.

Section 3 of the Act sets out the following objects:

"The objects of this Act are to encourage and assist persons to purchase or build their own homes and to encourage persons to save for the purpose of purchasing or building their own homes, and, in the construction and the administration of this Act, regard shall be had to those objects."

Whilst I am conscious of this injunction to have regard to the objects of the Act, I cannot conjure a section out of the air. There is simply no provision in the Act for payment of a partial grant in the circumstances for which Mrs Blom advocates.

She considered that the advice she had received might have been misleading and that she could have applied in her own name with a greater prospect of success. This however would not be so. Section 15(1) of the Act provides that each home acquirer is a prescribed person, together with their respective spouse and s. 16 requires each prescribed person in relation to a dwelling to join in the application for assistance. As was pointed out in Re Mrs V.G. (supra):

"It would appear from the legislation, read as a whole, that it was the intention of Parliament to ensure that one individual shall only receive a grant under the Act or its predecessors in respect of that individual's first purchase of a dwelling; and further, to ensure that two people who are living together as a married or de facto couple so as to form one household, should, between them, receive a grant only in respect of what is for both of them the first purchase of a dwelling."

It is true as the Tribunal there further noted, that the Act may be seen as favouring households in which the members are neither married nor living in a de facto relationship and the dwelling is purchased by one member of the household alone. Where for example members of the household are related otherwise than by marriage, or are of the same sex, the present situation could not have arisen. However that is not the case here.

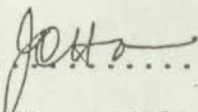
I am empowered by s. 49 of the Act to review a decision which has been reconsidered at a senior level, as this one has.

In exercising my powers of review however, I am as much bound by the terms of the Act as the officers of the Department. Whilst I may review the exercise of discretions and consider whether such exercise is reasonable, I must consider the discretions within the parameters of the sections which grant them. I am as much bound by the legal meaning of the Act as any other person is who exercises the discretions within those parameters.

For the reasons set out above, I am satisfied (standing in the place of the Secretary), that it would be reasonable to regard the Wallacia home as the principal place of residence of Mr Blom during the relevant period. That being so, a grant under the Act may not be made to joint applicants of whom he is one.

Accordingly the decision under review is affirmed.

I CERTIFY THAT THIS AND THE¹³
PRECEDING PAGES ARE A TRUE COPY OF THE
DECISION AND REASONS FOR DECISION HEREIN
OF MR B.J. McMAHON (Senior Member).

Signed ... 

Dated: 30.5.86 Member/Assoc/Clerk



ADMINISTRATIVE APPEALS TRIBUNAL

Keep if you wish

HOME DEPOSIT ASSISTANCE ACT 1982 - applicant refused grant due to previous ownership of a home - whether a "dwelling" within meaning of section 4(4) of the Act

Words and Phrases - "satisfied that ... unreasonable to regard that dwelling as suitable for the purposes of constituting the principal place of residence of the person or persons".

Home Deposit Assistance Act 1982 ss.4, 18

Home Savings Grant Act 1976

First Home Owners Act 1983

Re Sedate and Saime Lumanovski and Director-General of Social Security (1982) 6 ALN N53

Re Owen and the Secretary to the Department of Environment Housing and Community Development (1978) 1 ALD 452

Ward and the Secretary to the Department of Housing and Construction No. 79/14006

Morris and the Secretary to the Department of Housing and Construction T83/11

Mrs VG and the Secretary to the Department of Housing V85/290

HELEN LESLEY BECZE

Applicant

DEPARTMENT OF HOUSING AND CONSTRUCTION

Respondent

No. N85/289

Mr J.O. Ballard (Senior Member)

12th May 1986

Canberra

ADMINISTRATIVE APPEALS TRIBUNAL)
)
GENERAL ADMINISTRATIVE DIVISION)

No. N85/289

Re: HELEN LESLEY BECZE

Applicant

And: DEPARTMENT OF HOUSING AND
CONSTRUCTION

Respondent

Before : Mr J.O. Ballard (Senior Member)

Date : 12th May 1986

Place : Canberra

Decision : 1. The decision under review is set aside.

2. In substitution, this Tribunal decides that the applicant is not excluded from entitlement to a grant under the Home Deposit Assistance Act 1982 by virtue of her prior ownership of the property at 36 Jarrett Street, Coffs Harbour.

3. The matter is therefore remitted to the respondent for reconsideration of the application in accordance with the Tribunal's findings.



.....
Presiding Member

ADMINISTRATIVE APPEALS TRIBUNAL)
)
GENERAL ADMINISTRATIVE DIVISION)

No. N85/289

Re: HELEN LESLEY BECZE

Applicant

And: DEPARTMENT OF HOUSING AND
CONSTRUCTION

Respondent

REASONS FOR DECISION

This matter concerns an application under the Home Deposit Assistance Act 1982 ("the Act"). This Act repealed and replaced the Home Savings Grant Act 1976 ("the former Act") and for relevant purposes is in similar terms.

2. The applicant in this matter is Helen Lesley Becze. She seeks a grant under the Act for the purpose of the purchase of a property at lot 74 McFadyn Street, Bayldon, Coffs Harbour. This was rejected by the respondent because of previous ownership of a house at 36 Jarrett Street, Coffs Harbour. It is not in issue that the applicant and her then husband purchased the Jarrett Street residence in 1978. Finance for that purchase was in fact supplied by the applicant's father Leslie William Jennings who also represented the applicant at the hearing. The purpose of the purchase of the Jarrett Street house and garden was to try to

save the marriage of the applicant and her then husband. In that it failed and the applicant's husband left her with one child in the Jarrett Street residence. In August 1979 the applicant mortgaged the property to her parents Mr and Mrs Jennings. It was an old system title and the mortgage was effected by a transfer of the legal title to the parents. The applicant continued to live in the premises with the child. The title was at that time a perpetual lease.

3. At the hearing it was said by the father that for five of the six years that she lived in the house the applicant could not move because the ownership was still in the joint names of herself and her husband. Proceedings took place in the Family Court over the joint property and it was not until December 1982 that the leasehold title was transferred to the applicant. Immediately this transfer occurred Mr Jennings, the father, told the Tribunal the applicant put the premises on the market. Freehold title was granted in 1983 and in September of that year the property was sold to a Mr Jankowski, who was a builder by trade. Mr Jennings told the Tribunal that Mr Jankowski moved into the premises but his wife refused to.

4. When the matter came on for hearing in Coffs Harbour Mr Jankowski had moved to Queensland. An affidavit from Mr Jankowski was produced which reads:-

"I, ECKEHARD JANKOWSKI, Carpenter and Builder, of 36 Jarrett Street, Coffs Harbour, hereby declare the following to be true:

I purchased the property at 36 Jarrett Street, Coffs Harbour, because it was situated in a zoned

development area.

I planned to redevelop (sic) the site when I considered the time to be right. Until then, I intended to make use of the old house on the site.

Whilst I knew that the house was very old and in bad condition, I thought that the use that I could get out of it would justify the time and money that I would have to spend on it.

Actually it turned out to be in worse condition than I had expected. None of the stumps on which the house sat were supporting it properly. They were either rotten or washed out by the rain water which ran under the house whenever it rained.

The house shook when I walked around inside and swayed badly in windy conditions. I felt that it was unsafe and that a strong wind and heavy rain might bring it down.

The condition was so bad that I thought that the house would fall over of its (sic) own accord, without assistance from the weather, inside of two years.

In order to make the house safe to live in, I replaced all existing stumps with concrete block columns on concrete bases and, to give the old building some rigidity - and to provide a covered entry to the bathroom - I added a concrete block structure to the rear.

Mr Jennings has asked for my opinion on the probable condition of the building during the four years before I purchased it.

In my opinion, the structural defects were caused by the effects of continuous water flow under the house over a period of many years. I think that it would have been in a dangerous condition for the four years previous to my purchase of it."

An attempt was made to contact Mr Jankowski by telephone so that he could be questioned by the representative of the respondent but this was not successful. Mr Jankowski has subsequently sold the property; it is now vacant waiting completion and transfer to the new owners.

5. With the applicant's father and the representative of the respondent Mr Smart, the Tribunal visited the Jarrett Street house and inspected the exterior of the block, the adjacent blocks and the surroundings. It was not possible to get in to the upstairs part of the house. After the view the representative of the respondent prepared and read a description of the view. This is what he said:-

"On the afternoon of 7 April 1986, an inspection of the dwelling at 36 Jarrard Street, Coffs Harbour was carried out. The building presented as an original lapped weatherboard cottage, approximately 25 feet square, together with a full-length front verandah. It is built on a block of land having a fall from right front to right left at a gradient which I estimated at approximately 1 in 3 along the fall-line. Perhaps for clarify: I have used left and right when one is facing the building from the street, simply because I did not have a compass to work out the directions.

.....

The cottage is roofed in corrugated iron. Under the back left corner of the original cottage, a bathroom and laundry were sited, clad in painted fibro sheeting. There is apparent evidence of recent renovation, the most obvious being (a) a large concrete block addition to the rear of the cottage, comprising stairwell, upstairs enclosed deck, and downstairs partially enclosed area protecting the laundry and bathroom area under the house; (b) replacement of all external wall-bearing stumps, with the exception of those to the bathroom and some across the front of the house, they being replaced with concrete block piers; (c) a concrete block retaining wall down the right side of the cottage from front to rear; (d) a large concrete pad in front of the downstairs bathroom, together with a further concrete block retaining wall along the right side of that pad; and (e) a new barge board to the left side of the gable.

Of the cottage as it appeared to exist prior to these renovations, the following observations were made: the corrugated iron roof cladding and the ridge capping appeared to be in sound condition over the cottage. There was an obvious gap between the front wall of the cottage and the verandah roof, which is also corrugated iron, but this gap was protected by the overhang of the front eave. There was, however, some rusting through in the right-hand end of the front guttering across that

eave; (2) the front of the cottage protected by the verandah appeared to be in sound condition. There was no evidence of deterioration of the front wall timbers, the front windows, or the front door, (3) there was extensive wood rot along the front of the verandah floor-boards; (4) both side walls and the rear all showed signs of weathering and evidence of sprung nails. The left side wall appeared to be the most deteriorated. However, no weatherboards were noted to be missing, and all appeared to be properly lapped. There was no apparent evidence of any extensive refixing of the boards. All the window jambs, however, were weathered, with some evidence of rot, while the glazing putty had hardened and shrunk with age; (5) an inspection under the house disclosed that eight apparently original hardwood stumps had not been replaced. These included the stumps bearing the front wall. Each of the stumps was fitted with an ant cap, appeared upright and firmly embedded and load-carrying. Three of the more accessible stumps were tested for movement. All appeared to be in good condition, free of rot, and had been treated against deterioration or destruction. Perhaps that should be "appeared to be". All the bearers and the joists appeared to be original, and were found to be in good condition. From beneath the floor-boards, all appeared to be original and in sound condition, with no gaps between the boards. The floor and the subfloor timbers, together with the still-remaining stumps, all appeared to be constructed of hardwood. A fairly modern hot-water system and copper piping were also inspected underneath the house, and they appeared to be in good condition; (6) no internal inspection could be carried out in an adequate manner. However, from the upstairs deck, the room to the left rear of the cottage was able to be inspected through a window. This room was lined, both walls and ceiling, with fibro sheeting, with all joints covered in bead and all corners in quad. These walls and ceilings appeared to be in good condition, except for a crack around a power point on the left-side wall. There was no evidence on the walls or ceiling of any water ingress, nor was there any apparent evidence of repairs which might possibly be expected if the fibro had been squared after the fixing of the fibro. The paintwork appeared to be in good condition, but it did not appear to be recent, as there was a patch remaining unpainted behind a door on the wall common with the front left room which remained unpainted. It appeared as if a cupboard had been removed from there; (7) a partial inspection of the front left room was also possible. The ceiling and one wall which were visible were again lined with fibro, with bead to the visible joins and quad to the corners. The wall common to the back left room appeared to be an original board lining."

