



Department of Housing and Construction

In reply please quote
Contact

E84/58 (POL 01)

Messrs W.P. Walters and Company
Solicitors
PO Box 562
LISMORE NSW 2480

Dear Sirs,

RE: MULTIPLE OCCUPANCY AGREEMENTS - BILLEN CLIFFS
SERENDIP P/L, SOLOMON AND THOMAS

You have requested my advice as to the eligibility under the First Home Owners Act 1983 (the FHO Act) of persons participating in the above multiple occupancy schemes. You will appreciate that I cannot give definitive advice in advance of a specific application as each application must be decided on its merits. I can however, draw your attention to the relevant provisions and discuss, in a general sense, the documentation for each of the above schemes.

1. TENURE

Eligibility for a grant of assistance depends, amongst other things, upon the applicants having purchased or owning as provided by section 9(1), an "approved interest" in land or in an undivided share in land. Section 4(1) of the FHO Act defines an "approved interest" as including:

- (a) an estate in fee simple;
- (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;
- (f) an interest of the kind referred to in section 11; and
- (g) any other interest declared by the regulations to be an approved interest for the purposes of this Act.

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Under section 11 of the Act, a person building a home on a rural property who does not own the land on which that home is to be built, may be eligible for assistance if the owner of the land gives permission for that person to occupy the home on completion.

Section 4(1) defines "rural property" as,

- (a) land used wholly or substantially for carrying on the business of primary production; or
- (b) land that the Secretary is satisfied should, having regard to its extent, location, use or zoning be regarded as a rural property for the purposes of this Act.

This section would be relevant to multiple occupancy situations provided the specific requirement as to "business" can be satisfied. Further, subsection (b) must be read in conjunction with subsection (1) and could only be used, for example, where land is rural and an applicant has the intention of using it for primary production, but may not be doing so at the time an application is made.

Sections 9(2) and 12 are also relevant to the question of tenure. Section 9(2) provides that a reference to "purchase" or "ownership" in the Act may be read as a reference to purchase or ownership of:

- (b) where the dwelling is, or is to be ... one of two or more dwellings erected on a single parcel of land -
 - (i) an approved interest ... that enables the holding or enjoyment ... of proprietary rights ...;
 - (ii) shares in the capital of a body corporate that is the owner of land on which the dwelling is, or is to be erected, being shares that entitled 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 ... entitled to a right of occupancy in respect of the dwelling.

.../3

Section 12 of the FHO Act contains the provisions relevant to trust holdings. Where a person holds an interest in land in trust for another person or persons (referred to as the beneficiary or beneficiaries) and the Secretary is satisfied that the beneficiary or beneficiaries will become the owner or co-owner of the land, the beneficiary can be deemed to be the owner or co-owner for the purposes of the Act. Simply continuing to be a beneficiary of a trust is not sufficient for the purposes of the section. In Re D.R. and J.A. Jeans and the Secretary, Department of Housing and Construction 2 ALD 337, the Administrative Appeals Tribunal determined that "certainty of the vesting in the applicants of legal title to the subject land is required, not a mere possibility that such a vesting may occur at some indeterminate future date".

2. BILLEN CLIFFS UNIT TRUST

The rights of occupancy of this property are created by operation of the Trust Deed and the Deed of Lease.

For the purposes of the FHO Act, the relevant provisions of the Trust Deed are -

1. Paragraph 1(A)(f) which provides that the trust shall vest on 4 May 2062 or pursuant to sub-paragraphs (ii) and (iii).
2. 15(b)(i) which provides for 128 designated areas to be leased to the unit holders, which leases entitle the unit holders to the use and occupancy of their respective areas of the land.
3. 15(d) which provides that a Proprietary Lease shall be granted to each unit holder allowing that unit holder to solely occupy the designated part of the land corresponding to his or her unit holding.
4. 15(i) which provides that lessees or unit holders may apply to sublet their designated areas.

The Proprietary lease provides for the term to be for a period of approximately three years (presumably less) with provision in paragraph 8 for holding over from year to year on the same terms with termination on one year's notice. There is a proviso that the Lessor cannot give notice to terminate while the Lessee complies with the lease and retains ownership of the relevant unit in the Trust. Section 3 of the lease makes provision for the lease to be terminated on 10 days notice where, for instance, the lessee is no longer a unit holder.

.../4

The sections of the FHO Act to be considered for applications under this trust would probably be sections 4(1) and 12. Section 12, whilst usually relevant to trust situations, may not be applicable to Billen Cliffs because of the requirement that the Secretary be satisfied the beneficiaries will become owners. Whilst provision is made for divestment, it is highly unlikely that current owners would still be alive when that occurred, except perhaps if it occurred under paragraph 1(A)(f)(iii) in which case no certainty as to divestment would be apparent to the Secretary from the terms of the documentation evidenced, at the time of determination of an application.

Some other section of the FHO Act must then be relied upon for the requirements for tenure to be satisfied. Under the definition section 4(1), it is probable that unit holders could be regarded as having an "approved interest" under subparagraph (b) "a lease for a term of years", the security of tenure arising from both the lease and the unit holding. While the lease is expressed to be for a short initial period, it would be hoped that persons erecting a dwelling on trust land would stay on for some substantial period under the holding over provision. If this is an approved interest under that provision, then, it may simply be that having entered into a lease which satisfies the requirement of an "approved interest", the applicant can be a prescribed person for the purposes of the Act via section 14(1). Whether or not such a lease is part of a multiple occupancy would be irrelevant for the purposes of a determination under that provision.

