EXPLANATORY MEMORANDUM

FIRST HOME OWNER GRANT AMENDMENT BILL 2017

This Bill seeks to amend the *First Home Owner Grant Act 2000* to give legislative effect to the temporary additional grant of $5,000 and make a number of other amendments to improve the administration of the first home owner grant scheme.

Under the current legislation, eligible first home buyers are entitled to the payment of a first home owner grant of $10,000 when they build or purchase a new home valued at up to $750,000, or up to $1 million north of the 26th parallel.

On 27 December 2016, the then Government announced the first home owner grant for new homes would be boosted from $10,000 to $15,000 for 12 months from 1 January 2017. The Labor Government subsequently announced on 17 May 2017 that the temporary boost to the first home owner grant will cease on 30 June 2017.

First home buyers are eligible for the $5,000 boost payment if they enter into a contract to purchase or build a new home between 1 January and 30 June 2017. Owner builders are also eligible if they commence building between those dates.

To be eligible for the boost payment, applicants will need to satisfy existing criteria for the grant. In addition, criteria have been included to stimulate new home construction activity, with construction of new homes required to commence within 26 weeks of the owner signing a building contract and be completed by 30 June 2019. For owner builders or purchasers of 'off-the-plan' homes, construction must also be completed by 30 June 2019.

In cases where the additional eligibility criteria for the additional $5,000 are not met, the applicant will nonetheless continue to receive the $10,000 first home owner grant. This Bill includes specific provisions to ensure the Commissioner of State Revenue is able to recover the $5,000 boost payment where the additional eligibility criteria are not satisfied.

The boost payment has been implemented by the Commissioner as an administrative payment prior to the passage of this legislation. This Bill ensures that the relevant administrative and enforcement provisions are available to support compliance and recovery activity, and to ensure that an applicant's objection rights are available. Accordingly, the amendments regarding the boost payment apply retrospectively from 1 January 2017.

This Bill also makes other amendments to the First Home Owner Grant Act to address the outcome of a 2013 State Administrative Tribunal decision. The Tribunal's decision had unintended consequences for an applicant's eligibility for the grant in circumstances where a co-purchaser was found to not hold a relevant interest because they did not have a right to immediate occupation of the land within 12 months of completion of a transaction. The same issue also arises if a co-purchaser holds their interest on trust for another person.

The Tribunal's decision resulted in one co-purchaser not being required to be an applicant, allowing the grant to be paid to the other co-purchaser when they should have been ineligible. The amendments will restore the policy intent of the legislation, requiring all owners of the land on the completion date of the transaction to be applicants and satisfy the criteria for the grant unless otherwise excluded by regulation.

Other minor amendments are also being made to improve the efficiency of administering the first home owner grant scheme.

The Bill seeks to align the First Home Owner Grant Act with the *Taxation Administration Act 2003* to ensure that legal costs associated with the recovery of the first home owner grant can be recovered from the applicant. The amendments will also enable costs relating to legal recovery and lodging memorials to be included in any payment plan entered into with the grant recipient.

Minor amendments are being made to the provisions dealing with the time that a document is taken to be served on a person to reflect increased service delivery times by Australia Post. The day that a person is taken to be served will now be prescribed by the regulations and may differ depending on the different methods of service to enable the Commissioner to accommodate further changes to Australia Post delivery times and methods.

An amendment is also proposed to enable regulations to be made with retrospective effect where they do not adversely affect a person's entitlement to the grant. This will enable the Government to respond faster to matters favourable to first home owners.

The commencement date for the other amendments to the First Home Owner Grant Act is the day after this Bill receives the Royal Assent.

Clause 1: **Short title**

This clause provides that the short title of this Act is the *First Home Owner Grant Amendment Act 2017.*

Clause 2: **Commencement**

This clause provides the commencement dates for the various sections of the Act.

Paragraph (a) provides that sections 1 and 2, which relate to the short title and commencement provisions of this Act, come into operation on the day this Act receives the Royal Assent.

Paragraph (b) provides that sections 8 to 13 are deemed to come into operation on 1 January 2017. Sections 8 to 13 relate to the amendments that give legislative effect to the temporary additional grant of $5,000, commencing retrospectively from 1 January 2017.