6. When asked whether he had any comment arising from Mr Smart's description Mr Jennings said that he queried the assertion that eight of the original stumps were still in place and that they all appeared to be free of movement and in good condition. Mr Jennings said that only seven of the original stumps remained and that, when tested, four of them were not load carrying. The representative of the respondent did not contest this statement.

7. The applicant's father also produced a number of photographs which had been taken around the house over the years that the applicant had lived there. Most had originally been taken as family snap shots, without these proceedings in mind. However, they did offer some assistance as to the condition of the house before the renovations done by Mr Jankowski.

8. At the view it was reasonably easy to see additions made to the building by Mr Jankowski after he purchased the property from the applicant. It was less easy to see some changes which the applicant or her father did after the initial purchase in 1978. It is not in issue that before the initial purchase electricity and water were connected to the house but not sewerage; there was no septic system and night soil was taken by collectors. The site is higher at the back than at the front. At the front the house is on road level and the fall is enough to allow a bathroom of a little less than normal size to be placed under the house at the back. The configuration of the surrounding area is such that the block is at the lowest point of the contours and this provides a natural course for the flow of

water after rains.

9. For the respondent it was said that there were three issues. It was put:-

"In this particular matter three matters have to be resolved before one can come to a final conclusion. The first is, whether the structure is a "dwelling" within the meaning of section 4(1) (sic) of the Home Deposit Assistance Act. Secondly, if it is a dwelling, whether Mrs Becze can be said to have owned that dwelling within the meaning of section 18(1) of the Act, and if it can - that can also be said then whether it would be unreasonable to regard that dwelling as the principal place of residence at any time between January 1978 when she occupied it, and July - perhaps September 1983, when she ceased to occupy it, that being within the meaning of subsection 18(2) which is effectively an exclusion to section 18(1)."

The applicant, through her father, stated that she did not challenge the fact of ownership. Nor did she argue that the premises were not her principal place of residence (sub-section 18(2) of the Act).

10. Thus the matter turns on the interpretation of the word 'dwelling' in sub-section 4(4) of the Act; this reads:-

"For the purposes of this Act, a dwelling shall not be taken to be a dwelling in relation to a person or persons if the Secretary is satisfied that it would be unreasonable to regard that dwelling as suitable for constituting the principal place of residence of the person or persons."

11. Reference was made by the respondent to Re Sedate and Saime Lumanovski and Director-General of Social Security (1982) 6 ALN N53 ("Lumanovski's case") and to Re Owen and the Secretary to

the Department of Environment Housing and Community Development (1978) 1 ALD 452 ("Owen's case"). Reference was made to a letter from the Coffs Harbour Shire Council stating, inter alia, that "Council is unable to comment whether the building was fit for habitation during any time of the period of ownership although its condition at the time of inspection would allow permanent habitation", but this related to an inspection of a later point of time. It was also said that since the applicant resided there for so long and regarded the house as a dwelling it was not unreasonable for the Secretary to do so too.

12. For the applicant it was said that the building was on inadequate supports; it had actually swayed around. Proof of this was that Mr Jankowski did the repairs. A builder would not have done that work to a house of his own for nothing particularly when he intended to remove the house and redevelop the site when the time was right. The applicant had had to live there over the years because she had nowhere else to go. Between August 1979, when her marriage broke down, and December 1982, when the leasehold was transferred to her, she could not sell the property. As soon as the applicant could put the property on the market she did so and sold it soon after.

13. In Owen's case Smithers J. said (at p.454):-

"The Act is intended to benefit an applicant who, before the purchase of the house the subject of the application, has never owned a house suitable to constitute his or her principal place of residence."

That comment was made in relation to the former Act. The objects of the Act are set out in section 3:-

"The objects of this Act are to encourage and assist persons to purchase or build their own homes and to encourage persons to save for the purpose of purchasing or building their own homes, and, in the construction and the administration of this Act, regard shall be had to those objects."

These objects, although differently worded, are not materially different from those in the former Act. The comments in Owen's case can be taken to be of equal application to the Act.

14. The principal matters under the Act and the former Act to have come before this Tribunal relate to sub-section 18(2) of the Act. The view was taken that if an applicant has resided in premises for a significant period of time the fact of such residence established that it is suitable for the purpose of constituting the principal place of residence (Ward and the Secretary to the Department of Housing and Construction unreported, no. 79/14006, Morris and the Secretary to the Department of Housing and Construction unreported, T83/11 and Mrs VG and the Secretary to the Department of Housing unreported, V85/390 (under the Act)). In Lumanovski's case the decision went the other way. That matter concerned a house owned jointly by two families which was not adequate to house both families and where the applicant's family accordingly left the premises. The Tribunal took the view that the relevant provisions of the Act were remedial or beneficial and that if any ambiguity existed it was to be construed so as to give the fullest relief which a fair

reading of the language would allow. The issue considered in all those matters was whether it would be unreasonable to regard the dwelling as the principal place of residence (sub-section 18(2) of the Act). However none of those matters were directed to the primary question raised in this case, namely whether the building could be regarded as a dwelling suitable for the purposes of constituting a principal place of residence (sub-section 4(4) of the Act). The question of suitability arises under sub-section 4(4) of the Act and not under sub-section 18(2) of the Act.

15. The dwelling and the land on which it stands was bought for \$10,500 in 1978. It has a good commanding view over sloping ground towards the sea. The configuration of the land is marred by considerable run off after rains. (In this connection it is perhaps relevant to record that the Tribunal is accustomed to making property inspections in connection with its jurisdiction under the A.C.T. Rates Ordinance 1926.)

16. The two adjacent blocks are not attractive. One has large holes which could be dangerous to children, the other is littered with derelict motor vehicles. I do not, however, think that the circumstances of the adjacent blocks would normally be relevant for the purposes of sub-section 4(4) of the Act. Furthermore such hazards would not be as great as the hazard that a busy main road would present for children. I disregard the problem of these two blocks.

17. Clearly relevant, however, is the problem caused by the run off of rainwater underneath the house. It is not in issue

that it was this problem that made it necessary for many of the wooden stumps to be replaced. It was this problem which caused the situation which Mr Jankowski found prior to the replacement of those stumps. I accept from the applicant's father and Mr Jankowski's affidavit that before these repairs were made, the house was in a dangerous condition; and so find as a fact.

18. It seems to me reasonable to infer, given the commanding position of the block, that virtually all of the purchase price was paid for the land and virtually nothing for the dwelling itself. Although it is reasonably easy to see the extensions put on by Mr Jankowski it is not easy to picture what the property would have been like beforehand. This difficulty is compounded by the fact that it was impossible to view the interior during the inspection. Nor was it practicable to identify in any detail the work done to improve the property after initial purchase in 1978 at the cost of \$4,000. However apart from the connection with the sewerage it seems clear that this was more in the nature of repairs to external fittings such as drains and walls rather than structural alteration.

19. The fact remains that significant structural alterations were required to be made to the building in order to make it safe for habitation by replacing many of the piles on which it stood. I have accepted that the building was in a dangerous condition before the piles were replaced. There is no better corroboration of this than that a builder thought it necessary to do that work. In the circumstances of a family break up and the length of time taken over a property settlement the time that the applicant

continued to reside in the premises is not crucial. What is more in point is the speed with which she took steps to move out of and dispose of the dwelling as soon as she was able.

20. I accept from the affidavit of Mr Jankowski that none of the stumps on which the house stood were supporting it properly; that they were either rotten or had been washed out by rainwater which ran under the house whenever it rained; that the house shook when he walked around inside and swayed badly in wintry conditions; that he felt that it was unsafe and that a strong wind and heavy rain might bring it down; and that the condition was so bad that he thought that the house would fall over on its own accord without assistance from the weather on the inside of two years. That situation has to be seen together with the configuration of the land which means that run off after rains passes through the block and under the house; that was the principal cause of the unsatisfactory condition of the house but it also presented a future danger.

21. I accept that it is not the intention of the Act to enable everyone to apply for a grant if they could come forward with the proposition that the first house that they had was not as nice as they would have liked. In this matter I have had the benefit of an inspection of the premises and of an affidavit from the purchaser who by chance was a builder. The facts that have come out in this matter are such that it seems to me quite clear that the residence concerned was unsafe and was likely to collapse. The house, dilapidated as it is, standing on secure foundations I would have been prepared to regard it as suitable

for constituting the principal place of residence of the applicant. In my view the fact that it has been shown to be unsafe and liable to collapse makes it unreasonable to so regard the dwelling. This is not the place to try and lay down detailed guidelines for the interpretation of sub-section 4(4) of the Act. Submissions as to this were neither invited from or made by the parties. I would not expect that considerations of safety would be the only ones to arise but on these facts these considerations are relevant. I also note that the Act has now been, for all practical purposes, replaced by the First Home Owners Act 1983. That Act, in section 4(2), provides a definition of "dwelling" which is similar but not identical to the definition examined in these reasons for decision. This fact further strengthens the view that it would be inappropriate to embark upon a discussion of general principles at this time.

22. Standing in the place of the Secretary I am satisfied that it would be unreasonable to regard the Jarrett Street dwelling as suitable for the purposes of constituting the principal place of residence of the applicant and her child notwithstanding the fact that the applicant and her child did in fact live there between 1978 and 1983.

23. Accordingly the decision in this matter is set aside. The Tribunal decides that the applicant is not excluded from consideration for assistance under the Act by virtue of her prior ownership of the property at 36 Jarrett Street, Coffs Harbour. The matter will be remitted to the Department for reconsideration of Mrs Becze's application in accordance with this finding.



Department of Housing and Construction

In reply please quote
Contact

E85/0872

(22/39)

Mr David Spain
PO Box 16
NIMBIN NSW 2480

Dear David,

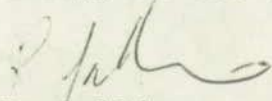
I apologise for the delay in writing to you following your letter of 18 January 1986. Nevertheless, your conversations with myself and with Jose Marques have no doubt clarified the reason for the delay.

In preparing material for the Spilsbury case and in examining the proposal by the Department of Environment and Planning on Multiple Occupancy it became apparent that a substantial legal difficulty arose from the operation of the NSW Local Government Act in relation to unapproved subdivisions.

You will note from the Spilsbury decision that a similar difficulty arises in Queensland. Counsel's opinion, obtained earlier this year advised that the legal difficulty arising from the NSW Local Government Act prevented payment of assistance to multiple occupancy participants including those at Co-ordination Co-operative.

Given that the issues were before the Federal Court at the time no action was taken on the Opinion in case the Federal Court took a different view. That was not to be. Therefore, it is apparent that the only solution remaining is political. As I explained on the phone, the Minister has now written to the Minister for Environment and Planning suggesting that the matter be resolved so that FHOS benefits can flow to applicants in Multiple Occupancy communities.

... A copy of the Spilsbury decision is attached.


R. Gallimore
for First Assistant Secretary
Housing Policy Division

23 April 1986

- Note - not to Walker (as I was advised)
- Who has followed this up with Carrick?
- Who have copies of this gone to?

Col J.
Deck P
R. J. J.

8.94 Peter
IN THE FEDERAL COURT OF AUSTRALIA)
QUEENSLAND DISTRICT REGISTRY)
GENERAL DIVISION)

320
QLD G44 of 1985

BETWEEN:

GREGORY THOMAS SPILSBURY and
STEPHANIE HELEN SPILSBURY

Applicant

AND:

THE SECRETARY, DEPARTMENT OF
HOUSING AND CONSTRUCTION

Respondent

SPENDER J.

17 MARCH, 1986.

REASONS FOR JUDGMENT

This is an application under the Administrative Decisions (Judicial Review) Act 1977 to review the decision of the Secretary of the Department of Housing and Construction that the applicants, Gregory Thomas Spilsbury and Stephanie Helen Spilsbury are ineligible for assistance under the First Home Owners Act 1983 ("the Act").