Section 9 does not apply, even though making special provision for multiple occupancies, since the purchase of shares in a unit trust does not satisfy any of the subsections of section 9(2)(b). These comments would probably not apply to persons holding an interest under a sublease.

Having satisfied requirements as to tenure, applicants would need to show that, pursuant to section 14, they had, on or after 1 October 1983 entered into a contract to purchase a dwelling on a proprietary lease or commenced construction of a dwelling on such a lease. If not applications may be able to be considered under earlier legislation.

3. SOLOMON AND THOMAS

This Deed provides primarily for all owners to be registered as proprietors as tenants in common in equal shares of the subject property. The proposal is for 16 units to be erected upon the land and each owner shall have, as a registered proprietor, exclusive possession, use and enjoyment of their designated site, and rights in common to the common areas. The Deed also provides conditions as to transfer of the land, erection of buildings, by-laws and so on.

.../5

On the document evidenced, the owners will clearly have purchased under section 9(1) an "approved interest" within the terms of section 4(1) of the FHO Act, being owners in fee simple.

As there is more than one building to be built on the subject land, section 4 of the Act would be relevant and in particular subsection (2)(b)(iii).

Once applicants have shown that they have purchased an approved interest in the land, they must satisfy section 14 of the Act to become prescribed persons. Accordingly they must have, on or after 1 October 1983,

- (b) entered into a contract for the construction by a building-contractor of a dwelling that satisfies certain requirements set out in subparagraphs (i) to (iii) or
- (c) commenced the construction, otherwise than through a building-contractor, of a dwelling that again satisfies the above requirements.

There are obviously other requirements for eligibility however these apply to ordinary applicants, not just to multiple occupancy applicants.

4. SERENDIP PTY LTD

For the purposes of the FHO Act, the relevant provisions of the Memorandum of Association of the above company are:

- 2(a)(i) which provides for designated areas of the subject property to be leased by way of Proprietary lease to members of the Company
- 2(a)(ii) which provides that ownership of shares in the Company entitles the holder to use and occupy his or her designated area of land for dwelling, agricultural and other approved purposes for the duration of his or her Proprietary lease.

The Proprietary lease contains terms and conditions very similar to the lease for Billen Cliffs Unit Trust, with the difference that shares in the unit Trust are expressed as shares in the Company.

Where shares in a unit trust are not covered by section 9(2) the Serendip Pty Ltd scheme apparently falls with subsection 2(b)(ii) of that section, involving as it does a purchase of shares in the capital of a body corporate where such shares entitle the holder to a right of occupancy by way of a lease.

If applicants can thus establish the purchase or ownership of an approved interest, they must then satisfy the further requirements of section 14 as mentioned above.

Other provisions of relevance to multiple occupancies would include, in the case of owner builders, section 17(1) which provides that assistance shall not be paid in respect of an application under section 14(1)(c) unless,

- (1) the dwelling has been completed or
- (2) the Secretary is satisfied substantial progress on the construction has been made or is likely to be made within a reasonable time.

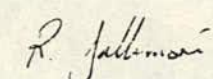
Section 4(2) is also of relevance as it sets parameters for what may constitute a dwelling for the purposes of the Act being,

- (1) a dwelling providing facilities such as would be reasonable for the purposes of constituting the principal place of residence of a person and
- (2) a building which complies with any applicable building standards.

I note that reference is made in the above three schemes to compliance with requirements of the local councils, Board of Health and any other governmental authorities and with all laws, ordinances, rules and regulations with respect to construction of dwellings. Presumably therefore, section 4(2) will not present any difficulty.

I trust that the above information will be of assistance to these multiple occupancy schemes.

Yours sincerely,



R. Gallimore
for First Assistant Secretary
(Housing Policy Division)

16 May 1984

DEPARTMENT OF
HOUSING AND
CONSTRUCTION



In reply please quote 22/002283

Contact

16 October 1984

Miss E Hession
"Hamlet Omshallow"
Co-ordination Co-operative Ltd
North End Tunttable Falls
VIA NIMBIN NSW 2384

Home Ownership Assistance Office
First Home Owners Scheme
Home Deposit Assistance Scheme
Ground Floor, Gold Fields House,
1 Alfred Street,
SYDNEY COVE, N.S.W. 2000
Box 9889, G.P.O. Sydney, 2001.
Telephone: (02) 236 0022.
Telex: AA21157.

Dear Miss Hession

SUBJECT: CO-ORDINATION CO-OP LTD TUNTTABLE FALLS

Your application for assistance under the First Home Owners Act 1983 has been considered. I regret to inform you that on the basis of the information disclosed in the application and supporting documents, the legislation does not permit payment of assistance to you.

The tenure of the subject land on which the subject home is to be erected, does not appear to be sufficiently secure to meet the requirements of the Act.

Extracts from a previous Central Office memorandum below outline the reasons for the above decision to reject your application.