Paragraph (c) provides that the rest of the Act comes into operation on the day after the Act receives the Royal Assent. These provisions relate to the amendments to address the outcome of a 2013 State Administrative Tribunal decision, and other minor changes to the administrative arrangements applying to the first home owner grant.

Clause 3: **Act amended**

This clause provides that the amendments in this Act are to the *First Home Owner Grant Act 2000.*

Clause 4: **Section 6 amended**

In order to qualify for a first home owner grant, an applicant must have, or will have on completion of the transaction, a relevant interest in land on which a home is built. Section 6(1) of the First Home Owner Grant Act defines the meaning of relevant interest and lists the types of interests in land that will constitute a relevant interest.

Sections 6(2)(a) and 6(2)(b) provide exceptions to section 6(1). The provisions provide that a person will not hold a relevant interest if the person does not have a right to immediate occupation of the land within 12 months of completion of a transaction (or a longer time approved by the Commissioner) or if a person holds an interest subject to a trust.

This clause deletes current sections 6(2)(a) and 6(2)(b) to address the implications of a 2013 decision of the State Administrative Tribunal, *Benzion v Commissioner of State Revenue* [2013] WASAT 1 (*Benzion*).

The Tribunal in *Benzion* held that a co-purchaser who will not have a right to immediate occupation of land within 12 months of the completion of a transaction will not have a relevant interest in the land that is being acquired. The decision resulted in a purchaser not having a relevant interest in the land and not being required to be an applicant under section 16 of the First Home Owner Grant Act, despite being a co-owner of the land and home.

The effect of this is that where there is more than one purchaser to a contract, one co-purchaser can apply for a grant and their eligibility is not affected by the status of the other co-purchaser, who is not required to be an applicant because they do not have a relevant interest in the land under section 6(2)(a).

The intent of the legislation was that all owners of the land on the completion date of the transaction should be applicants and satisfy the criteria for the grant, unless otherwise excluded by regulation.

The amendment seeks to address this decision by deleting section 6(2)(a) so that a co-purchaser who does not have a right to immediate occupation of the land within 12 months of completion is also required to be an applicant and meet the eligibility criteria, including the residency requirements in section 13.

Clause 4 also deletes current section 6(2)(b). Under section 6(2)(b), an owner is excluded from holding a relevant interest if they hold the interest subject to a trust.

The *Benzion* decision has highlighted an unintended consequence in which a purchaser's eligibility for the grant is not affected by a co-purchaser who holds their interest on trust. A co-purchaser who holds an interest as a trustee does not have a relevant interest under section 6(2)(b), and is therefore not required to be an applicant.

Deleting section 6(2)(b) will mean that a co-purchaser who holds an interest subject to a trust on the completion of a transaction will have a relevant interest in the property. The co-purchaser will then be required to be an applicant for a grant and meet the eligibility criteria, unless otherwise excluded by the regulations.

The purpose of section 6(2)(b) was to ensure that a person cannot receive a grant where they are holding the interest as a trustee. The provision also ensured that where land is held on trust by a person, they will not be disqualified from accessing the grant in their own right due to ownership in a trustee capacity.

In order to preserve the policy behind section 6(2)(b) after the section is deleted, amendments are made to section 12 and a new eligibility criteria is inserted into the First Home Owner Grant Act (see clauses 5 and 6 below).

Clause 5: **Section 12 amended**

Section 12 currently provides that an applicant is not eligible for the grant where:

1) the applicant or their spouse held a relevant interest in Australian residential property before 1 July 2000; or
2) the applicant or their spouse held a relevant interest in Australian residential property after 1 July 2000 and occupied the property as a place of residence for any length of time; or
3) the applicant or their spouse held a relevant interest in Australian residential property on or after 1 July 2004 and resided in that property for a continuous period of at least six months.

Clause 5 amends sections 12(1) and 12(3) to ensure that a person who has held land on trust for another will not be disqualified from accessing the grant in their own right once section 6(2)(b) is deleted. It does this by excluding from the operation of section 12 relevant interests that were held subject to a trust.

Subclause (1) amends section 12(1)(a) to provide that an applicant is ineligible if the applicant or their spouse or de facto partner has held a relevant interest in residential property in the State before 1 July 2000, other than a relevant interest held subject to a trust.