The applicants claimed that they were entitled to assistance under that Act because they are the beneficial owners of the land and dwelling house the subject of their application, and their interest in that land and dwelling come within the

2.

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definition of "approved interest" under s.4 of the Act. That definition of "approved interest" includes "an estate in fee simple".

The applicants had decided to marry in June 1984. In November 1983, they had found a wheat farm with a dwelling at Kapunn via Dalby, in Queensland, which they wished to purchase. Mr. Spilsbury had recently completed a degree in Agricultural Science at the University of Queensland. The couple had insufficient funds of their own to purchase the property or any part of it. They approached their relatives for finance in respect of the acquisition of the farm property. The property consisted of four separate parcels of approximately 427 acres, 27.33 ha., 17.81 ha. and 2.023 ha. The family agreed to find the necessary amount, and to provide it in two ways:-

- (a) As to the farm, a family trust (the Bressow-Morris Family Trust) was established, with a corporate trustee Amoria Pty.Ltd. as the trustee thereof; Amoria Pty.Ltd. as such trustee would borrow the \$275,800 from the relatives; acquire the farm; and enter into arrangements for Mr. Spilsbury and Miss Morris (as she was then) to manage/work it on a share-farm basis.
- (b) As to the dwelling, the \$50,000 purchase monies were lent to Mr. Spilsbury and Miss Morris and they instructed Amoria Pty.Ltd. to act as trustee for them in purchasing the dwelling.

Mr. Spilsbury is the Managing Director of Amoria Pty.Ltd.

On 30 November, 1983, Amoria Pty.Ltd. entered into a Contract of Sale for the purchase of the property for a total consideration of \$325,799.99.

It was the applicants' case that in purchasing part of this property, being the dwelling house known as Willaroo Homestead and .5 hectares of land immediately adjacent thereto, (which was a small part of the largest parcel of land in the purchase), Amoria Pty.Ltd. was acting as trustee for the applicants pursuant to a written request by the applicants to Amoria Pty.Ltd. bearing date 29 November, 1983 to so act. The homestead and surrounding .5 hectares, which comprises a garden area with trees and shrubs, some fences and a private roadway was valued by the real estate agent involved in the sale to Amoria Pty.Ltd. at \$50,000.00.

The request said in part:-

"We, Gregory Thomas Spilsbury and Stephanie Helen Morris hereby request that you act as Trustee for us in connection with the purchase of the dwelling-house known as the Willaroo Homestead and the 0.5ha of land immediately adjacent thereto situated on land described as Subdivision 4 of Portion 72 on Registered Plan No. 101433 in the County of Derby Parish of Daandine which you are negotiating to purchase from William Edward Wanka in conjunction with, inter alia, the balance of the said Subdivision 4 of Portion 72 and certain other lands comprising the Willaroo wheat farm."

Local planning laws applicable to the properties in the area near Dalby prohibited a subdivision of land of less than 40 hectares. In particular, the .5 hectare and dwelling could not

be subdivided off.

Section 34(1)(b) of the Local Government Act 1936-84 provides:-

"A person or corporation shall not -

(b) cause land to be subdivided, except in accordance with this Act."

Section 3 of that Act provides:-

" 'Subdivision,' 'subdivide,' and similar expressions mean and refer to dividing land into parts, whether the dividing is -

- (a) By sale, conveyance, transfer, or partition, or
- (b) By any agreement dealing or instrument inter vivos (other than a lease for any term not exceeding five years without right of renewal) rendering different parts thereof immediately available for separate disposition or separate occupation, or
- (c) By procuring the issue of a certificate of title under 'The Real Property Acts, 1861 to 1887', in respect of a part of the land;"

Of particular importance is s.34(19)(iv), which provides:-

Nothing in this section shall -

- (iv) Be deemed to render any agreement to sell, let, or otherwise dispose of any land illegal or void by reason merely that it is entered into before an application in respect of the subdivision has been approved by the Local Authority, but the agreement shall be deemed to be made subject to such approval being obtained;"

The applicants claim that the arrangements were such as to make Mr. & Mrs. Spilsbury the beneficial owners of the dwelling and its curtilages; that they are jointly entitled to an equitable estate in fee simple and to sole and exclusive possession, enjoyment, and use of the dwelling house and its surrounding .5 hectares and have the right to physically sever the dwelling house from that land and to sell or move it as they see fit. It is their case therefore that they are the "owners" of "an estate in fee simple" in the said dwelling house and the .5 hectares of land within the meaning of the Act and as such are entitled to assistance pursuant to the provisions of that Act.

Some time before 26 March, 1984, the applicants made application to the respondent for assistance pursuant to the provisions of the Act. On or about 28 March, 1984, they received a letter dated 26 March, 1984 from the Department of Housing and Construction. This letter indicated the view of the Department that, consistent with the provisions of the Act, the legislation did not permit payment of assistance to the applicants. The letter said in part, -

"It is noted that Amoria Pty.Ltd. are the registered proprietors of the land and you have requested them to act as your trustees.

The First Home Owners Act provides that where a person has entered into a contract to purchase a dwelling to be held in trust for another person the other person shall be deemed to have entered into the purchase contract, provided that the Secretary is satisfied that the other person will become the owner.

On the evidence I cannot be satisfied that you as beneficiary will become the owner of the 5 hectares of the land and of the dwelling."

In response to this letter, further material was supplied on behalf of the applicants by Mrs. Spilsbury's father who said in part, -

"They (the applicants) located a suitable farm at Kapunn and I and other members of my family undertook to arrange the necessary purchase money. We agreed that the dwelling house and 5 hectares surrounding it would be purchased by Gregory and Stephanie as owners, and the remainder of the farm would be purchased by a family trust and that Gregory and Stephanie would have an option to acquire it also if and when they are able to afford to do so.

Local planning laws prevent a subdivision of land of less than 100 acres (about 40 hectares) and it was therefore arranged that the trustee of the family trust, viz. Amoria Pty.Ltd., should acquire both the dwelling house and the farm, acting as trustee for Gregory and Stephanie as to the dwelling and 5 hectares and as trustee of the family trust in relation to the balance of the property.

...

I myself provided the \$50,000 purchase price of this property by way of loan to Gregory and Stephanie (which, as I have submitted, is no different from my guaranteeing a bank loan to them). I can therefore, as chairman of directors of Amoria Pty.Ltd. and as such lender, certify, which I now do, that Gregory and Stephanie are acquiring the house property and 5 hectares as owners thereof."

(It is apparent that on some occasions the area of land surrounding the dwelling house was referred to .5 hectares and on other occasions 5 hectares.)

A review was requested and, in a letter dated 18 April 1984, the delegate of the Secretary stated:-

"I have carefully considered all the information supplied and note that the local authority prevents subdivision of land less than 100 acres (about 40 hectares).

Therefore, I must confirm my previous decision that assistance cannot be paid because I am not satisfied that you as beneficiaries will become the owners of the dwelling and 5 hectares of land."

Pursuant to s.27(3) of the Act, the applicants appealed to the Secretary of the Department of Housing and Construction. The letter accompanying the Notice of Appeal referred to "the typographical mistake concerning the area in question."

The contract of purchase by Amoria Pty.Ltd. was completed in about January, 1984, and the applicants have exclusive occupancy of the dwelling and manage the balance of the property for Amoria Pty.Ltd.

In support of the appeal under s.27(3), the applicants said that the reasoning of the delegate that, because the homestead and surrounding land could not be subdivided from the rest of the farm property, he was not satisfied that the applicants would become the owners of the dwelling and the land, was incorrect. It was said that the words "become the owner" quite properly include the case of persons becoming entitled to the possession and enjoyment of the land to the exclusion of all others, as was the present case.

Further correspondence included the submissions that "there is no question of whether the applicants will become the

owners of the dwelling and curtilages, for they already are, at least the beneficial owners thereof," and "the difficulty in the way of becoming registered proprietors does not, we submit, make the applicants any less the owners of the dwelling."

The delegate of the Secretary, by letter dated 13 May, 1985, affirmed the earlier decision that a grant could not lawfully be made to the present applicants.

Hence, this application to review that decision.

The object of the Act is "to encourage and assist persons to purchase or build their own homes". It should be construed in a manner to promote that object: section 3. The Act was amended in 1985. The amendments came into effect on 20 May, 1985, and do not affect the present matter which falls to be determined on the Act as originally enacted.

A "prescribed person in relation to a dwelling", referred to in s.14(1) as a "home acquirer", is a person who, as well as satisfying other requirements, has entered into a contract for the purchase of a dwelling, or who has entered into a contract for the construction of a dwelling, or commenced the construction of a dwelling. Ownership is not the criterion of eligibility; it is the entering into contractual relations or the commencing of the construction of a dwelling that is the crucial determinant of being a prescribed person in relation to a dwelling.

Section 15(1) permits a person who is a "prescribed person" in respect of a dwelling, and who is a person to whom s.14(2) applies in relation to the dwelling, to apply for assistance. It is not in dispute that the second aspect of eligibility is satisfied.

Section 9 provides, in part, -

"9.(1) A reference in this Act to purchase, or to ownership, in relation to land or an undivided share in land, shall be read as a reference to purchase or ownership, as the case may be, otherwise than as trustee, of an approved interest in the land or in the undivided share, as the case may be.

(2) A reference in this Act to purchase, or to ownership, in relation to a dwelling, shall be read as a reference to purchase or ownership, as the case may be, otherwise than as trustee, of -

(a) whether or not the dwelling is a dwelling of a kind referred to in paragraph (b) - the land on which the dwelling is, or is to be, erected; or

(b) where the dwelling is, or is to be, a part of a building or is, or is to be, one of 2 or more buildings erected on a single parcel of land -

(i) an approved interest in the dwelling in pursuance of a law of a State or internal Territory that enables the holding or enjoyment by different persons of proprietary rights in respect of different parts of that building or of different buildings erected on that parcel of land, as the case may be;

(ii) shares in the capital of a body corporate that is the owner of the land on which the dwelling is, or is to be, erected, being shares that entitle the holder to a right of occupancy (whether under a lease or otherwise) in respect of the dwelling; or

(iii) an undivided share in the land on which the dwelling is, or is to be, erected, where the owner of that share is, or is to be, entitled to a right of occupancy in respect of the dwelling."

Section 9(1) and (2) expressly exclude purchase or ownership as a trustee. The Act evinces a concern that there be security of tenure and an exclusive right of occupancy in the applicants. By way of illustration, what is an "approved interest" includes a lease (which includes a sub-lease) giving "reasonable security of tenure": s.4(1); Section 9(4) allows a joint owner to be treated as the purchaser of a prescribed interest, if entitled to an exclusive right of occupancy; and s.11 of the Act enables assistance to be given where an owner of rural property (whether a trustee or not) has given permission to another to occupy a dwelling contracted by that other person after 1 October 1983 on part of that property. This section would entitle the applicants to assistance if, instead of the homestead being in existence, they were to embark on its construction, with the permission of Amoria Pty.Ltd. to occupy it on completion.

The effect of the statutory provisions is that, subject to exceptions not presently relevant, where two persons have, after 1 October, 1983, entered into a contract for the purchase of an estate in fee simple in land on which a dwelling is located, they are eligible for assistance under the Act.

Since the relevant contract in this case was entered into by Amoria Pty.Ltd., the entitlement of the applicants to assistance depends on s.12(1)(b) of the Act. Section 12(1) provides:-

"12. (1) Where -

(a) a person holds an interest in land, or in a dwelling, in trust for any other person or persons (in this sub-section referred to as the "beneficiary" or "beneficiaries", as the case may be); or

(b) a person has, alone or together with any other person or persons, entered into a contract for the purchase of land or a dwelling, and an interest in the land or dwelling is to be held by the first-mentioned person in trust for any other person or persons (in this sub-section also referred to as the "beneficiary" or the "beneficiaries", as the case may be), not being any of the persons who so entered into the contract, and the Secretary is satisfied that the beneficiary or beneficiaries will become the owner or co-owners of the interest referred to in paragraph (a) or (b), as the case may be, the beneficiary or beneficiaries shall, for the purposes of this Act, be deemed to be the owner or co-owners of the interest referred to in paragraph (a) or to have entered into the contract for the purchase of the land or dwelling, as the case may be."

