

FIRST HOME OWNER GRANT AMENDMENT BILL 2017

Council's Amendments — Consideration in Detail

The following amendments made by the Council now considered —

No. 1

New Clause 11A, page 5, after line 30 — To insert —

11A. Section 26 amended

In section 26 in the definition of *decision on the application*:

- (a) in paragraph (d) delete “(3);” and insert:
(3); and
- (b) after paragraph (d) insert:
 - (e) a requirement under section 52A(1) to pay an amount of legal costs incurred by the Commissioner.

No. 2

New Clause 12A, page 6, after line 17 — To insert —

12A. Section 30 amended

After section 30(5) insert:

- (6) If, as the result of a decision on an objection, an amount of legal costs paid by an applicant is to be repaid to the applicant, the following amounts are payable to the applicant —
 - (a) the amount of legal costs to be repaid;
 - (b) any interest paid by the applicant in respect of a written arrangement approved by the Commissioner under section 52 that relates to an amount referred to in paragraph (a);
 - (c) interest at the prescribed rate on the amounts payable to the applicant under paragraphs (a) and (b) from the date the amount was paid by the applicant to the date approved for the repayment.

No. 3

New Clause 12B, page 6, after line 17 — To insert —

12B. Section 32 amended

After section 32(4) insert:

- (5) If, as the result of an application for a review of a decision, an amount of legal costs paid by an applicant is to be repaid to the applicant, the following amounts are payable to the applicant —
 - (a) the amount of legal costs to be repaid;
 - (b) any interest paid by the applicant in respect of a written arrangement approved by the Commissioner under section 52 that relates to an amount referred to in paragraph (a);
 - (c) interest at the prescribed rate on the amounts payable to the applicant under paragraphs (a) and (b) from the date the amount was paid by the applicant to the date approved for the repayment.

No. 4

Clause 15, page 8, line 15 — To insert after “pay the” —
reasonable

No. 5

Clause 15, page 8, after line 22 — To insert —

- (3) If the notice covers legal costs as defined in the *Legal Profession Act 2008* section 3 —
 - (a) the notice must include or be accompanied by a written statement setting out the applicant’s right under the *Legal Profession Act 2008* to apply for an assessment of those costs; and

- (b) the Commissioner must not commence proceedings to recover those costs until at least 30 days after the date on which the notice is given to the applicant.

Mr B.S. WYATT: During the debate in the Legislative Council, amendments to the First Home Owner Grant Amendment Bill 2017 were passed. The amendments arose out of concerns from the opposition on whether the amendments in clause 15 of the bill are inconsistent with the Legal Profession Act 2008. The concerns were that the commissioner may pass on legal costs to an applicant in circumstances where those costs are incurred through engaging external lawyers, and the applicant may not be aware of their rights under the Legal Profession Act to dispute those costs. The Commissioner of State Revenue very rarely engages external lawyers for the purposes of recovering debts but, to allay the opposition's concerns and to progress the bill through the Council, amendments to insert new clauses 11A, 12A and 12B were moved by the government. These clauses allow an applicant to dispute a requirement to pay legal costs incurred by the commissioner, and the amount of those costs, through the formal objection process set out in the First Home Owner Grant Act, including a right of appeal to the State Administrative Tribunal. The government also proposed amendments to clause 15 to ensure the commissioner can require a payment of only "reasonable" legal costs under proposed section 52A. It was also proposed to insert a provision in clause 15 to exclude the application of the Legal Profession Act for legal costs an applicant is required to pay under section 52A. The latter was to ensure there was only one avenue to dispute these costs.

It is with disappointment that the bill has been returned to this house with the government's amendment to exclude the application of the appeal right under the Legal Professional Act being defeated. Instead, a further amendment moved by the opposition is proposed to require the commissioner to notify the applicant of their rights under the Legal Profession Act and to not commence recovery of the grant within 30 days of notice being given. The proposed objection rights in the First Home Owner Grant Act have a broader application than the rights under the Legal Profession Act. This is because the objection provisions will give all applicants a right to challenge legal costs required to be repaid, regardless of whether the commissioner engages external lawyers.