Subclause (2) makes a similar amendment to section 12(3)(a) to provide that an applicant is also ineligible if the applicant or their spouse or de facto partner has held a relevant interest in residential property in the State after 1 July 2000, other than a trust interest, and lived in the property as a place of residence.

Section 12 also provides that a person must not have previously held an interest that is a relevant interest in the corresponding first home owner grant legislation of the other States and Territories.

Under the corresponding legislation of the other jurisdictions, a trust interest is not a relevant interest. Therefore, an amendment is not required to exclude trust interests where the relevant interest is held in another Australian jurisdiction.

Clause 6: **Section 13B inserted**

Under section 8 of the First Home Owner Grant Act, a first home owner grant is payable in respect of an eligible transaction where the applicant, or each applicant if there are two or more of them, complies with the eligibility criteria (set out in Part 2, Division 2).

This clause inserts a new criterion that an applicant must satisfy in order to qualify for the grant.

Section 13B provides that an applicant is not eligible for the grant if on the completion of the transaction, the applicant will own the land on which the home is built as a trustee.

The amendment is necessary to address the implication of the *Benzion* decision where an applicant's eligibility for the grant is not affected by a co-purchaser who holds their interest in trust.

Once section 6(2)(b) is deleted by clause 4, a person who holds an interest in trust will have a relevant interest. Any owner who is a trustee will then be required to be an applicant and satisfy the applicant eligibility criteria.

The policy remains that a person should not be able to claim the grant where they are merely holding the interest on trust for another. The new criterion will achieve this by making an applicant ineligible for the grant if the applicant holds as trustee the relevant interest in land on which the home is built.

As originally intended by the First Home Owner Grant Act, applicants will not be eligible for the grant in circumstances where there is more than one purchaser to a contract and one of the purchasers will hold the interest on trust.

An exception to requiring a trustee to be an applicant in circumstances exists where land is held on trust by a guardian for a person with a legal disability. A regulation will be made to prescribe trustees who are guardians to be exempt from being an applicant under section 16(1) of the First Home Owner Grant Act.

The guardian will not be required to be an applicant, but they can still make the application on behalf of the person under the legal disability, and the person under the legal disability is taken to be the applicant (section 17).

The regulations will commence on the day after this Act receives the Royal Assent.

Clause 7: **Section 14AA amended**

Section 14AA provides a definition of 'commencement date' and sets out when a transaction is completed in relation to an eligible transaction.

The definition of 'completed' for a contract to purchase a home refers to when the purchaser becomes entitled to possession of the home. In circumstances where a home is purchased subject to a lease, the purchaser obtains possession of the home when the lease terminates (*Band v Chief Commissioner of State Revenue* [2007] NSWADT 185) (*Band)*.

If a home is purchased subject to a lease of 12 months or greater, the applicant is taken to not have a relevant interest in the home for the purposes of the First Home Owner Grant Act, and the purchaser is not eligible for the grant.

To be eligible for the grant, section 13 provides that an applicant must commence residing in the home within 12 months of completion of the transaction (the take-up period) and must occupy the home as their principal place of residence for at least six continuous months.

The policy intent was for the take-up period to commence upon acquisition of the relevant interest in the property on which the grant was received. However, the *Band* decision had the effect of defining when a person becomes entitled to possession of a home to be the date on which a lease terminates, rather than the date on which the property was acquired.

Clause 7 replaces section 14AA(2)(a) with a new definition of when a transaction involving a contract to purchase a home is completed. Section 14AA(2)(a) as replaced provides that the transaction is taken to be completed when the purchaser acquires the relevant interest in land on which the home is built.

In the case of ordinary contracts for the purchase of a home, a purchaser acquires the relevant interest in land when the legal interest in the land passes to the purchaser on registration of the relevant transfer, which is usually also the settlement date.

Where a home is acquired subject to a lease, section 6(2)(a) (which is deleted by clause 4) limited the period within which a person could defer the take-up period to one day short of 12 months after completion of the transaction, provided that any lease in place terminated by that day.

Deleting section 6(2)(a) means that the start of the take-up period could be extended out to a period more than 12 months after the relevant interest is acquired if the property is subject to a longer lease.