Section 12(4) provides:

"Section 9 has effect in relation to paragraph (1)(b) of this section as if there were omitted from sub-section 9(2) the words 'otherwise than as trustee.'"

If s.12(1) operates at all in the circumstances of the present case, its effect is, on the required satisfaction of the Secretary, to deem the applicants the co-owners of the estate in fee simple of the .5 hectare on which the homestead stands, and further, the applicants are deemed to have entered into the contract for the purchase of the land.

It seems to me that the first deemed consequence does not provide a basis for assistance under the Act; it is only the second deemed consequence which would enable the applicants to be described as "home acquirers" under s.14(1) and, as a consequence, prescribed persons in relation to the dwelling.

In this case, the contract is for the purchase of land. There is a dwelling erected on the land. The dwelling is not the kind referred to in s.9(2)(b), and in my opinion, the case is not concerned with the circumstances addressed by s.9(2)(b).

There are a number of reasons, it seems to me, why s.12(1)(b) does not operate in the circumstances which have occurred.

First, as a matter of construction, "the interest in the land" held in trust for the beneficiaries has to be an interest in the land the subject of the contract of purchase by the trustee. The words "the land" used in s.12(1)(b) indicate, in my opinion, that there must be identity of the land the subject matter of the purchase, and the land, an interest in which is held in trust for the beneficiaries. Here Amoria Pty.Ltd. entered into a contract to purchase, with other parcels, a parcel of land of approx. 427 acres (or 173ha.). The interest said to be held by it in trust for the applicants was an interest in a defined .5ha. of that parcel. In my view, the subsection does not apply where an interest in part only of the land purchased is to be held in trust for beneficiaries.

Secondly, it was said that Amoria Pty.Ltd. holds the .5 ha. as a simple or bare trustee for the applicants. Of this type of trust, Lewin on Trusts 16th Ed. has this to say at p.6:-

"A simple or bare trust is where property is vested in one person in trust for another, and the nature of the trust, not being prescribed by the settlor, is left to the construction of the law. In this

case, the beneficiary has jus habendi, or the right to be put in actual possession of the property, and jus disponendi, or the right to call upon the trustee to execute conveyances of the legal estate as the beneficiary directs."

Moreover, such a beneficiary of such a trust is entitled to the indicia of title to the trust property: Jacob on Trusts, 4th Ed. para 2302, citing Turner v. Noves (1903) 20 W.N.(N.S.W.) 266.

Because of the Planning By-Laws of the Wambo Shire Council, no such conveyance of the legal estate in the .5 ha. to the beneficiaries could be executed by the trustee company, and there is not and cannot be, a certificate of title to the .5 ha. on which the homestead stands.

To this, it might be said that the beneficiaries have an equitable interest in fee simple in the .5 ha., and the impossibility of having the legal title to that land vest in them is irrelevant.

The answer, it seems to me, is that, as a consequence of paragraphs 34(1)(b) and 34(19)(iv) of the Local Government Act 1936-84 (Qld.), the applicants do not have any equitable interest in the .5 ha.

Amoria Pty.Ltd. has the legal estate in fee simple in the largest parcel. The submissions of the applicants are based on the premise that Amoria Pty.Ltd. holds the .5 ha. on trust for the applicants, to which area the applicants have exclusive

possession, and the balance of the parcel in trust for the Bressow-Morris Trust. I find it difficult to accept that Amoria Pty.Ltd. holds the legal estate in fee simple in the .5 ha. and the legal estate in fee simple in the balance. Such seems to be unlawful subdivision pursuant to the provisions of the Local Government Act. Also, Isaacs J. in The Commonwealth of Australia v. The State of New South Wales and Another (1923-4) 33 C.L.R. at 42 referred with complete approval to a passage from Challis's Real Property, 3rd Ed., p.218:-

"In the language of the English law, the word fee signifies an estate of inheritance as distinguished from a less estate; ... A fee simple is the most extensive in quantum, and the most absolute in respect to the rights which it confers, of all estates known to the law. It confers, and since the beginning of legal history it always has conferred, the lawful right to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the imagination, including the right to commit unlimited waste; and, for all practical purposes of ownership, it differs from the absolute dominion of a chattel, in nothing except the physical indestructibility of its subject. Besides these rights of ownership, a fee simple at the present day confers an absolute right, both of alienation inter vivos and of devise by will."

See also Dixon C.J. in Hall v. Busst (1960-61) 104 C.L.R. 206 at 217-8. In the circumstances of the present case, Amoria Pty.Ltd. is unable to alienate the .5 ha.

The applicants assert that they have an equitable interest in the .5 ha.

In George v. Greater Adelaide Land Development Company

Limited. (1929-30) 43 C.L.R. 91, the High Court concluded that a contract for the sale of certain allotments, entered into at a time when the provision of the Town Planning and Development Act 1920 (S.A.) had not been complied with, was illegal and invalid. In Braham v. Walker (1960-61) 104 C.L.R., the High Court distinguished George, and held that the land there in question had not been "sold" unless and until the plan of subdivision was sealed. Mack J. applied George in Classified Pre-mixed Concrete Pty.Ltd. Qd.R.388.

The disposition of the land implicit in the arrangements between the applicants and Amoria Pty.Ltd., in my opinion, does not create any equitable interest of the applicants in the .5 ha. In McWilliam v. McWilliams Wines Pty.Ltd. (1963-64) 114 C.L.R., a transfer of land required the consent of the Water Conservation and Irrigation Commission. Mr.Tiernan and Taylor JJ. at 660-1 said:-

"...the contract in this case was subject to an implied condition that the sale of the farm land in question was subject to the consent of the Commission being obtained (Egan v. Ross (1928) 29 S.R. (N.S.W.) 382; 46 and Butts v. O'Dwyer (1952) 87 C.L.R. 267) and, that being so, it could not be contended that the respondent company became entitled by force of the contract to an equitable interest in the land."

In Brown v. Heffer (1967) 116 C.L.R., Barwick C.J. McTiernan Kitto and Owen JJ. said, of the purchaser's right under a contract for the sale of land requiring Ministerial consent, at 350:-

"The specific performance which will be granted before the Minister's consent has been obtained is not specific performance of the obligation to convey or transfer, for that obligation has not yet arisen: McWilliam v. McWilliams Wines Pty.Ltd. (1964) 114 C.L.R. 656, at p.661. As Havelock C.J. in Egan v. Ross (1928) 29 S.R. (N.S.W.) 382, at p.388 the decree that will be made will go further than directing that the proper steps be taken for the purpose of obtaining the Minister's consent and, "if that is obtained", to transfer the land to the purchaser: see also the more explicit form of order made by this Court in Kennedy v. Vercoe (1960) 105 C.L.R. 521, at pp.530, 531. Accordingly until the consent has been obtained the purchaser's interest, being 'commensurate only with what would be decreed to him', does not extend to ownership of the land and the interest of the vendor is not yet converted into a right to receive money in place of the land. Many authorities on the topic are discussed in the valuable judgment of Callan J. in In re Rudge; Curtain v. Rudge [1949] N.Z.L.R. 752."

In re Bosca Land Pty.Ltd.'s Caveat, Dunn J. concluded that a purchaser of land in respect of which conditional approval to subdivide had lapsed, had no equitable interest in the land. He ordered the removal of the purchaser's caveat on the land.

Those cases lead me to the conclusion that the applicants have no equitable interest in the .5 ha. Mason J. said in Re Toohey and Anor.; Ex parte Meneling Station Pty.Ltd. & Ors. 44 A.L.R. 63 AT 74:-

"There is no question that the phrase 'estate or interest' in s.3(1) of the Act has, in its ordinary and natural usage, a proprietary connotation; see Stow v. Minereal Holdings (Aust.) Pty.Ltd. (1977) 14 A.L.R. 397 at 411; 51 ALJR 672 at 679; Harada v. Registrar of Titles [1981] VR 743 at 748. No one who has a merely personal right in relation to land can be said to have an 'estate or interest' in that land."

In my view, the applicants have a mere licence in respect of the .5 ha.

I have addressed these questions, because they constitute the basis of the applicants' case.

The Secretary, in the letter informing the applicants of the decision under review, stated:-

"I have not investigated in any detail whether the document of 29 November 1983 is sufficient to create a valid trust, because I have decided in any case that the second limb of section 12 has not been satisfied"

In my opinion, this conclusion reveals no reviewable error. It is correct.

The requirement that the Secretary be satisfied that the beneficiaries will become the owners of the interest in the land involves two aspects. First, the word "will" implies that the contemplated change is capable of occurring, and is certain to occur. Mere possibility is insufficient. Secondly, the juxtaposition of the concepts of "beneficiary" and "owner" means that the contemplated change in the vesting of the legal estate of the interest in the persons who previously were the beneficiaries under a trust.

My conclusion accords with the decision of the Administrative Appeals Tribunal in Re Jeans and Secretary, Department of Housing and Construction (1978-80) 2 A.L.D. 337,

which however was concerned with a discretionary trust, and with provisions of the Home Savings Grant Act 1976, which were similar to but not identical with s.12 of the Act here. The tribunal concluded that those provisions required a certainty of the vesting of the legal title to the subject land.

For the above reasons, in my opinion, the application should be dismissed with costs, to be taxed if not agreed.

Departmental Officers can give you an application form and advise on how to fill it in.

Application forms are also available from banks, building societies and credit unions, and from many real estate agents and builders. There are more details of the Scheme on the application form and a guide to help you fill it in.

If you have any problems or questions get in touch with the Home Ownership Assistance Office in your capital city.

The addresses and telephone numbers are listed on the back of this brochure.

You are urged to lodge an application as soon as you contract for your home and before you finalise your home finance.

When your application is approved the Home Ownership Assistance Office will write to you advising what will be paid and when payments will commence.

This brochure is only a guide to the First Home Owners Act.

Doubts regarding provisions of the Act can be clarified by contacting any of the offices listed.

ADDRESSES AND TELEPHONE NUMBERS

New South Wales (except Queanbeyan)
Box 9889, GPO, Sydney, N.S.W. 2001
Ground Floor, Gold Fields House,
1 Alfred Street, Circular Quay, NSW 2000
Telephone: 236 0022

Victoria
Box 9889, GPO, Melbourne, Vic. 3001
Shops 12 and 13, Tivoli Court,
239 Bourke Street, Melbourne, Vic. 3000
Telephone: 6528890, 6528894, 6528818
or 6528832

Queensland
Box 9889, GPO, Brisbane, Qld, 4001
Ground Floor, Australia House,
145 Eagle Street, Brisbane Qld. 4000
Telephone: 33 7011

South Australia
Box 9889, GPO, Adelaide, S.A. 5001
Shop 12, Renaissance Tower,
127 Rundle Mall,
Adelaide, S.A. 5000
Telephone: 228 6211

Western Australia
Box 9889, GPO, Perth, W.A. 6001
197 Adelaide Terrace, Perth, W.A. 6000
Telephone: 326 9111

Tasmania
Box 9889, GPO, Hobart, Tas. 7001
Continental Building,
162 Macquarie Street, Hobart, Tas. 7000
Telephone: 20 5011

Australian Capital Territory
(and Queanbeyan)
Box 9889, GPO, Canberra City, A.C.T. 2601
Sydney Building, 113 London Circuit,
Canberra City, A.C.T. 2601
Telephone: 47 2066

Northern Territory
Applications to be sent to the above
South Australian address.
General enquiries may be made at:
Construction House, 1-3 Brigg Street,
Darwin, N.T. 5790
Telephone: 80 0211.