1. The Trust deed provides for the trustee (Co-ordination Co-operative Ltd) to be the registered proprietor of the land and to hold it in trust for the owners, the trust to be called Rabbit Association. ~~The Trustee is able to convey, lease or dispose of the property only as the beneficial owners direct.~~
2. The deed of indemnity between the trustee and Rabbit Association allows, amongst other things,
 - (i) ~~exclusive use of the property by the Association for 3 years with a provision for holding over from year to year;~~
 - (ii) the Association members to apply to be shareholders of the Co-operative, but there is not compulsion for them to do so;
 - (iii) the Association to accept new members or expel them or allow members interests to be transferred without consent from the co-operative. The deed also indemnifies the trustee for certain costs.

- 2 -

3. The beneficial owners indemnify the trustee against loss and damage, amongst other things arising out of instructions from the beneficial owners to the trustee.

Under the provisions of the Act:

"Where -

- (a) the owner of land holds the land in trust for another person or other persons;

- (b)

and the Secretary is satisfied that the other person or other persons will become the owner or owners of the land or dwelling-house, the other person or other persons shall, for the purposes of this Act be deemed to be the owner or owners of the land or dwelling-house.

The section operates in such a way as to require not simply that land be held in trust but, more particularly, that the Secretary be satisfied that the beneficiary of the trust will become the owner of the land. ~~Simply continuing to be the beneficiary of an interest or share in the trust itself is not sufficient.~~

There is no provision in this trust deed for any of the beneficiaries to become an owner of the land concerned, even though each of the beneficiaries may well consider that he or she owns a part of the land, particularly the land on which his or her own home has been built.

Further, there are no provisions in the trust deed relating to divestment of the assets of the trust to the beneficiaries. The Statutory Declaration does no more than grant rights of occupancy which do not amount to proprietary rights or ownership.

On that basis, it is my opinion that the Secretary could not be satisfied that any of the beneficiaries would become an owner of land and the assistance could not therefore be granted.

If the relevant land meets definition of rural property as defined in section 4 of the Act it may be possible to assist the applicants as the tenure problem is thereby overcome.

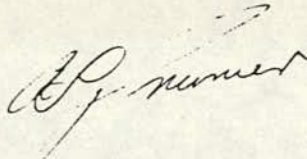
The Act only requires that where an applicant is building a home on a rural property and the Secretary is satisfied that the land forms part of a rural property owned by another person (whether that other person holds the land as a trustee or not) who has given permission to the first mentioned person or persons to occupy the dwelling-house when completed, then, for the purposes of the Act, that permission shall be deemed to create an interest in the land in favour of that first mentioned person or persons, and that first mentioned person or persons shall be deemed to be the owner or owners of that interest.

(3) Rural property is defined in section 4(1) of the Act. For the purposes of sub-section (a) of the definition the word "business" is a specific requirement and the land must be used wholly or substantially for that purpose. From the documents evidenced, there is no indication that the land will be used for generation of income through primary production, but rather for self-sufficiency. In my view self-sufficiency does not meet the requirements of the running of a business on the land.

Appeal Provisions

1. If you want further information about decisions made in relation to your application, you may write or telephone this office.
2. Should you be dissatisfied with a decision in relation to your application, you may formally appeal to the Secretary of the Department under Section 27(3) of the First Home Owners Act.
3. Should you be dissatisfied with the Secretary's decision, Section 27(5) provides a right of appeal to the Administrative Appeals Tribunal.

Yours sincerely



A PRIMMER
Senior Assessment Officer
Delegate of the Secretary

SUE BARKER

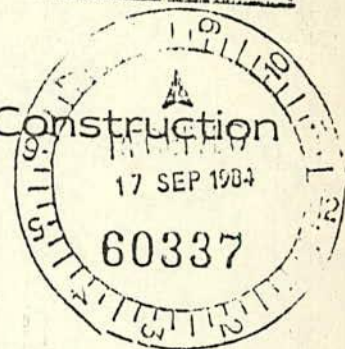
Sue Sarkins



Commonwealth of Australia
DEPARTMENT OF HOUSING AND CONSTRUCTION

FILE No.

using and Construction



With Compliments

John D. Barker
HOME OWNERSHIP PROGRAMS
BRANCH (436671)

14/9/1984.

Central Office:

P.O. Box 111, Dickson 2602

470 Northbourne Avenue, Dickson, ACT 2602

(062) 436111

Attention : Ms Sarkins

MULTIPLE OCCUPANCY DEVELOPMENT

You requested information on multiple occupancy as it relates to the First Home Owners Scheme (FHOS).

By way of background I should explain that participants in many multiple occupancy developments we have examined to date have been ineligible for FHOS generally because the individual's tenure for the land is either non-existent or readily defeasible by the body corporate, trustee or owner as the case may be. In some cases, for example, a breach of even minor rules of the Co-operative or other governing body can result in expulsion of that member and forfeiture of interest in that body.

There have been only three multiple occupancy proposals to date which have been eligible. Each of those proposals were drafted by Mr Tony Pagotto, of W.P. Walters & Co. of Lismore. I understand Mr Pagotto is retained as a consultant by the NSW Land Commission.

The security of tenure of the individual participant is paramount and provisions in the rules of a body corporate which enable expulsion and forfeiture of an interest in the body corporate often result in that person being ineligible for FHOS.