For example, Jane buys a new home that is subject to a lease by a company that uses it as a display home. Settlement occurs on 1 February 2017 and Jane is registered as the owner on the Certificate of Title on the same day. The lease over the property terminates on 1 July 2017.

Pursuant to current sections 13 and 14AA(2)(a), Jane's take-up period does not begin until she obtains possession of the home, which is when the lease terminates on 1 July 2017. Under the current legislation, Jane has 12 months from 1 July 2017 to satisfy the residence requirement.

If the lease was to terminate on 1 April 2018, section 6(2)(a) would not allow a grant to be paid to Jane because she will not have a relevant interest in the land for the purpose of the First Home Owner Grant Act, as she does not have a right to occupy the land within 12 months of acquisition. If section 6(2)(a) is deleted and these amendments are not made, the immediate occupation requirement will be removed and Jane's 12 month take-up period will start from 1 April 2018.

Deferring the start of the take-up period to when the lease terminates is not consistent with the purpose and object of the First Home Owner Grant Act. Replacing the requirement for possession to when a person acquires the relevant interest restores the original intent for the transaction completion date to be the date the person acquires the legal interest.

In the example above, once the amendments to section 14AA(2)(a) are made, Jane's 12 month take-up period will start from when she acquires the relevant interest in the land on 1 February 2017, unless a longer period is approved by the Commissioner.

Under section 13(6A)(b), the Commissioner has discretion to extend the 12 month take-up period within which an applicant must begin occupying the home if, in the Commissioner's opinion, there are good reasons why the applicant cannot comply with the residence requirement.

In circumstances where a purchaser acquires a home subject to a lease, the Commissioner will generally exercise discretion under section 13(6A)(b) to extend the take-up period by a further 12 months from the date the lease ends, providing the termination date is within 12 months of the purchaser acquiring the relevant interest.

The application of the discretion is to replace the current legislative practice achieved by section 6(2)(a) and the definition of 'completed' under section 14AA(2) prior to the amendments. It also gives effect to preserving the outcome of the *Band* decision with regard to the take-up period commencing on the termination of a lease within 12 months of acquisition.

Deleted section 14AA(2)(a) also required that, if a purchaser is to obtain a registered title to the land, the purchaser must have taken necessary steps to obtain registration of the title (except for a relevant interest mentioned in section 6(1)(e)) in order for a contract to purchase a home to be completed.

This requirement is not repeated in the new section 14AA(2)(a) because a purchaser would have obtained registration of the title if they acquired the relevant interest (in circumstances where a purchaser is to obtain title to the land).

Clause 8: **Section 14A amended**

Section 14A defines the terms used for special eligible transactions. This clause amends the definition of relevant date to include a relevant date for a class 8 special eligible transaction, which is needed to accommodate the temporary boost payment of $5,000.

The relevant date is referred to in section 14B, which sets out the requirement that building work for an off-the-plan contract or the building of a new home by an owner builder must be completed before that date.

For a class 8 special eligible transaction, the relevant date is 1 July 2019, as building work for an 'off-the-plan' contract or the building of a new home by an owner builder must be completed by 30 June 2019.

Clause 9: **Section 14B amended**

Section 14B sets out the different classes of special eligible transactions. The amendments to this section provide the eligibility criteria for the temporary boost payment of $5,000.

Subclause (1) inserts new section 14B(4C), which sets out the meaning of a 'class 8 special eligible transaction'. A class 8 special eligible transaction is an eligible transaction of a type referred to in paragraphs (a), (b) or (c) with a commencement date between 1 January 2017 and 30 June 2017 (inclusive).

Subclause 4(c) sets out the relevant dates for a class 8 eligible transaction for the contract to purchase a new home or substantially renovated home, a comprehensive home building contract and the building of a home by an owner builder.

Subclause (2) deletes and replaces section 14B(4).

Section 14B(4) as inserted allows the Commissioner to extend the period within which the building work is to commence or be completed if the Commissioner is satisfied that the delay in commencing or completing the building work is caused by circumstances beyond the control of the parties to the contract.

The inserted section is largely similar to previous section 14B(4). The new section separates the ability for the Commissioner to extend the period within which the building work is to begin, and the period within which the building work is to be completed, into separate paragraphs (a) and (b) to improve the readability of the subsection.