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How you can get up to \$6000 towards your first home!

3rd Edition

August 1985



THE FIRST HOME OWNERS SCHEME.

FIRST HOME OWNERS SCHEME

The Federal Government's First Home Owners Scheme assists low to middle income earners to buy or build their first home, by raising the borrowing capacity or deposit of people who otherwise might not qualify for a housing loan.

It applies to people who start to buy or build their first home from 1 October 1983.

This brochure is only a general guide to what the Scheme is about.

If you want to know more contact the Department of Housing and Construction's Home Ownership Assistance Office in the capital city nearest you.

The telephone numbers and addresses are on the back of this brochure.

If you have problems speaking or reading English, ring the Telephone Interpreter Service (TIS).

The TIS numbers are in the Information pages at the front of the telephone directory.

TIS will help you talk to the Department about the First Home Owners Scheme.

You can apply under the Scheme if you acquire your first home on or after 1 October 1983. The date you acquire your home is most important — it is referred to as the "prescribed date".

PREScribed DATE

The date for qualification

Your prescribed date can be:

- (a) the date of the contract of sale if you buy a completed home. It is not the settlement date.

- (b) the date of the contract with a builder if you are having your home constructed
- (c) the date construction commenced if you are an owner-builder (i.e. the date foundations were commenced)

If you are not sure what your prescribed date is, please contact the Home Ownership Assistance Office in your nearest capital city and they will help you.

WHICH HOMES QUALIFY

You can claim for a new or established home in the city or country.

It can be a house, home unit, flat or other type of self contained fixed dwelling which meets local building standards.

You must plan to live in that home. The benefit is paid only if you continue to own and occupy, or intend within a reasonable time to occupy the house as your principal place of residence.

WHO CAN BE PAID

You can be single or married.

If you are married at your prescribed date your husband or wife must apply with you. (This also applies to people living de facto). Generally, when you acquire a home with someone else they must join in the application with you. There is no age limit on people who can apply.

If you are not an Australian citizen, you or at least one joint applicant must have the right of permanent residence in Australia.

You can get this after you acquire

your home but one of you must have the right of permanent residence or be an Australian citizen before any payment can be made.

You do not qualify if you have owned (or jointly owned) a home in Australia (this includes paying off a home under terms purchase or a mortgage); or have been paid a Home Savings Grant, a Home Deposit Assistance Grant or a First Home Owners benefit.

Also, you do not qualify if a joint applicant with you has owned (or part-owned) a home before, or has been paid a Home Savings Grant, a Home Deposit Assistance Grant or a First Home Owners benefit.

INCOME TEST

You must pass an income test to qualify.

The income test applies to the combined taxable income of the person or persons applying for the last full financial year just before your prescribed date.

The table at the end of this section shows the relevant year of income for your prescribed date, together with the income limits which apply.

The maximum benefit may be paid if income is on or below the lower limit.

A reduced benefit may be paid if income is between the lower and upper limits.

No benefit is payable where income is on or above the higher limit.

A special income test may apply if any applicant's income in the financial year of home acquisition is or is likely to be less than the previous year.

This might be where one or more have ceased or will cease work, or for some

Each applicant has a legal right to an equal share of any payments, although payment will generally be to a single or joint account.

For homes acquired from 17 April 1985			
Benefit Options	No Dependents	One Dependent	Two or more Dependents
OPTION 1 Subsidy Only	\$4,000	\$5,500	\$6,000
OPTION 2 Subsidy	\$2,300	\$3,800	\$3,800
Lump Sum	\$1,200	\$1,200	\$1,700
OPTION 3 Subsidy	\$1,250	\$2,250	\$2,250
Lump Sum	\$2,000	\$2,500	\$3,000
For homes acquired before 17 April 1985			
Benefit Options	No Dependents	One Dependent	Two or more Dependents
OPTION 1 Subsidy Only	\$5,000	\$6,500	\$7,000
OPTION 2 Subsidy	\$3,000	\$4,500	\$4,500
Lump Sum	\$1,500	\$1,500	\$2,000
OPTION 3 Subsidy	\$1,750	\$2,750	\$2,750
Lump Sum	\$2,500	\$3,000	\$3,500

Note: These figures are the maximum benefit paid where income is under the lower income limit

WHAT HAPPENS IF CIRCUMSTANCES CHANGE DURING THE SUBSIDY PERIOD

Income and dependency are tested only when your application is first assessed and are not retested.

Benefits will be paid during the payment period to each applicant who retains ownership of the home and either lives in the home, or intends to live in it as that person's principal place of residence.

If any applicant sells his or her interest in the home, or no longer lives or intends to live in the home in the reasonable future, that person must immediately inform the Home Ownership Assistance Office and his or her share of the monthly subsidy must cease.

It may recommence if within twelve months a person reoccupies or intends to reoccupy the home.

Where, within the subsidy period, an applicant contracts for another home within twelve months of the sale of the previous home, and occupies or intends to occupy that new home, his or her monthly subsidy will recommence.

The income or dependency test will NOT be applied to a second or subsequent home acquisition.

This brochure does not attempt to cover the range of possible changing circumstances during the subsidy period.

Further information is available from the Home Ownership Assistance Office.

REVIEW OF DECISIONS

A person affected by a decision on his or her application may appeal to the Secretary of the Department of Housing and Construction to have the decision reconsidered.

That decision of the Secretary may be further appealed to the Administrative Appeals Tribunal.

WHAT TO DO NOW

If you think you might qualify under the First Home Owners Scheme you should apply.

other reason will get less income than in the previous year.

Ask the Home Ownership Assistance Office for more details if this applies to you.

If you were not a resident of Australia during any part of the financial year before home acquisition you should contact the Home Ownership Assistance Office to enquire how the income test will apply in your case.

Joint Applicants (with or without dependents) and Sole Applicants with Dependent Children		
Date of Home Acquisition	Income Year for Testing	Income Limits
1.10.83 — 30.6.84	1982/83	Lower Upper \$24,300 — 27,900
1.7.84 — 21.8.84	1983/84	\$24,300 — 27,900
22.8.84 — 30.6.85	1983/84	\$20,000 — 27,900
From 1.7.85	1984/85	\$20,000 — 27,900
Sole Applicants Without Dependent Children		
Date of Home Acquisition	Income Year for Testing	Income Limits
1.10.83 — 30.6.84	1982/83	Lower Upper \$24,300 — 27,900
1.7.84 — 21.8.84	1983/84	\$24,300 — 27,900
22.8.84 — 30.6.85	1983/84	\$10,000 — 13,950
From 1.7.85	1984/85	\$10,000 — 13,950

WHAT CAN BE PAID

If you meet the conditions in this brochure you may be eligible for:

- (a) up to \$4,000 over 5 years if you do not have dependent children
- (b) up to \$5,500 over 5 years if you have one dependent child
- (c) up to \$6,000 over 5 years if you have two or more dependent children. —

These figures represent the maximum entitlement for people buying or building their first homes on or after 17

April 1985. For people acquiring first homes before that date, but on or after 1 October 1983, the maximum assistance is \$7,000 over 5 years [category (c) above].

A dependent is a child for whom a family allowance benefit is payable (or would be if they did not get certain prescribed tertiary educational allowances) to an applicant at the prescribed date or up to 11 months from that date. The prescribed educational Schemes are Tertiary Education Assistance, Pre-School Teacher Education Assistance, Aboriginal Study Grants, Commonwealth Teaching Service Scholarships, Post-Graduate Awards and Adult Secondary Education Assistance.

If you are not sure about your dependency entitlement please contact the Home Ownership Assistance Office in your nearest capital city and they will assist you.

HOW WILL PAYMENT BE MADE

Applications will be processed promptly on receipt of a correctly completed application. Every attempt is made to commence payments without delay but the payment of any assistance is subject to the availability of funds.

The table at the end of this section shows three ways how payment can be made.

You will be asked to choose the payment option you want.

Subsidy payments will be paid monthly, generally into an account which you nominate with your bank, building society or credit union.

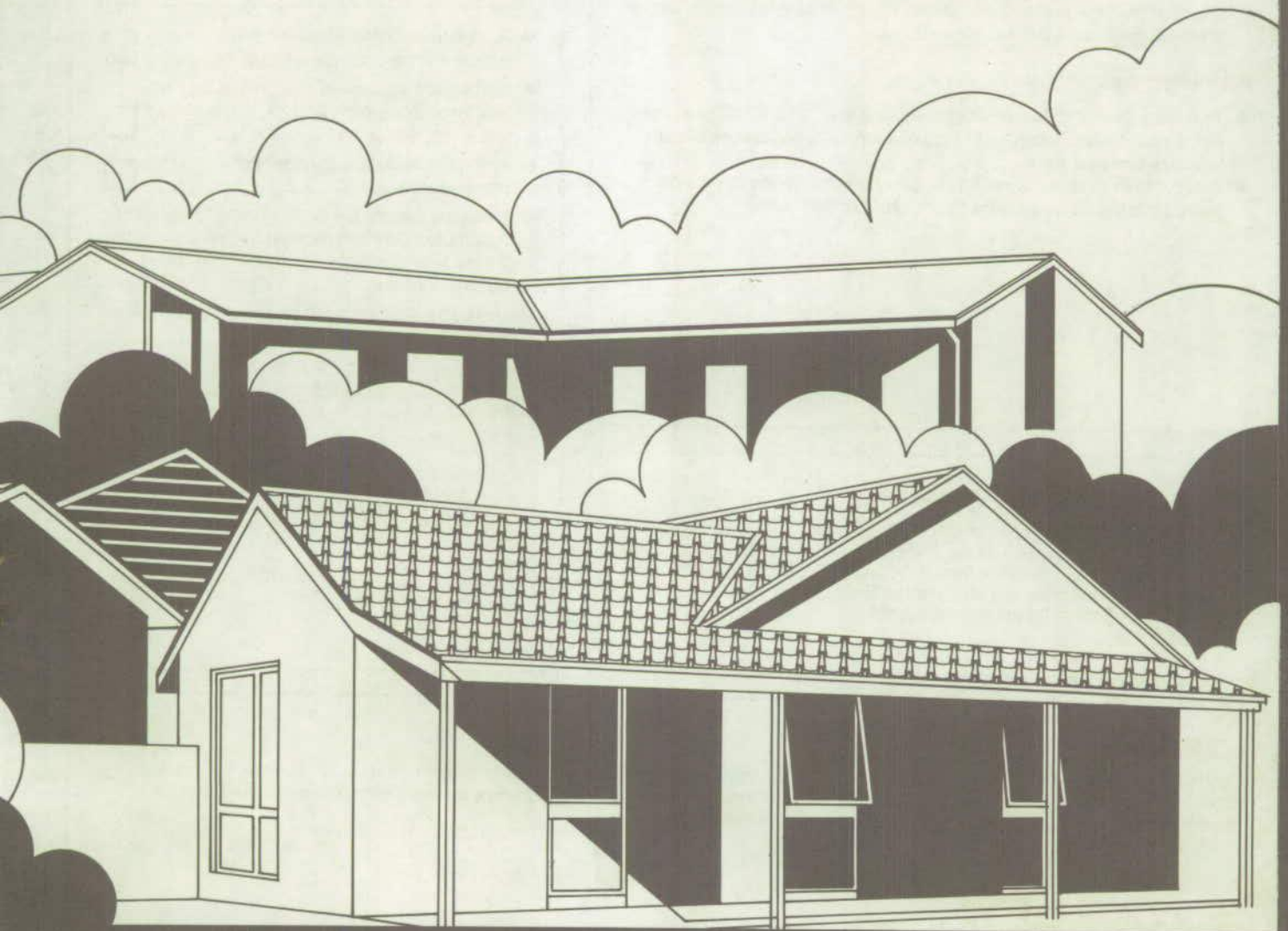
Subsidy payments will generally be made over a period of 5 years.