The general criteria is that a "right of occupancy" should be a legal right; in other words enforceable by the individual in the Courts if necessary.

Further, the reference in section 11(4) and (5) of the First Home Owners Act to "an exclusive right of occupancy" indicates that it is the individual's rights which are paramount for the purposes of the FHO Act. The Department takes the view that it is not possible for an individual to hold an

.../2.

Central Office

470 Northbourne Avenue, Dickson ACT 2602

PO Box 111 Dickson ACT 2602

Telephone: (062) 436111, Telegrams: COCON, Telex: 62441

exclusive right of occupancy jointly with the other owners of the land. Therefore an individual must be able to lawfully evict a trespasser including an adjoining neighbour from the individual's dwelling.

In this regard the Home Unit Company Shares structure which is common in New South Wales may provide a useful model.

I should also add that these issues are canvassed in more detail in the Feasibility Study on Multiple Occupancy Development, a study undertaken by the Land Commission of NSW. This Department has been liaising with the Land Commission on their proposal.

There also appears to be some general doubt in the community regarding the type of dwelling which will be considered in relation to a FHOS application. Section 4 of the FHO Act defines a dwelling in terms of applicable building regulations and facilities provided in the structure. This is not to suggest that even a minor defect would result in that dwelling being unacceptable for our purposes. The test is interpreted in terms of physical habitability of the dwelling. No grant would be payable if the dwelling concerned was, or was likely to be subject to an order under Section 317B of the NSW Local Government Act.

A final point which should be made on the subject of acceptable dwellings concerns communal structures. An example would be where 4 buildings each exclusively used by separate family groups as sleeping quarters are erected adjacent to a fifth building which incorporates kitchen, living and washing facilities used in common by the family groups. Such a communal structure and separate sleeping quarters would be a dwelling for the purposes of the FHO Act, provided that the person seeking assistance has an exclusive right of occupancy of the sleeping quarters and a right in common with a limited number of other persons to use and occupy the communal facilities. As discussed above, such rights of occupancy should be enforceable by the individual concerned. It is assumed, of course, that the buildings described comply with all relevant building standards.

The Central Office of the Department is available to provide written comment on proposed legal structures prior to their execution. Such documents should be forwarded to

Assistant Secretary,
Home Ownership Programs Branch,
Department of Housing and Construction
P.O. Box 111
DICKSON ACT 2602

Warren Butler

W.E.J. BUTLER
for First Assistant Secretary
Housing Policy Division

14.9.84

MINISTER FOR
**HOUSING AND
CONSTRUCTION**



17 OCT 1983

The Hon. Chris HURFORD M.P.
Parliament House, Canberra, ACT 2600

Mr Dave Lambert,
Secretary,
Rural Resettlement Task Force,
P.O. Box 26,
NIMBIN NSW 2480

Dear Mr Lambert,

Thank you for your letter of 5 August 1983 concerning our new First Home Owners Scheme which came into operation on 1 October 1983, and in particular its application to multiple occupancy home builders.

Apart from the matters covered in my previous letter to you there are two features of our new scheme of particular interest to builders on multiple occupancy properties.

It is a requirement that my Department must be satisfied that the land on which the home is or is to be built, is or will be owned by the person seeking a grant. Ownership, for the purposes of the legislation, includes the ownership of shares in the capital of a body corporate which entitle the holder to a right of occupancy in respect of a dwelling. This provision will facilitate payment of assistance to those wishing to settle under multiple occupancy arrangements where title to the land is held by a co-operative society or other incorporated body.

The legislation does not permit the payment of assistance in respect of substandard or temporary dwellings. However a dwelling will be recognised as such for the purposes of the legislation if my Department can be satisfied that it complies with any relevant local building standards and that the facilities it provides are such that it is reasonable to regard the dwelling as a person's principal place of residence.

I hope that by the inclusion of these provisions in the legislation we will be helping multiple occupancy homebuilders significantly. It is the Government's intention that through the First Home Owners Scheme as many eligible people as possible will be assisted into home ownership.

Yours sincerely,

CHRIS HURFORD

There is no minimum cost or value for a qualifying home. As the Minister has explained previously, the legislation requires simply that the Department must be satisfied that 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 that, if any building standards are applicable to it, it complies with those standards.

The legislation provides that assistance shall not be paid until the dwelling has been completed or the Secretary is satisfied that substantial progress on the construction has been made or is likely to be made within a reasonable time. The provision is administered flexibly, having regard to obvious building delays faced by owner builders financing construction from their own resources as funds become available. There must be some certainty that a project will proceed to completion before assistance can be paid, but it is recognised that with a modest owner built project, the FHOS payments may represent the major part of the finance required.

In your letter of 24 September you raise some questions of legal interpretation and I think it best that the Department respond to you direct about these. At the same time your questions I have dealt with briefly above will be given more attention.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Len Early', with a stylized, cursive script.

Len Early
Senior Private Secretary

MINISTER FOR
**HOUSING AND
CONSTRUCTION**



The Hon. Chris HURFORD M.P.
Parliament House, Canberra, ACT 2600

Mr Dave Lambert,
Secretary,
Rural Resettlement Task Force,
P.O. Box 62,
NIMBIN NSW 2480

1 NOV 1984

Dear Mr Lambert,

The Minister for Housing and Construction, Chris Hurford, is presently leading a construction industry trade mission to ASEAN countries. He has asked me to thank you for your letters of 10 and 24 September 1984, and to reply on his behalf.