The actions of the opposition will result, for the extremely rare recovery cases when the commissioner engages external lawyers, in the applicant having two avenues to dispute the legal costs. This could lead to concurrent proceedings and inconsistent outcomes. While the outcome is undesirable, due to the rarity of the commissioner engaging external lawyers and for the sake of facilitation of the passage of the bill, the government will not oppose these amendments. Therefore, by leave: I move —

That the amendments made by the Council be agreed to.

Section 26 of the First Home Owner Grant Act 2000 provides a definition of decision on the application for the purposes of the objection and appeal provisions. It lists the matters against which an objection or appeal can be made. New clause 11A amends section 26 to include a new matter against which an objection or appeal can be made. The new matter that can be the subject of rejection or appeal is a requirement under section 5 2A(1) to pay an amount of legal costs incurred by the commissioner. Section 27 provides a right for an applicant to object to a decision on the application. After 26 is amended applicants will have a right to object to a decision and to require a person to pay an amount of legal costs and reasonableness of those costs. An applicant who is dissatisfied with the commissioner's decision on objection can apply to the State Administrative Tribunal for a review of the decision under section 31. As a matter of practice, notices issued under section 52A will set out an applicant's right to object to the requirement to pay an amount of legal costs and the process for objecting.

New clause 12A inserts in section 30 subsection (6) to provide that if an applicant's objection to pay an amount of legal costs is successful, the commissioner must repay the legal costs and any interest paid by the applicant.

The interest at the prescribed rate is also payable by the commissioner on the amount of legal costs to be repaid to the applicant. The interest is calculated from the date the amount was paid by the applicant to the date of the decision of the objection.

New clause 12B will provide for the treatment of legal costs in which an applicant successfully appeals a matter to the State Administrative Tribunal. The treatment is the same as contemplated by new clause 12A for objections. They are the two processes we have now set up.

There are two amendments to clause 15; I will make some comments on them. An amendment is made to clause 15 of the bill to insert the word "reasonable" after the words "pay the". The effect is that the commission will have the power under section 52A only to require an applicant to pay reasonable costs incurred by the commissioner in relation to recovery proceedings. As the commissioner usually seeks to recover only the fees for filing and serving of process, the costs that the commissioner requires an applicant to repay should be a reasonable amount. However, if an applicant disagrees with an amount or the requirement to pay legal costs, the applicant will have a right to dispute those costs through the formal objection process and appeal to the State Administrative Tribunal. By way of an aside, obviously, the costs of filing fees and processes will be so small that nobody will go to the SAT, I suspect. Clause 15 is also amended to insert a new subclause (3), which provides that if legal costs, as defined in

the Legal Profession Act 2008, are incurred, the commissioner must, in the notice contemplated by section 52A, notify the applicant that they have the right to have those costs assessed and not commence proceedings to recover those costs until 30 days after the notice has been given. An applicant can apply under the Legal Profession Act for a costs assessment only if they are a third-party payer. An applicant will only ever be a third-party payer if the commissioner is a client of a law practice and the commissioner has incurred legal costs as defined in the Legal Profession Act. This situation will rarely arise as it can occur only if the commissioner engages external lawyers to assist with the recovery process. I made the point before that that is a very rare circumstance.

Mr D.C. NALDER: For clarification and to try to put legal speak into laymen's terms because I am a simple farm boy from Wagin, my understanding is that these amendments are really an attempt to put the onus on the government that, if it is claiming these expenses, it must be able to substantiate the expenses but give people the right to have that assessment. I seek clarification that I have this interpretation right. If the government is seeking repayment of expenses, is the legal onus on the government to ensure that the rights of the person are explained to them so they can fully understand their options to appeal the expenses that have been levelled at them? Is that a good interpretation?