First home owners scheme application form

3rd Edition

November 1985



INFORMATION SHEET

GUIDE TO APPLICATION FORM

PRESCRIBED DATE

This is a term used throughout the form. Your **prescribed date** is:

- the date of the contract of sale, if you are buying your home;
- the date of the building contract if you have engaged a building contractor to construct your home;
- the date that construction commenced (ie: the date foundations were started), if you are an owner builder.

Note: The prescribed date is NOT the date of settlement.

WHO CAN APPLY

- If you are acquiring your first home in Australia and your prescribed date falls on or after 1 October 1983 you can apply for the assistance.
- Anyone joining in a contract to buy or build the home, or who are owner-builders, MUST join in the application if they intend to reside in the home.
- People who, on the prescribed date, were spouses of someone who signs a contract or of an owner-builder, MUST join in the application, whether or not they join in the contract or in building the home. For the purposes of the First Home Owners Scheme, "spouses" include defacto as well as legally married persons. If you are separated from your spouse you should enquire from the Home Ownership Assistance Office about your eligibility.
- Before payment can start at least one applicant must be an Australian citizen or live in Australia with permanent residence status.
- You cannot be paid if any of the applicants has already been paid a Home Savings Grant, a Home Deposit Assistance Grant or First Home Owners Assistance. As well, you cannot be paid if any one of the applicants has owned or part-owned a home in Australia before the **prescribed date**. An exception may be made if the home was not the principal place of residence of the applicant, or did not meet the relevant local building standards. You must give full details before previous ownership can be disregarded.

PAYMENTS

- To ensure payment before settlement or any other critical date please lodge your correctly completed application as soon as possible after your **prescribed date**.
- Subject to the availability of funds, every effort is made to provide assistance before settlement or any other critical date.

FREEDOM OF INFORMATION

Under the Freedom of Information Act you can ask to see your First Home Owners Scheme file and the rules and guidelines used in assessing your claim. Further information on the Freedom of Information Act may be obtained from any office of the Department. There may be a charge for Freedom of Information requests.

WARNING

The First Home Owners Scheme legislation provides for fines of up to \$2000 and/or imprisonment for up to one year for those convicted of supplying false or misleading information in their applications or supporting documentation. Please ensure that all information you provide is correct to the best of your knowledge.

CHECKLIST FOR APPLICANTS

Have you enclosed the following documents?

Note: All documents will be returned by certified mail where appropriate.

- Original or certified copy of your signed and dated purchase or construction contract and a copy of your land contract where purchased separately.

(If you do not already have a copy of your contract it may be obtained from your solicitor, builder or real estate agent.) ☐

- Original Notice of Assessment or other Taxation Office evidence of taxable income (see ITEM 34) ☐

(If more than one Notice of Assessment was issued please enclose the latest one for your relevant financial year)

INCOME YEAR ENDED 30 JUNE 19 or subsequent accounting period		AUSTRALIAN TAXATION OFFICE NOTICE OF ASSESSMENT MADE PURSUANT TO THE INCOME TAX ASSESSMENT ACT 1936		IC	FILE NUMBER
Taxable income	Tax Assessed and Other Amounts Deducted	Amounts Credited	Refunds and Adjustments	Other Amounts Payable or Other Credits	Amount of Refund
16472	A3563.10 O 68.52	E3426.85 G 830.00	L625.23CR		\$ 625.23 CH

See back of this notice for an explanation of symbols and information concerning taxpayers etc.

SYMBOL 0 - MEDICARE LEVY	CHECK NUMBER
ISSUE DATE 21AUG85 290664/ 066	45699005 7
Mr J. Smith 22 Block Street Surf Beach NSW 2432	804 880
	THE FILE NUMBER SHOWN AT THE TOP OF THIS NOTICE SHOULD BE SHOWN ON NEXT YEAR'S RETURN
	J. E. MCTIGUE Deputy Commissioner of Taxation 7 Macquarie Street SYDNEY 2000

NAT 88 180

- Advice from principal lender that loan has been approved (see ITEM 15) ☐
- Settlement statement (see ITEM 20) or evidence of completion of home (see ITEM 23, 26 or 29) ☐
- Any other evidence or separate statements ☐
- It may be necessary for the Home Ownership Assistance Office to request further information if they are not satisfied that your eligibility has been established.

Note: The application must be completed in ink or ball-point pen — not in pencil.

Have all applicants SIGNED the Declaration at the end of the form and the detachable section entitled Applicants Directions Regarding Option and Payment?

Application for FIRST HOME OWNERS ASSISTANCE

(for first homes bought or built from 1 October 1983)

Please read the information sheet before you fill out the application

OFFICE USE ONLY	
/	/19

PERSONAL PARTICULARS	APPLICANT 1	APPLICANT 2
1 Full names of persons applying for the assistance. SURNAME FULL GIVEN OR CHRISTIAN NAMES	(Please answer the questions on this page in BLOCK LETTERS)	
	<input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Miss <input type="checkbox"/> Ms	<input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Miss <input type="checkbox"/> Ms
2 Maiden Surname		
3 All other previous names		
4 Date of birth	/ /19	/ /19
5 a) Your present residential address Postcode: b) Your postal address if not the same as above Postcode: c) Contact telephone Work: () Home: () d) Address/es of all other home/s you have lived in over the last 5 years. (If the same as Item 5(a) write "as above") Postcode: (If insufficient space attach a separate list)	 Postcode: Postcode: Work: () Home: () Postcode: (If insufficient space attach a separate list)	 Postcode: Postcode: Work: () Home: () Postcode: (If insufficient space attach a separate list)
6 Relationship to any other applicant at PRESCRIBED DATE (If "other", give details).	<input type="checkbox"/> Husband/Wife <input type="checkbox"/> Engaged Other: (Details:)	<input type="checkbox"/> Husband/Wife <input type="checkbox"/> Engaged Other: (Details:)
7 Date (or expected date) of marriage	/ /19	/ /19
8 Marital status at PRESCRIBED DATE (Tick appropriate box/es. If more than one box ticked attach a statement giving details)	1. a) Married — legal <input type="checkbox"/> b) Married — defacto <input type="checkbox"/> 2. Permanently Separated <input type="checkbox"/> 3. Widowed <input type="checkbox"/> 4. Divorced <input type="checkbox"/> 5. Engaged <input type="checkbox"/> 6. Never Married <input type="checkbox"/>	1. a) Married — legal <input type="checkbox"/> b) Married — defacto <input type="checkbox"/> 2. Permanently Separated <input type="checkbox"/> 3. Widowed <input type="checkbox"/> 4. Divorced <input type="checkbox"/> 5. Engaged <input type="checkbox"/> 6. Never Married <input type="checkbox"/>
9 Full name/s of previous spouse/s.		
10 Are you an Australian citizen? IF NO — Do you have permanent resident status in Australia? If you are not an Australian citizen, enclose a photocopy of your complete passport or other available evidence of residence status in Australia.	<input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> YES <input type="checkbox"/> NO	<input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> YES <input type="checkbox"/> NO
11 If not born in Australia state date of arrival and country of birth.	/ /19	/ /19

OFFICE USE ONLY	Pre-assessment data entered:		
	Signature	No. FA dependents	APPLIC 1,2,3,4 etc.
	/ /19	No. Student dependents	
		Initial Date / /	

DEPENDANTS**12**Number of dependent children (including student children — see **GUIDE** below)

- (a) at the **PRESCRIBED DATE** ☐
- (b) not at the **PRESCRIBED DATE** but within 11 months after the **PRESCRIBED DATE** ☐

(c) full Given or Christian name/s of eldest and youngest dependent children	(Eldest)	Date of Birth	/ /19	Is Child a Student?	<input type="checkbox"/> YES <input type="checkbox"/> NO
	(Youngest)		/ /19		<input type="checkbox"/> YES <input type="checkbox"/> NO

13

Full name of applicant to whom Family Allowance is paid.

*Note: Family Allowance is generally paid to the mother of dependent children***14**

Do any of the dependent children get assistance under a prescribed educational scheme?

☐ YES ☐ NO

If YES — State: (a) the name/s of the student/s

(b) the name/s of the scheme/s

(c) whether the student/s is/are wholly or substantially dependent upon one or more of the applicants

☐ YES ☐ NO

GUIDE — You may be eligible for an allowance for dependants if one or more of the applicants receives, or becomes a recipient of a family allowance at the **PRESCRIBED DATE** or within 11 months after the **PRESCRIBED DATE**. You may also be eligible if you or another of the applicants had a student child who was wholly or substantially dependent on any applicant at the **PRESCRIBED DATE** or within 11 months of the **PRESCRIBED DATE**, and who receives an allowance under one of the prescribed educational Schemes (see the First Home Owners Scheme brochure for the Educational Schemes which qualify).

If you receive family allowance in respect of a child or student child after the lodgement of your application you may make a later application for the dependent allowance but family allowance must be payable within 11 months of your **PRESCRIBED DATE**.

YOUR MEANS OF FINANCING THE PURCHASE/CONSTRUCTION OF YOUR HOME**15**

- (a) **PRINCIPAL LOAN** (Actual or expected). Enclose evidence — if evidence is not available please ask your lender to complete Part E of the section entitled Applicants Directions Regarding Option and Payment. \$
- (b) **OTHER LOANS**, including personal loans from lending institutions \$
.....
(State name and address of lender and provide evidence of loan)
- (c) **PRIVATE LOANS AND GIFTS** \$
(Provide a statement from the persons providing the loan or gift)
- (d) **OTHER SOURCES** e.g. savings, sale of assets, future income etc. (Provide evidence if you are not obtaining a principal loan) \$
- (e) **IF LAND WAS PURCHASED SEPARATELY** — add in the cost of your land and enclose a statement advising how the purchase was financed. \$

TOTAL — This should be the same as the amount for the cost of the home (given in ITEM 17a) \$

GUIDE — You must provide the finance information required, even if you have already settled your contract or completed construction, otherwise processing of your application may be delayed. If your loan is not yet approved, indicate how much you think you will get, and lodge your application without evidence.

DETAILS OF THE DWELLING**16**

Address of home for which you are applying for assistance

Postcode:

17

Actual/expected final cost of house and land

(a) House and Land

\$

(b) Land, if purchased separately

\$

18

Name/s of all persons who will be registered as title-holder/s or, if the transfer has been completed, the name/s now registered.

(Do not include the lending authority or vendor)

GUIDE — If you build on a rural property but do not own the land, you can get payment if the owner gives you written permission for exclusive use of the home. For example, if you build on your father's farm, you will need his written permission to occupy the home as your own. Please forward a statement from the owner with your application. The property must be used for the purposes of primary production to be classified as a rural property.

COMPLETE ITEMS 19 TO 21 IF YOU ARE BUYING AN EXISTING HOME, HOME UNIT OR FLAT, ETC.

19 Date of contract of sale.	/ /19	This will generally be your PREScribed DATE . Please enclose the original contract or a copy certified by your lending authority, solicitor, or real estate agent.
20 Is your purchase contract already settled?	<input type="checkbox"/> YES <input type="checkbox"/> NO	If YES — Enclose evidence (eg: advice from solicitor)
If NO — Expected date of settlement	/ /19	
21 Has the home been previously occupied	<input type="checkbox"/> YES <input type="checkbox"/> NO	

GUIDE — The date of settlement of your contract is the date on which all outstanding moneys for the purchase are paid. If you are not sure of your date of settlement, your solicitor, or real estate agent may be able to help. Payment of assistance can commence before settlement, but evidence **MUST** be forwarded when settlement is completed.