I was disturbed to learn from your letters of the delays encountered by some applicants with the processing of their First Home Owners Scheme applications. You mention particularly that applicants from the Co-ordination Co-operative community have received no word about the status of their applications. I am informed that action has been taken to quickly deal with the applications involved.

You raise in your letter of 10 September a number of general issues in relation to processing of applications. There are a couple of points among these that I can deal with quickly, which seem to arise solely from confusion over what information the Department is seeking, and its purpose.

The legislation governing the payment of assistance requires that before it is paid the Department must be satisfied that the applicant has or will have adequate resources to complete the home acquisition. In the case of a "conventional" home acquisition, the cost to the applicant of the home is apparent from the building or purchase contract. In the case of owner-builders, whether or not they are building on a multiple occupancy project, the Department needs some idea of the expected cost to the applicant in order to be able to judge whether adequate financial resources are or will be available. The value of any labour the applicant will contribute therefore is of no concern to the Department.

If the home is to be funded from Social Security and FHOS benefits, this should be stated and the application will be assessed on that basis.

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MINISTER FOR
**HOUSING AND
CONSTRUCTION**



Parliament House, Canberra, ACT 2600

Mr Dave Lambert
Secretary
Rural Resettlement Task Force
PO Box 62
NIMBIN NSW 2480

8 JAN 1985

Dear Mr Lambert,

I am replying to your letter of 16 November 1984 addressed to the former Minister for Housing and Construction. Your letter made further points in relation to Multiple Occupancy and the First Home Owners Scheme.

As explained in the letter, Mr Early, Senior Private Secretary to the former Minister, sent to you on 1 November, my Departmental officers are looking carefully at the matter raised in your letters of 10 and 24 September. I have asked that they examine also the comments you now offer, and let me have their views.

When I have been able to consider these I should be in a position to let you have a substantive reply.

Yours sincerely,

STEWART WEST



Department of Housing and Construction

In reply please quote
Contact

E83/223

(31/41)

Mr David Lambert
Secretary
Rural Resettlement Task Force
PO Box 62
NIMBIN NSW 2480

Dear David,

I apologise for the delay in writing to you following your correspondence with the Minister last year.

In preparing material for the Federal Court hearing of the Spilsbury case decision (attached) 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 and that the difficulty affected virtually all multiple occupancy communities in NSW.

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.

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. The Minister for Housing and Construction has now written to the NSW Minister for Environment and Planning suggesting that the matter be resolved so that FHOS benefits can flow to applicants in Multiple Occupancy communities.

Yours sincerely,

R. Gallimore
for First Assistant Secretary
Housing Policy Division

11 June 1986

MINISTER FOR
**HOUSING AND
CONSTRUCTION**



The Hon. Stewart WEST M.P.
Parliament House, Canberra, ACT 2600

25 JUL 1986

Mr Dave Lambert
Secretary,
Rural Resettlement Task Force
PO Box 62
NIMBIN NSW 2480

Dear Mr Lambert,

Thank you for your letter of 9 June 1986 concerning the availability of assistance under the First Home Owners Scheme (FHOS) for those people who acquire their home under some form of multiple occupancy arrangement.

I understand that my Department wrote to you on this issue on 11 June 1986 and so it seems that your letter crossed in the post with that advice of my contact with the New South Wales Minister for Environment and Planning, Mr Carr. I can now add that Mr Carr has replied to me and that officers of our two Departments have met to look at what might need to be done to resolve the present legal impediment; you will of course be aware of the present situation following my officer's recent discussions with you in Nimbin.

Your concern for the needs of multiple occupants is shared by the Government. Because I am anxious to provide every assistance possible to those applicants who are multiple occupancy home owners I have asked my Departmental officers to assist Mr Carr's officers in any way possible to help those who prefer home ownership through multiple occupancy.

Yours sincerely,

STEWART WEST



Department of Housing and Construction

In reply please quote
Contact

E83/223

(31/41)

Mr David Lambert
Secretary
Rural Resettlement Task Force
PO Box 62
NIMBIN NSW 2480

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Yours sincerely,

R. Gallimore
for First Assistant Secretary
Housing Policy Division

11 June 1986

The Hon. Stewart WEST M.P.
Parliament House, Canberra, ACT 2600

The Hon Robert Carr MLA
Minister for Environment and Planning
10th Floor
139 Macquarie Street
SYDNEY NSW 2000

Dear Mr Carr,

Thank you for your letter of 5 August 1986 concerning the eligibility of multiple occupancy home owners for assistance under the First Home Owners Scheme (FHOS).

I have recently approved the making of a Regulation along the lines suggested at the meeting between Mr Gallimore of my Department and officers of your Department. Officers of my Department are currently engaged in discussions with officers from the Commonwealth Attorney-General's Department regarding the wording of such a Regulation. In the course of those discussions officers will also examine the ways by which an applicant might meet the requirement in section 14 of the FHO Act that they have an exclusive right of occupancy to the dwelling. One way of achieving this right would be through a formal lease which would have the additional benefits of providing security of tenure and increasing the availability of normal commercial finance. I note that a form of lease was recommended by Mr John Woodward, Chairman of the Commission of Enquiry into Multiple Occupancy Development in the Shire of Tweed.