The other difference is that the new section 14B(4) provides the Commissioner with the ability to extend the period within which the building work is to begin, and the period within which the building work is to be completed, for a class 8 special eligible transaction if the Commissioner is satisfied that the delay is caused by circumstances beyond the control of the parties.

Subclause (3) inserts subsection 14B(6)(b)(iii). This provision is to prevent the boost amount being paid for a class 8 special eligible transaction where it is apparent that a person had entered into a contract to purchase a new home or a comprehensive home building contract before 27 December 2016, and has sought to replace that contract on or after 27 December 2016 in order to access the additional boost payment.

Clause 10: **Section 19 amended**

This clause amends subsection 19(3) to include paragraph (g) to the definition of 'relevant amount.' The amendment provides that the relevant amount for a class 8 special eligible transaction is $15,000. This consists of the standard grant amount of $10,000 and the boost amount of $5,000.

Clause 11: **Section 22 amended**

Section 22 allows the Commissioner to impose conditions on the payment of a grant and requires a person to notify the Commissioner of non-compliance with the condition and to repay the grant amount.

Clause (11) makes a minor amendment to subsection 22(2)(b) to ensure that the Commissioner can recover part of a grant amount, and not necessarily the whole of the grant amount, if the conditions imposed by the Commissioner on a special eligible transaction are not complied with.

This may occur where the Commissioner imposes a condition on the payment of a relevant amount for a special eligible transaction and the condition provides that the person must repay a part of the grant (for example, the additional $5,000 boost amount) if the condition is satisfied.

Any conditions imposed by the Commissioner under section 22 are separate to the legislative requirements that must be satisfied under section 14B(4C) in order to qualify as a class 8 special eligible transaction.

Clause 12: **Section 28 amended**

Section 28 sets out the time in which an objection to a decision on an application must be lodged.

Decisions on applicant's eligibility to the additional $5,000 boost payment are being made on an administrative basis until this Bill is passed.

The 60-day period to object from the date after a decision on an application in relation to a class 8 special eligible transaction was made may have already lapsed by the time the Act receives the Royal Assent.

Section 28(1)(c) as inserted extends the period of time within which an applicant can lodge an objection to a decision on an application relating to a class 8 special eligible transaction by allowing a further period of 60 days after the Act receives the Royal Assent.

Clause 13: **Section 51 amended**

Section 51 provides the ability for the Commissioner to require the grant to be repaid and impose penalties in certain circumstances.

This clause amends section 51 to make it sufficiently clear that the Commissioner may recover only the additional 'boost amount' paid for special eligible transactions if the applicant does not satisfy the legislative requirements for the commencement and/or completion dates for a class 8 special eligible transaction.

The applicant will continue to receive the $10,000 grant provided that the existing eligibility criteria for an eligible transaction are satisfied.

Subclause (1) inserts paragraph (d), which enables the Commissioner to require an applicant to repay an amount paid on the application if the additional requirements that must be satisfied for a special eligible transaction are not met.

Subclause (2) inserts new sections (1A) and (1B).

Subsection (1A) sets out the amount that the Commissioner may require an applicant to repay if the additional requirements that must be satisfied for a special eligible transaction are not met.

If the amount paid on the application was more than the standard grant amount, the applicant is to repay the difference between the amount paid and the standard grant amount.

If the amount paid on the application was equal to or less than the standard grant amount, there is nothing for the applicant to repay.

Subsection (1B) defines 'standard grant amount' to mean the amount of the first home owner grant that would apply to the transaction if it were not a special eligible transaction.

For example, Jim enters into a comprehensive home building contract on 30 December 2017, and is paid a grant of $15,000 in anticipation that he will satisfy the commencement and completion requirements of a class 8 special eligible transaction.

Jim subsequently fails to complete construction of the new home within 18 months of the commencement date, but otherwise meets the existing eligibility criteria for an eligible transaction.

The amount that the Commissioner requires Jim to repay is $5,000. This is calculated as the amount that was paid on the application (that is, $15,000) less the 'standard grant amount' (being $10,000) that would have been paid on an eligible transaction under section 19(2CA).

If the grant paid for the special eligible transaction is less than or equal to the standard grant amount, the applicant is not required to repay an amount to the Commissioner where the eligibility requirements for a class 8 special eligible transaction are not satisfied. This would occur where the consideration for the special eligible transaction is less than or equal to the standard grant amount.