COMPLETE ITEMS 22 TO 23 IF YOU ARE BUYING LAND FROM THE SAME PERSON OR COMPANY WHO HAS BUILT OR WILL BUILD YOUR HOME (A HOUSE/LAND PACKAGE)

22 Is the house/land package the subject of a single contract	<input type="checkbox"/> YES <input type="checkbox"/> NO	
If YES — Date of contract	/ /19	This will generally be your PREScribed DATE . Please enclose the original signed and dated contract or a copy certified by your lending authority, solicitor or builder.
If NO — What is the date of the contract to buy your land?	/ /19	Enclose contract for purchase of land
What is the date of the contract to build your house?	/ /19	This will generally be your PREScribed DATE . Please enclose the original signed and dated contract or a copy certified by your lending authority, solicitor or builder.
23 Date construction commenced or is expected to commence	/ /19	
Has construction of the home been completed?	<input type="checkbox"/> YES <input type="checkbox"/> NO	If YES — Enclose supporting evidence (Supporting evidence could include a Certificate or other advice from your local government building authority or written advice from your builder. Payment of assistance can commence before completion, but evidence MUST be forwarded when construction is completed.
If NO — What is the expected date of completion?	/ /19	

COMPLETE ITEMS 24 TO 26 IF YOU ENGAGED A CONTRACTOR TO BUILD YOUR HOME ON YOUR LAND

24 Date of contract to build	/ /19	This will generally be your PREScribed DATE . Please enclose the original signed and dated contract or a copy certified by your lending authority, solicitor or builder.
25 Date construction commenced or is expected to commence	/ /19	
26 Has construction of the home been completed?	<input type="checkbox"/> YES <input type="checkbox"/> NO	If YES — Enclose supporting evidence (see ITEM 23)
If NO — What is the expected date of completion?	/ /19	

● Enclose original or copy of contract for purchase of land if purchased separately, or if you did not purchase the land, evidence of your exclusive right of occupancy.

GUIDE — If you build on a rural property but do not own the land, you can get payment if the owner gives you written permission for exclusive use of the home. For example, if you build on your father's farm, you will need his written permission to occupy the home as your own.

OFFICE USE ONLY	
Method of acquisition	

COMPLETE ITEMS 22 TO 25 IF YOU ARE AN OWNER BUILDER*(An owner-builder is a person who undertakes the construction of a home without the services of a principal contractor)*

27 Date building permit issued	/ /19 . Enclose a copy of the building permit.
28 Date construction commenced	/ /19 . (ie: date foundations started will generally be your PRESCRIBED DATE) Enclose evidence such as a statement from the local authority or dockets for the delivery of foundation materials.
GUIDE — Date construction commenced is generally taken as the date when the steel mesh or reinforcing for the foundations was laid in place or when the first stump was placed in position.	
29 Actual or expected date of completion	/ /19 .
30 STAGE OF COMPLETION REACHED: (Please note that assistance cannot be paid until you can demonstrate that there has been substantial progress on construction or that substantial progress is likely to be made within a reasonable time. Give details and enclose any evidence. When construction is completed, evidence such as a Certificate from your local government building authority must be forwarded).	
● Enclose original or copy of contract for purchase of land or, if you did not purchase the land, evidence of your exclusive right of occupancy. (See the Guide in ITEM 18, if you are building on rural land you do not own).	

INCOME — BEFORE PROCEEDING YOU SHOULD BE SURE OF WHAT YOUR PRESCRIBED DATE IS. CHECK THE INFORMATION SHEET.

	APPLICANT 1	APPLICANT 2
31 Were you overseas for any period in the financial year before your PRESCRIBED DATE , or the financial year in which your PRESCRIBED DATE falls? If YES — advise the date of your departure advise the date of your return advise the reason for your period overseas. (If insufficient space attach a separate statement).	<input type="checkbox"/> YES <input type="checkbox"/> NO If NO proceed to ITEM 32 / /19 . / /19 .	<input type="checkbox"/> YES <input type="checkbox"/> NO / /19 . / /19 .
GUIDE — Any financial year is from 1 July to 30 June in the following year. In general your taxable income for the financial year prior to your PRESCRIBED DATE is the income to be tested but if you were not domiciled in Australia in that financial year the Home Ownership Assistance Office may need to obtain further information.		
32 Tax Assessment File Number.	____/____/____	____/____/____
33 Have you lodged or will you lodge a taxation return for the financial year before your PRESCRIBED DATE ?	<input type="checkbox"/> YES <input type="checkbox"/> NO	<input type="checkbox"/> YES <input type="checkbox"/> NO
If NO — please give reasons in the space below as to why you were not required to lodge a taxation return and then proceed to ITEM 36. APPLICANT 1 APPLICANT 2		
34 Have you received a Notice of Assessment from the Australian Taxation Office for that financial year?	<input type="checkbox"/> YES <input type="checkbox"/> NO If YES enclose original Notice of Assessment	<input type="checkbox"/> YES <input type="checkbox"/> NO If YES enclose original Notice of Assessment
If NO — please give reasons why you expect a delay before you receive a Notice of Assessment and then proceed to ITEM 36 APPLICANT 1 APPLICANT 2		
35 Does your Notice of Assessment show your amount of taxable income in dollars? (see the example of a Notice of Assessment on the Information Sheet. If an R appears in the Taxable Income column instead of an amount you should complete ITEM 36).	<input type="checkbox"/> YES <input type="checkbox"/> NO	<input type="checkbox"/> YES <input type="checkbox"/> NO

TAXABLE INCOME INFORMATION

36 If you answered NO to any of ITEMS 33, 34 or 35 please complete Sections A to F below providing details of the income you earned in the financial year before your PRESCRIBED DATE . Otherwise proceed to ITEM 37 . Note: You should support the information below with evidence of all your income for the full financial year, e.g. a statement from your employer/s, accountant or tax agent AND a copy of your taxation return, group certificate/s etc; or statement of benefit from the Department of Social Security.
--

Show financial year relevant to your circumstances

(Write the financial year **before** your prescribed date, unless you wish to be tested on more recent income (see ITEM 37) in which case write the financial year of your prescribed date).

1 July /30 June

198 /8

1 July /30 June

198 /8

Section YOUR OCCUPATION DURING THAT YEAR**A**

Applicant 1: Applicant 2:

Section GROSS SALARY, WAGES AND OTHER INCOME. (If available, enclose copy of group certificate, tax stamp sheets or statement of earnings).**B**

Include:

- ☐ salary, wages
☐ business income
☐ unemployment and sickness benefits
☐ pensions and benefits paid by the Commonwealth Government
☐ other pensions, superannuation or retiring allowance (not included in Section C)
☐ directors fees, workers compensation, honoraria, etc.
☐ any income earned outside Australia

(Tick sources if income and enclose evidence)

USE FULL DOLLARS

USE FULL DOLLARS

= \$.....

= \$.....

Section ALLOWANCES AND EMPLOYEE BENEFITS**C**

Include

- value of board or quarters subsidised or provided free by employer
- tips
- living-away-from-home, travelling, tool, clothing and car allowances
- employer contribution to health funds or medical expenses
- any other allowance in cash or otherwise

= \$.....

= \$.....

Section PAYMENTS ON RETIREMENT OR TERMINATION OF EMPLOYMENT**D**

Include

- payments for unused annual leave and for unused long service leave which accrued after 15 August 1978
- and the taxable portion of other lump sum payments on retirement or termination of employment

= \$.....

= \$.....

Section INTEREST AND DIVIDENDS**E**

Include

- interest from banks, building societies, credit unions, etc., Commonwealth Government Securities, Australian Savings Bonds, debentures, personal loans etc.
- dividends from shares

= \$.....

= \$.....

INCOME Note: if you did not receive any income under Items B – E write 'NIL' in the total column

TOTAL INCOME — Add B + C + D + E

= \$.....

= \$.....

Section DEDUCTIONS — Only include those expenses allowable under the Income Tax Assessment Act**F**

State amount for each

- trade union subs \$.....
- deductions relating to allowances under Section B \$.....
- tax agents fee \$.....
- gifts and donations \$.....
- any other deductions necessarily incurred in earning your income \$.....

= \$.....

= \$.....

"TAXABLE INCOME" — SUBTRACT TOTAL DEDUCTIONS FROM TOTAL INCOME

= \$.....

= \$.....

You should note that "Income" in this item has the same meaning as under the Income Tax Assessment Act 1936 and if you are unsure of any of the items then the Form S Taxation Guide available from the Australian Taxation Office may help you. Note that you may reduce the amount of your income, if any, by claiming deductions of the sort allowable under the taxation law.

37

Do you think your income in the same financial year you acquired your home is or will be less than for the financial year before your home purchase?

☐ YES ☐ NO ☐ YES ☐ NO

If YES — Do you wish your income to be tested on the basis of the lower income?

☐ YES ☐ NO ☐ YES ☐ NO

If YES — Your lower income may be tested if it will benefit you. Please complete **ITEM 36** above giving details of income earned, or expected to be earned, in the financial year in which you acquired your home. Also please provide:

- a statement giving reasons for the expected decrease in your income
- any documents, records etc. which would support the estimate of your income — e.g. a letter from your employer confirming your weekly wage/salary etc.
- the ORIGINAL Notice/s of Assessment for the financial year **before** you acquired your home

GUIDE — Where the Department is required to make an estimate of income an advance of your entitlement may be payable (subject to the availability of funds). This may occur when —

(i) a Taxation Return had been lodged at the time of purchasing or building your home and the Taxation Notice of Assessment has not been forwarded to you.

(ii) Your income for the financial year in which you purchased or built your home is less or likely to be less, than the previous year.

In either case, the relevant Taxation Notice of Assessment must be forwarded to this office immediately you receive it to confirm your income details. In any case where an estimate of income is made it may be necessary to adjust the amount of your assistance or require any overpaid amounts to be re-paid.

INTENTION TO OCCUPY**APPLICANT 1****APPLICANT 2**

38 Do you already occupy the home?	<input type="checkbox"/> YES <input type="checkbox"/> NO	<input type="checkbox"/> YES <input type="checkbox"/> NO
If NO — About when do you intend to move into the home as your principal place of residence?	/ /19	/ /19
GUIDE — You and any other applicants must intend to live in the home within a reasonable period. If there is to be a lengthy delay before you move into your home, you will need to attach a statement giving reasons.		

PREVIOUS OWNERSHIP

39 Have you at any time owned, been buying or had an interest in any other home in Australia?	<input type="checkbox"/> YES <input type="checkbox"/> NO	<input type="checkbox"/> YES <input type="checkbox"/> NO
If YES — attach a statement giving details, including the address/es of the property/ies the date of purchase, when sold, the reason for purchasing and your period of occupation.		

PREVIOUS HOME OWNERSHIP ASSISTANCE

40 Have you ever applied, either solely or jointly, for a Home Savings grant, a Home Deposit Assistance grant, or First Home Owners Assistance?	<input type="checkbox"/> YES <input type="checkbox"/> NO	<input type="checkbox"/> YES <input type="checkbox"/> NO
(If YES — attach a statement giving details of the property, the name under which you applied and the State or Territory in which the application was lodged.		

DECLARATION — ALL APPLICANTS MUST SIGN

I/WE APPLY for FIRST HOME OWNERS ASSISTANCE for the home which is the subject of this application. I/WE solemnly and sincerely DECLARE that the details we have supplied are true and correct.

PENALTY FOR A DELIBERATE FALSE DECLARATION — MAX. PENALTY \$2000 AND/OR IMPRISONMENT FOR TWELVE MONTHS AND REPAYMENT OF ANY BENEFIT ALREADY PAID

Applicant 1:

Applicant 2:

Dated this day of 19

APPLICATIONS SHOULD BE ADDRESSED TO:

The Executive Officer (Housing), for the State or Territory in which the home is located.