It might be that, for FHOS applicants to satisfy the requirement to obtain an exclusive right of occupancy, individual leases will need to be held by home owners for their dwelling. In turn, this might make necessary a complementary amendment to your multiple occupancy policy before FHOS assistance can be payable to residents of these communities.

My officers will again contact your Department as the situation becomes clear.

I hope that it will not be long before home ownership assistance is available to multiple occupancy home owners.

Yours sincerely,

26. 9. 86.

STEWART WEST

E85/459

SENT TO MINISTER'S OFFICE ON: 16/10/86
 COURIER RUN: 0830 HOURS
 BY HAND: HOURS
 NOTED ON SCHEDULE NO: 195 DATE: 16/10/86

Prepared by : R. Gallimore 43 1221
 Cleared by : WEJ Butler AS (HOP)

The Hon Frank Walker Q.C., M.L.A.
 Minister for Housing
 Member for Georges River
 34th Level
 Legal & General House
 8 Bent Street
 SYDNEY NSW 2000

MC860904-004(184)

Dear Mr Walker,

Thank you for your letter of 29 August 1986 concerning the eligibility of multiple occupancy home owners for assistance under the First Home Owners Scheme (FHOS).

My Departmental officers, together with officers of your Department and the Department of Planning and Environment, have been investigating means to overcome the current legal impediments to residents in multiple occupancy communities obtaining home ownership assistance. To facilitate this and in anticipation of steps that my officers understand your Government is proposing to take in this matter, I have approved the making of a Regulation under the First Home Owners Act. Its wording is now being considered by my officers and officers of the Commonwealth Attorney-General's Department. They will also canvass ways in which applicants from multiple occupancy communities might satisfy the requirement of section 14 of the First Home Owners Act that they hold an exclusive right of occupancy to their own dwelling.

I am advised that one method of overcoming the difficulties arising from the current New South Wales legislation might be the facility of a formal lease for each dwelling site. I note that Mr John Woodward, Chairman of the Commission of Enquiry into Multiple Occupancy Development in the Shire of Tweed, has made recommendations along these lines.

If the outcome of the current consideration is that individual leases would be required, then, for the purposes of eligibility for FHOS, complementary amendments may need to be incorporated into the New South Wales Government's draft policy on multiple occupancy.

Region advised

NG 22/10/86

.../2

24
 22/10

DEPARTMENTAL FILE

2.

My officers will continue to keep those of your Department and of the Department of Planning and Environment informed of their progress and I should be grateful if we could be advised in turn of developments at the State level.

Yours sincerely,

Signed by
STEWART WEST
17 OCT 1986

STEWART WEST

17-10-86

Region advised
NG 22/10/86

175 Wamey
AS (HOP) 25/10/86
DEPARTMENTAL FILE

The Hon. Stewart WEST M.P.
Parliament House, Canberra, ACT 2600

The Hon Frank Walker, QC, MLA
Minister for Housing
34th Level
Legal and General House
8 Bent Street
SYDNEY NSW 2000

Dear Mr Walker,


I wrote to you on 17 October 1986 regarding multiple occupancy and my desire to ensure that FHO assistance can be paid to residents of multiple occupancy communities.

I wish to inform you of developments concerning the provision of assistance under the First Home Owners Scheme (FHOS) to multiple occupancy home owners.

Since I last wrote the Commonwealth Attorney-General's Department has advised that the making of a Regulation under the FHO Act cannot be guaranteed to be an effective way of ensuring the payment of assistance to multiple occupancy residents.

Legal advice from that Department suggests however, that the granting of a formal lease to individual residents is an appropriate and effective method of ensuring that applicants obtain an exclusive right of occupancy to their dwelling, and obtain an approved interest for the purposes of the FHO Act. The use of leases has other advantages as noted in the Woodward Report (e.g., availability of commercial finance, transferability of title, etc.). This solution, however, requires acceptance by your colleague, the Minister for Planning and Environment, Mr Carr, of a limited form of sub-division in multiple occupancy communities.

I have written to Mr Carr expressing my concerns over this issue and suggesting the use of leases as a firm option to resolve the matter. A copy of that letter
... is attached for your information.



Officers of my Department will be having discussions with the Department of Environment and Planning with a view to reaching a satisfactory and effective solution and I will keep you advised of further developments.

In the meantime, I wish to thank you for your continued support of our attempts to resolve this matter.

Yours sincerely,

STEWART WEST

The Hon. Stewart WEST M.P.
Parliament House, Canberra, ACT 2600

The Hon Robert Carr MLA
Minister for Planning and Environment
10th Floor
139 Macquarie Street
SYDNEY NSW 2000

Dear Mr Carr,

Further to my letter of 26 September 1986, I wish to advise you of developments concerning the eligibility of multiple occupancy home owners for assistance under the First Home Owners Scheme (FHOS).