Mr B.S. WYATT: The member has nailed the interpretation; that is exactly right. The amendments require people to be informed of their rights and also makes clearer the fact that only reasonable costs can be obtained, as defined. In all cases in which legal costs are awarded under the Legal Profession Act 2008, people have the right to what is called "be taxed" in the profession; it means assessed. It goes through a process to ensure they are reasonable costs and not over and above what is reasonable. I can confirm that. The member's summary was exactly what I think the upper house is trying to achieve here.

Mr D.C. NALDER: Is it also possible that part of the reason to make these amendments is although we know that administrative costs are small and they will never go through SAT and so forth, it will stop the one-way path whereby the government could all of a sudden make some large claims that were a bit preposterous but people would have no right of action? Is it trying to stop that circumstance from potentially happening in the future, even though we do not think it is likely to happen?

Mr B.S. WYATT: That is exactly right. Ultimately, the commissioner very rarely uses external lawyers but the member is right; in the future, if an extensive legal dispute involves third-party lawyers along the way, this will allow for the process of reasonableness and people's rights being afforded—exactly. As I pointed out regarding the amendments to clause 12, in the vast majority of cases, the commissioner will recover only the fees for filing and process—serving of the originating summons, for example—which will be small costs in any event. If they end up in the SAT, I dare say it would be because somebody wanted to make a particular point as opposed to trying to seek costs.

Mr D.C. NALDER: One of the Treasurer's opening comments was about duplication and that there are now two avenues for people to appeal. Is the Treasurer able to provide clarity on those comments? It created a bit of confusion for me, so I would like that clarification, if the Treasurer could provide it.

Mr B.S. WYATT: I guess this is one of the unfortunate outcomes of the amendments made in the other place. As I said, I am going to accept them because I do not want to go back to the other place and we end up going backwards and forwards for months. Effectively, under the original bill that went through this place, people had objection rights under that bill—quite broad objection rights through the First Home Owner Grant Act process. We are also creating a separate process through the SAT. Two options were created that could both be utilised. That will be problematic if both are utilised and they come to different outcomes—one through the Legal Profession Act and the other, as it originally went through this house under the First Home Owner Grant Act. Members in the other place had concerns and wanted to ensure that people had the right, under the Legal Profession Act, to pursue a similar outcome that they can pursue under the First Home Owner Grant Act. The reason I say that is problematic is that if two processes are created to try to get the same outcome, if both are pursued and there are different outcomes, how do we arbitrate that outcome between two different processes and different bodies making a decision on the same dispute? That is the problem. But because it will be so rare that the commissioner uses third-party lawyers, it is not ideal, but we will accept it just to avoid the legislation going back to the other place and coming back here with other amendments.

Mr D.C. NALDER: On the Treasurer's point about the First Home Owner Grant Act, is he able to explain that mechanism? My understanding is that there was not really a lot of recourse for it. Can the Treasurer provide clarity around how people could seek assurances that the charges were legitimate and appropriate?

Mr B.S. WYATT: That is a good question. It is ultimately what we are trying to fix with new clause 11A. It was not in the original bill. New clause 11A sort of became apparent, I assume, through debate in the other place. This was one of the government's amendments. New clause 11A amends section 26 to include a new matter against which an objection or appeal can be made. The new matter that can be the subject of objection or appeal is a requirement under section 52A to pay an amount of legal costs incurred by the commissioner. I think we have

made the bill better as a result of that amendment, but created confusion on the dual processes of appeal. Under the First Home Owner Grant Act 2000, new clause 11A deals with a process in which legal costs incurred by the commissioner can be appealed.

Mr D.C. NALDER: It is fair to say, then, that it is a good thing that the First Home Owner Grant Amendment Bill 2017 was assessed by the Council, even though duplicate amendments came back that might have added a little bit of confusion or created two possible outcomes. The fact that the Council identified there was no right of appeal for consumers would have to be considered a good assessment, and work well done by the Legislative Council—is that a correct assessment?

Mr B.S. WYATT: I am never one to dispute the role of the upper house, I assure the member of that, despite the upper house disappointing me day after day—regardless of how reasonable I can sometimes be. But the member is right in that that actually creates something that I think is a good right.

Debate interrupted, pursuant to standing orders.

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