NEW SOUTH WALES

Box 9889, GPO, Sydney, 2001
Ground Floor, Gold Fields House
1 Alfred St, Circular Quay
Sydney, NSW 2000
Telephone: 236 0022 008-42 2615

Newcastle FHOS Information Office
165 Lambton Rd, Broadmeadow, NSW 2292
Telephone 52 8144

VICTORIA

Box 9889, GPO, Melbourne, Vic. 3001
Shops 12 and 13, Tivoli Court
239 Bourke Street, Melbourne, Vic. 3000
Telephone: 652 8894 652 8890
652 8832 008-13 6371

QUEENSLAND

Box 9889, GPO, Brisbane, Qld. 4001
Ground Floor, Australia House
145 Eagle Street, Brisbane, Qld 4000
Telephone: 33 7011 008-17 7238

WESTERN AUSTRALIA

Box 9889, GPO, Perth, W.A. 6001
197 Adelaide Terrace, Perth, W.A. 6000
Telephone: 326 9111 008-19 9205

SOUTH AUSTRALIA

Box 9889, GPO, Adelaide, S.A. 5001
Shop 12, Renaissance Tower
127 Rundle Mall, Adelaide, S.A. 5001
Telephone: 228 6211 008-08 8118

TASMANIA

Box 9889, GPO, Hobart, Tas. 7001
Continental Building, 162 Macquarie St
Hobart, Tas. 7000
Telephone: 20 5011 008-00 1399

A.C.T.

Box 9889, GPO, Canberra City, 2601
Sydney Building, 113 London Circuit
Canberra City, A.C.T. 2601
Telephone: 47 2066 008-04 6052

NORTHERN TERRITORY

Applications to be sent to the above South Australian address. General enquiries may be made at:
Construction House, 1-3 Brigg Street
Darwin, N.T. 5790
Telephone: 80 0211 008-08 8118

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APPLICANTS DIRECTIONS REGARDING OPTION AND PAYMENT

INSTRUCTIONS

Please read
carefully

- **DO NOT DETACH THIS SECTION** if you have already arranged the financing of your home. You should provide a copy of any loan approval letter or have your lender complete Part E of this section.
- If there is likely to be a delay in obtaining finance you should
 - **DETACH THIS SECTION** and lodge the rest of the application form
 - Complete this section in consultation with your lender and then lodge it.
- Each applicant should write his or her name in the space below and complete the following sections.

PART A

	SURNAME	INITIALS	DATE OF BIRTH
APPLICANT 1			
APPLICANT 2			

(PLEASE PRINT)

PART B — OPTION ELECTION FOR PAYMENT

As a guide, the following benefits are payable **WHERE COMBINED INCOME IS ON, OR BELOW, THE RELEVANT LOWER INCOME LIMIT.**

	Prescribed dates on or before 16/4/85			Prescribed dates on or after 17/4/85		
	No. of Dependants			No. of Dependants		
	Nil	One	Two or More	Nil	One	Two or more
OPTION 1 (Subsidy Only)	\$5000	\$6500	\$7000	\$4000	\$5500	\$6000
OPTION 2 Lump Sum Subsidy	\$1500	\$1500	\$2000	\$1200	\$1200	\$1700
	\$3000	\$4500	\$4500	\$2300	\$3800	\$3800
	\$4500	\$6000	\$6500	\$3500	\$5000	\$5500
OPTION 3 Lump Sum Subsidy	\$2500	\$3000	\$3500	\$2000	\$2500	\$3000
	\$1750	\$2750	\$2750	\$1250	\$2250	\$2250
	\$4250	\$5750	\$6250	\$3250	\$4750	\$5250

USING THE GUIDE ABOVE INDICATE THE OPTION NUMBER OF YOUR CHOICE IN THIS BOX ☐

PART C — PAYMENT DIRECTIONS

PAYMENT DIRECTIONS	SUBSIDY — payable monthly to a nominated account held with a Bank, Building Society or Credit Union	LUMP SUM (Options 2 and 3 only) Complete if different to subsidy directions
Name of Institution where account is held
Address of Institution where account is held
Surname and Initials of account holders
Account Number (Maximum of 9 digits: if more contact your finance institution)	<input type="text"/>	<input type="text"/>
Type of Account e.g. Saving, Cheque
Bank/State/Branch Code	<input type="text"/>	<input type="text"/>

In respect of both lump sum and monthly subsidy payments, if there is more than one applicant, each has a legal entitlement to an equal share of the total benefit. Payment will generally be to a single or joint account.

Indicate where and to whom benefit is to be paid.

If you nominate payment to an account, the lump sum will generally be paid with the subsidy around the middle of the month following receipt of all information.

Some types of accounts have restrictions on the amount which can be deposited at any one time. FHOS benefits cannot be paid to these accounts. Please ensure that the account you nominate does not have these restrictions.

You must advise the Home Ownership Assistance Office if you close or transfer your account.

PART C — CHEQUE PAYMENT DIRECTIONS

Complete this section if you do not want your lump sum paid into an account but need a cheque.
e.g. for settlement.

Payment of the lump sum may be made by cheque to the address of applicant or nominee (but not to a bank, building society or credit union).
Possible date for payment.

Name of Payee
Address
Postcode

Settlement or other critical date

PART D — DECLARATION

EACH APPLICANT MUST SIGN

I/We being applicant/s for assistance under the First Home Owners Scheme, make the above option election and payment directions.

Applicant 1:

Applicant 2:

/ /19 .

PART E — ADVICE FROM MAIN LENDER THAT LOAN HAS BEEN OR WILL BE MADE

THIS SECTION MUST BE COMPLETED BY YOUR LENDER

If you are unable to provide other evidence that your loan has been approved (see ITEM 15)

Statement from Lender:

The following persons have been or will be approved a loan of \$.....

in respect of their home at

Surname: Given Names:

LENDER: Please list below the names of all other persons known to be associated with the loan application or home acquisition (eg: persons acting as guarantor).

Surname: Given Names:

Name and Branch of lending institution:

Signature of Authorised Officer:

OFFICIAL
STAMP
OR
SEAL

PART F — FIXED ASSIGNMENT OF BENEFIT

Note: This section only to be completed where required by lender

Complete this section only if lender and applicant are in agreement that the nominated payment arrangements may be varied only with the knowledge of the lender.

Special agreement between applicant and lender:

I/We authorise officers of the Department to inform my/our lender prior to acting on any request to vary the payment arrangement nominated on this form.

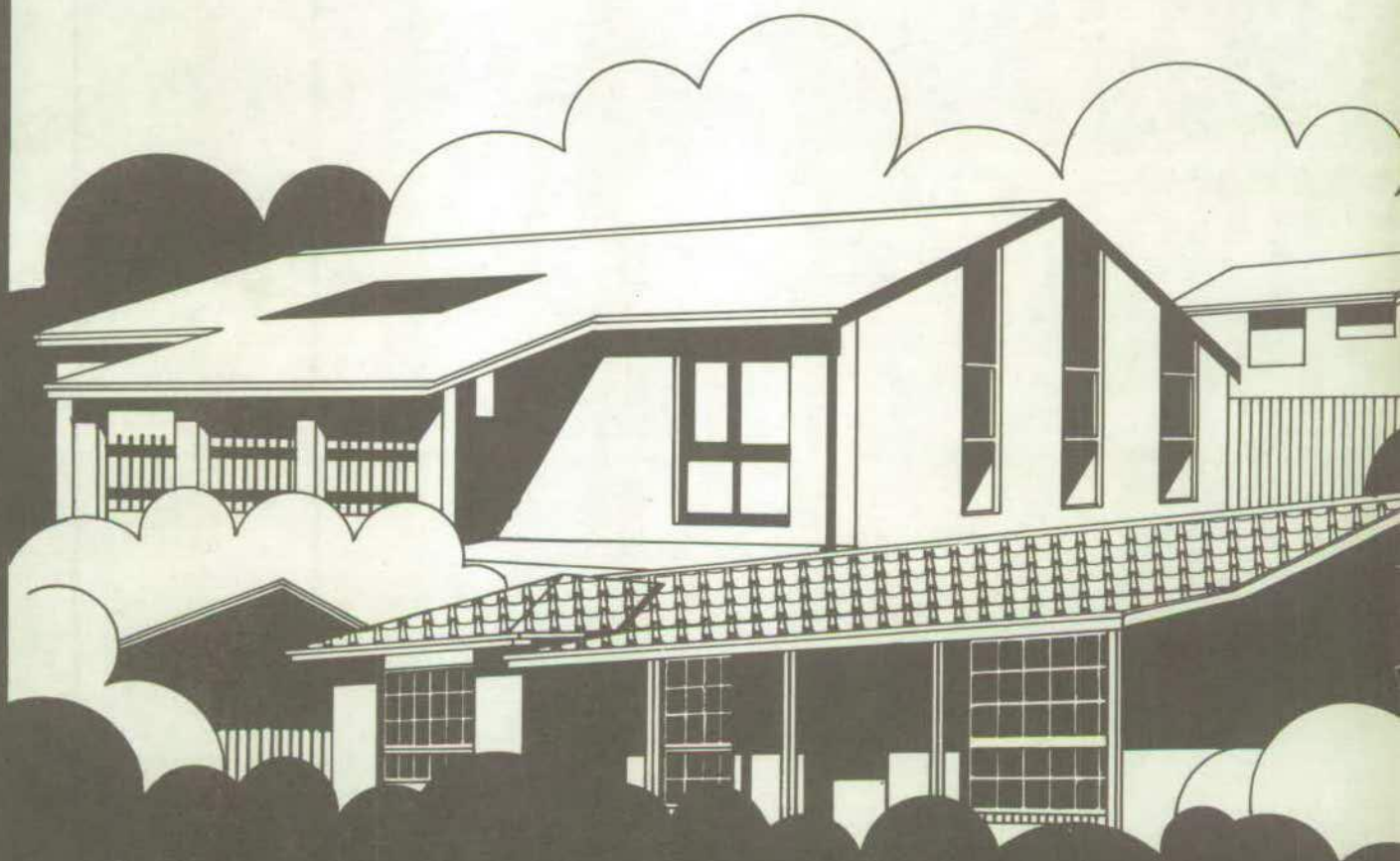
Signature of Applicant Applicant 1 Applicant 2

Signature of Lender

Name of lending institution

Signature of Authorised Officer / /19 .

OFFICIAL
STAMP
OR
SEAL



Department of Housing & Construction



First home owners scheme

BENEFITS TABLE

*For people acquiring their first
home from 17 April 1985*

*Note: For people acquiring their first home before
17 April 1985, refer to the September 1984
edition of the FHOS Brochure and Ready Reckoner*

For details on the Federal Government's First Home Owners Scheme contact:

New South Wales (except Queanbeyan)
Box 9889, GPO, Sydney, N.S.W. 2001
Ground Floor, Gold Fields House,
1 Alfred Street, Circular Quay, NSW 2000
Telephone: 236 0022.

Victoria

Box 9889, GPO, Melbourne, Vic. 3001
Shops 12 and 13, Tivoli Court,
239 Bourke Street, Melbourne, Vic. 3000
Telephone: 652 8111.

Queensland

Box 9889, GPO, Brisbane, Qld. 4001
Ground Floor, Australia House,
145 Eagle Street, Brisbane Qld. 4000
Telephone: 33 7011.

South Australia

Box 9889, GPO, Adelaide, S.A. 5001
Shop 12, Renaissance Tower,
127 Rundle Mall,
Adelaide, S.A. 5000
Telephone: 228 6211.

Western Australia

Box 9889, GPO, Perth, W.A. 6001
197 Adelaide Terrace, Perth, W.A. 6000
Telephone: 326 9111

Tasmania

Box 9889, GPO, Hobart, Tas. 7001
Continental Building,
162 Macquarie Street, Hobart, Tas. 7000
Telephone: 20 5011

Australian Capital Territory

(and Queanbeyan)

Box 9889, GPO, Canberra City, A.C.T. 2601
Sydney Building, 113 London Circuit,
Canberra City, A.C.T. 2601
Telephone: 47 2066.

Northern Territory

Applications to be sent to the above South
Australian address.

General enquiries may be made at:
Construction House, 1-3 Brigg Street,
Darwin, N.T. 5790
Telephone: 80 0211.