Clause 14: Section 52 amended

Section 52 sets out the arrangements by which the Commissioner may approve an extension of time to repay the grant or allow the applicant to enter into an instalment arrangement.

This clause amends section 52 to include new subsection (1A), allowing the legal costs of any recovery proceedings and the costs of lodging or withdrawing a memorial to be amounts that can be the subject of a repayment arrangement.

It achieves this by including a payment required under section 52A (legal costs incurred in relation to recovery proceedings) or section 60(1) (costs of lodging and withdrawing a memorial) to the definition of required repayment.

Clause 15: Section 52A inserted

This clause inserts new section 52A which enables the Commissioner to require an applicant to pay the legal costs incurred by the Commissioner in recovery proceedings.

The amendment aligns the First Home Owner Grant Act with the *Taxation Administration Act 2003*, which allows the Commissioner to recover legal costs incurred by the Commissioner in relation to proceedings for the recovery of tax.

Subsection (1) enables the Commissioner to recover legal costs incurred from an applicant if the costs relate to proceedings for the recovery of a grant amount, a penalty imposed under the Act, an amount including any interest that is due and payable under a repayment arrangement, or an amount relating to the registration or withdrawal of a memorial on land.

Subsection (2) provides that an applicant must pay those legal costs within 28 days after the date on which notice of the requirement is given to the applicant, unless the applicant has entered into an instalment arrangement.

The 28-day period in which an applicant must pay the legal costs is consistent with the period in which an applicant must repay a grant amount and any penalties under section 51(4).

Clause 16: Section 53 amended

This clause amends section 53(1) to include in the operation of section 53 the amount of legal costs referred to in a notice given by the Commissioner.

The effect is that where legal costs are required to be paid under section 52A by two or more applicants, the liability for that amount is to be joint and several, and the legal costs are recoverable as a debt due to the Commissioner in a court of competent jurisdiction.

Clause 17: Section 62 amended

Section 62 sets out the methods by which a notice or other document may be served by the Commissioner and the day the document is taken to be served.

Section 62(3) currently provides for when a document is taken to be served where it is not served personally. The provision uses service delivery times for posting a document within the State, to other jurisdictions within Australia and overseas. As the postal service delivery times have been changed by Australia Post, the provision requires amending.

Subclause (1) amends section 62(3) so that the day that the document is taken to be served other than personally, is a day prescribed by the regulations. This will enable the Government to accommodate for any changes to the postal delivery times in a timely manner.

Subclause (2) deletes and replaces section 62(4).

Subsection (4) as inserted provides that the regulations referred to in subsection 62(3) may prescribe different days for documents served by different methods and in different circumstances.

This will allow for different days to be prescribed for different methods of service. The reference to different circumstances is intended to cover the circumstances that were previously in section 62(4) that have been deleted (that is, service by post to different jurisdictions which may have varying delivery times) and also the different postal services that are available, for example, express post or same-day courier services.

Regulations will be prescribed to set out when a document that is not served personally is taken to be served for the purposes of subsection 62(3), taking into account Australia Post's new service delivery times.

Clause 18: **Section 69 amended**

Section 69 provides that the Governor is able to make regulations prescribing all matters that are required or permitted by the First Home Owner Grant Act.

Subsection (3) as inserted provides that regulations may be prescribed to apply with retrospective effect provided that regulations will not adversely affect a party to the transaction.

'Transaction' is defined in section 3 of the First Home Owner Grant Act to mean a contract for the purchase of a home, a comprehensive home building contract, or the building of a home by an owner builder. The regulation can only apply retrospectively if it does not adversely affect a party to these transactions.

The parties who could be affected by a regulation in relation to a transaction the subject of a first home owner grant application is the purchaser, for a contract to purchase a home, or the owner of the land on which a home is built in the case of a comprehensive home building contract or the building of a home by an owner builder.

This will enable the Government to respond in a timely manner to matters favourable to first home owners. The amendment will bring the First Home Owner Grant Act in line with the *Duties Act 2008* and the *Pay-roll Tax Assessment Act 2002*, which both have a provision that allows regulations to be made to apply retrospectively as long as it does not adversely affect the person who is or may be liable to pay the duty or payroll tax.