As you know, I have approved the making of a Regulation designed to facilitate the payment of FHOS assistance to multiple occupancy applicants. However, the Commonwealth Attorney-General's Department has advised that there is considerable difficulty in the drafting of an effective Regulation. This arises from the variety of legal structures used in such communities or total lack of a legal structure in some cases. In the circumstances, it is doubtful whether a regulation could be framed so as to assist multiple occupancy communities across the board.

There is a further problem which I foreshadowed in my earlier letter to you. Assuming an effective Regulation could be drafted, applicants would still need to meet the requirement in the FHO Act that they have an exclusive right of occupancy to their dwelling. The Attorney-General's Department has advised that in the absence of some kind of agreement legally conferring the right of occupancy, the requirement cannot be satisfied, i.e., an informal understanding among members of the community regarding each other's rights would not suffice. It also indicated that a formal lease would be an appropriate method of satisfying the requirement. A lease could also constitute an "approved interest in land" under the FHO Act and would obviate the need for the making of the Regulation. Further advantages flowing from the execution of leases include the assurance that assistance is only paid to residents who have a legal right to occupy and also, would enable the determination of whether particular applicants are previous owners for the purposes of the FHO Act.

MINISTER FOR
HOUSING AND
CONSTRUCTION



The Hon. Stewart WEST M.P.
Parliament House, Canberra, ACT 2600

Mr Dave Lambert
Secretary,
Rural Resettlement Task Force
PO Box 62
NIMBIN NSW 2480

25 JUL 1986

Dear Mr Lambert,

Thank you for your letter of 9 June 1986 concerning the availability of assistance under the First Home Owners Scheme (FHOS) for those people who acquire their home under some form of multiple occupancy arrangement.

I understand that my Department wrote to you on this issue on 11 June 1986 and so it seems that your letter crossed in the post with that advice of my contact with the New South Wales Minister for Environment and Planning, Mr Carr. I can now add that Mr Carr has replied to me and that officers of our two Departments have met to look at what might need to be done to resolve the present legal impediment; you will of course be aware of the present situation following my officer's recent discussions with you in Nimbin.

Your concern for the needs of multiple occupants is shared by the Government. Because I am anxious to provide every assistance possible to those applicants who are multiple occupancy home owners I have asked my Departmental officers to assist Mr Carr's officers in any way possible to help those who prefer home ownership through multiple occupancy.

Yours sincerely,

STEWART WEST

A form of lease would, of course, necessarily involve the recognition of a limited form of subdivision. As noted in the Woodward Report on Multiple Occupancy in the Shire of Tweed, I urge you to give serious consideration to making multiple occupancy communities a special case exception to the present rural policies.

The form of land tenure proposed has the obvious advantage of facilitating the obtaining of FHOS grants and home-building finance as well as other advantages noted in the Woodward Report (e.g. transferability of equity by individual members of the community). This may provide a more sound basis for encouraging the development of low cost housing in rural areas.

I should add that my officers have obtained written advice from the Victorian Department of Local Government that legal structures establishing a range of multiple occupancy communities do not amount to subdivisions under the Victorian Act. My officers believe that each of the structures involved would amount to illegal subdivisions under NSW legislation because in each case the individual resident obtains an exclusive right of occupancy to his own dwelling. A copy of that advice is attached for your information.

Consequently, it would appear that multiple occupancy residents may be eligible for assistance in Victoria but ineligible in NSW, despite having identical structures.

I am sure you will agree that it would be desirable to avoid such a situation.

Officers of my Department will be seeking urgent discussions with officers of your Department with a view to resolving this problem as effectively and as quickly as possible.

In the absence of a solution, my Department has no option but to refuse assistance to participants in NSW multiple occupancy communities.

Yours sincerely,

STEWART WEST



COMMONWEALTH OF AUSTRALIA

GPO Box 9848
Canberra ACT 2601
Telephone: (062) 89 1555
Telex: 61209 Fax: (062) 81 6946 431226

DEPARTMENT OF
COMMUNITY SERVICES
AND HEALTH

N05

85/872

Mr David Spain
Andrew G Dozer and Co.
Main Street
STOKERS SIDING 2484

Dear David

Thank you for your letter of 4 February.

Referring to your comments (a) to (f) I make the following observations

- (a) Billen Cliffs has become strata titled albeit with some political intervention. It cannot be ruled out as an option. Further, M.O. is spreading interstate and the same philosophical basis of M.O. might not necessarily arise.
- (b) Tenancy in common is frequently used by smaller communities of say less than ten families. FHOS eligibility flows as soon as an exclusive right of occupancy is created.
- (c) See below.
- (d) I sought advice on Re Lehrer some time ago when we attempted to define multiple occupancy and draft a regulation creating an interest in an M.O. as an approved interest. A.G's expressed reservations about the use of the principle in Lehrer because they felt it could be distinguished if its use were challenged by a Local Council. This advice was obtained in the context of whether such a lease could create an approved interest in land. In so far as a lease being necessary only to create an exclusive right of occupancy the same difficulty should not arise because the Development Approval will have issued before any lease is drawn up.

2

- (e) I cannot answer this question without further information. The Act requires that the land be used "wholly or substantially for the business of primary production". The phrase "wholly or substantially" has been considered judicially and there are a large number of cases - Tax cases in particular - dealing with the phrase "business of primary production."

Use of the rural property definition as a general solution is unsatisfactory because many communities will not meet the requirements of business of primary production. Furthermore, there is no provision in section 11 of the Act for the purchase of an existing dwelling. On that basis I have been more inclined to pursue a remedy which will assist all M.O. residents rather than a handful.

- (f) The difficulty which A.G's encountered with this proposal was that it is difficult to define multiple occupancy in a manner which does not create a much larger class than intended.

It was proposed that a prescription along the lines of "any development approved pursuant to SEPP 15" but it is still necessary to consider how to ensure that a person has an interest in such a community.

In any event that proposal was less than satisfactory because members of several communities suggested that they already had Development Approval and would not be inviting Local Councils to have another attempt at imposing restrictive conditions by seeking approval under SEPP 15. Hence it would have been necessary to prescribe individual communities.

By the time SEPP 15 did issue we had developed a more equitable solution. We were forced to do so because of the length of time that SEPP was in incubation. I should add that Mr Carr was urged by the then Minister for Housing and Construction, Mr West to allow in SEPP 15 the issue of fifteen year leases over homesites to residents within the general framework of common ownership. This would have overcome all of the difficulties in relation to FHO eligibility because such a lease would have been an approved interest and created an exclusive right of occupancy.

Comments on SEPP 15 and 5 year Leases

As I see it SEPP 15 precludes subdivision, however, s. 327AA (Local Govt Act) requires an instrument or dealing to exceed five years before subdivision arises. Accordingly, I intend to continue to accept a registered five year lease as creating an exclusive right of occupancy.

MINISTER FOR
HOUSING AND
CONSTRUCTION



The Hon. Stewart WEST M.P.
Parliament House, Canberra, ACT 2600

Mr Robert Young
Bundagen Community
C/- Bundagen Co-operative Ltd
McCabes Road
REPTON NSW 2454

23 MAY 1986

Dear Mr Young,

The Prime Minister has passed to me your letter of 20 March 1986 concerning the entitlement of members of the Bundagen Community to assistance under the First Home Owners Scheme (FHOS).

The Government wishes to support those people who prefer to acquire their first home through some form of multiple occupancy arrangement. Unfortunately, our ability to provide assistance is complicated by New South Wales legislation relating to the lawful ownership of land. On becoming aware of this problem earlier this year my Department sought the advice of Counsel and the opinion received was that the legal difficulty arising from the New South Wales Local Government Act prevented payment of assistance under FHOS to multiple occupancy home owners.

So that FHOS assistance might become payable to members of communities such as yours I wrote to the Hon R.J. Carr, MLA, NSW Minister for Planning and Environment, suggesting that an appropriate amendment be made to his Government's proposed multiple occupancy policy. I have also made available my Departmental officers to assist his officers in any way possible to help those who prefer home ownership through multiple occupancy.

Thank you for bringing your concerns to the Government's attention.

Yours sincerely,


STEWART WEST

*First impression from Home Titles Office
is that they're fucking to get H.O.
Grand rules changed to allow for
(pseudo) subordination. We mustn't
accept it under any name!
N.B. Rules are at stake
- Bob.*

On Monday 2 February I visited the head office of the NSW Department of Environment and Planning to discuss the difficulties caused by NSW legislation which prevent the payment of FHOS assistance to virtually all Multiple Occupancy residents. Those DEP officers attending were

- . Mr Neville Apitz, Senior Planner (Northern)
- . Mr Ashley Brown, Principal Legal Officer
- . Mr Colin Jones, DEP, Grafton.

I saw my visit as a "last ditch" attempt to achieve a result on this issue, the alternative being the rejection of over 100 cases for reasons which would reflect badly on both NSW and the Commonwealth.

DEP officers commenced from the viewpoint that if FHOS wanted to pay MO residents it was a Commonwealth problem and we should undertake our own amendments. It became readily apparent that the DEP officers (bar Colin Jones from DEP's Grafton office) were unaware of the degree of strong support for MO development within NSW Cabinet. Between Mr Jones and myself I was able to convince Mr Apitz that there was considerable support for MO with the NSW Cabinet, particularly from Mr Walker.

I outlined the difficulties that Attorney-General's Department envisaged in trying to draft an amendment to the FHOS Act to recognise multiple occupancy and their advice that a lease over the individual's dwelling site was the most effective method of providing security of tenure for the individual resident.

Mr Apitz agreed with the merit of that proposal but was concerned that the policy on subdivision of rural areas not be compromised.

He agreed at the end of the day that the demand for security of tenure for the individual was not going to go away irrespective of FHOS's position and undertook to discuss amendment of the Local Government Act to enable leases to be obtained.

He felt that the rural subdivision policy would be compromised by long leases as are obtained in the Act for example but suggested that leases of 20 years or less would be acceptable. I suggested that FHOS would like as long a lease as possible in order to maintain consistency with all of the other approved interests in the FHOS Act which run for life and accordingly we would prefer to see leases closer to 20 years than say 5 years.

Conclusion

The Department of Environment and Planning now recognises the simplicity of amending NSW legislation to overcome the problems posed by multiple occupancy and the merits of providing security of tenure by leases.

That Department is now moving to achieve that aim.

4 Feb 1987

R. Gallimore
PEO PL&A