



Law Council
OF AUSTRALIA

Legal Practice Section

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Dear Colleague

REVISION OF COMMISSIONER'S INTERPRETATION STATEMENT CIS2014/02 PROVISION OF HOUSING BY CHARITIES

1. The Charities & Not for Profits Committee (**the Committee**)¹ of the Law Council of Australia's Legal Practice Section welcomes the opportunity to make a submission to the Australian Charities and Not for Profits Commission (**ACNC**) in relation to the revision of Commissioner's Interpretation Statement CIS2014/02 Provision of Housing by Charities.

Summary of Recommendations

- (a) There are many aspects of the current Commissioner's Interpretation Statement (**CIS**) that are commended and should be retained.
- (b) There ought to be clearer guidance on provision of housing by ownership as well as rental.
- (c) The reference to not for profit in [5.2] needs revision.
- (d) The section on relationships with government needs expansion.
- (e) Consideration of Housing under the "fourth head" of charity needs expansion and clarification.
- (f) The design of the Statement and Appendix is confusing, and consolidation of both documents would be clearer.

Commendations

2. The housing CIS addresses many of the typical circumstances recognised as housing for charitable purposes (described in the Housing CIS as "charitable housing") [2.2].

¹ The Law Council of Australia is a peak national representative body of the Australian legal profession. It represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. The Law Council represents 60,000 Australian lawyers through state and territory bar associations and law societies, as well as Law Firms Australia.

3. [2.7] helpfully sets out the factors relevant to poverty, distress or disadvantage.
4. [4] correctly describes the place of “commercial activities” in furtherance of a charitable purpose.
5. [5.2-5.3] is an appropriate statement of the position on returning assets to government where required.

Rental versus Equity

6. The Housing CIS avoids a key issue in many housing schemes, namely: is the provision of equity rather than rental a private benefit that goes further than the relief of need?

7. [3.2] touches on the issue but provides little guidance:

3.2. It is possible that a charity could operate rent-to-buy or shared equity housing purchase schemes. However, such housing schemes would be assessed on a case-by-case basis to ensure that the solely charitable purpose of the charity remains.

8. The Committee would be grateful for further guidance regarding the Commissioner’s view on enabling disadvantaged people who are unable to attain secure and affordable housing being assisted to acquire equity over time. The Committee submits that assistance with home ownership is an effective means of providing secure and affordable housing over the long term and inter-generationally. As such the public benefit outweighs the private benefit.
9. The Committee perceives that the ACNC tends to regard provision of housing by home ownership as necessarily providing unacceptable private benefit. The Committee submits that provision of home ownership is not incompatible with charitable purposes. Indeed, there will be circumstances where enabling ownership may be more efficient, effective and economic than commitment to long term rental subsidy.
10. The test of charitable purposes according to the majority in *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited*² “is found in the natural and probable consequence of its immediate activities”.³ It is submitted that the enabling of home ownership is likely to effectively relieve the inability to procure secure and affordable housing required for a modest standard of living in Australia.
11. Moreover, such provision, even for people of moderate means is likely to relieve the demand for social housing consistent with the principles in *Re Resch’s Will Trusts*.⁴

The general benefit to the community of such facilities results from the relief to the beds and medical staff of the general hospital, the availability of a particular type of nursing and treatment which supplements that provided by the general hospital and the benefit to the standard of medical care in the general hospital which arises from the juxtaposition of the two institutions.

² *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited* [2008] HCA 55 (3 December 2008)

³ *Ibid* [38]

⁴ AC 514, [1967] 3 All ER 915.

12. The Committee commends the Joint guidance from HM Revenue and Customs, the Charity Commission and the Homes and Communities Agency on Affordable Home Ownership: Charitable Status and Tax (“the UK Guidance”).⁵

A2. In line with wider social changes, many charitable RSLs now seek to give beneficiaries the security of affordable low cost home ownership (LCHO). However, charity trustees need to be clear what charitable purpose they are furthering and to be satisfied that providing access to LCHO achieves this. This guidance explains when this activity may be charitable, and the legal and tax implications.”

B3. It can be charitable to provide housing for key workers, for example, teachers or health workers, where there is a need for the charitable service that the key worker will provide, which have been created by shortages of such workers due to the difficulty of affording accommodation in the area. In the respective examples, the charitable services provided are advancing education and promoting health (see section C2).

Private Benefit

13. [5.1] attempts to describe the requirements of “not-for-profit” as contemplated by the definition of Charity in section 5 of the *Charities Act 2013* (Cth) (**Charities Act**).

5.1. Charities are required to be not-for-profit under section 25–5(3) of the ACNC Act 2012 (Cth). Accordingly, there can be no distribution of income or assets to individuals for private benefit either during its operation or upon winding up. Ordinarily, upon winding up, any income or assets remaining after the satisfaction of debts and liabilities must be distributed to another charity with a similar charitable purpose. A failure to ensure such a charitable distribution may mean that the organisation is not considered to be charitable.

14. The expression of the non-distribution concept omits reference to the essential exclusion of distribution of income or assets to individuals **other than charitable beneficiaries**.⁶ The risk is that any benefit to an individual who is a charitable beneficiary could be regarded as unacceptable private benefit. As Professor Dal Pont observes:

...that the benefits of charity almost invariably ultimately accrue to individuals is hardly inconsistent with charity.⁷

15. Accordingly, we propose that the clause read:

*5.1. Charities are required to be not-for-profit under section 25–5(3) of the ACNC Act 2012 (Cth). Accordingly, there can be no distribution of income or assets to individuals (**other than charitable beneficiaries**) for private benefit either during its operation or upon winding up. Ordinarily, upon winding up, any income or assets remaining after the satisfaction of debts and liabilities must be distributed to another charity with a similar charitable purpose. A failure to ensure such a charitable distribution may mean that the organisation*

⁵https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/355526/Affordable_home_ownership_charitable_status_and_tax.pdf

⁶ *Re Delius (deceased)* 1957 1 Ch 299 at 308 per Roxburgh J. (“a charitable trust must not have inherent in it the potentiality of individual profit for a non-charitable beneficiary”).

⁷ G E Dal Pont *Law of Charity* LexisNexis Butterworths Australia 2010 at [3.23]

is not considered to be charitable. [bolding for the purpose of showing proposed amendment]

16. In passing, the Committee notes that [5.1] does not appear to be directly relevant to the section heading: “Relationships with Government” and might be given its own chapter heading or located elsewhere.

Relationships with government

17. The Committee has commended the observations in [5.2-5.3] that funds returned to government would not contravene the non-distribution rule. The Committee recommends that reference be made to assistance from government in the form of funding, incentives and subsidies will not be disqualifying factors.⁸

Providing charitable housing coincidental with government policy or with the assistance of government funding, incentives or subsidies is not necessarily inconsistent with a charitable purpose.

The fourth head

18. [2.1] asserts that

the provision of charitable housing may come within one or more of the charitable purposes set out in section 12 of the Charities Act including:

...

[2.1.3] any other purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of, any of the purposes mentioned in [section 12(1)(a) to (j) Charities Act 2013].

19. [2.7.2 Appendix] states:

2.7.2 This section ensures that the classes or categories of charities are not closed, and other charitable purposes may be recognised over time, reflecting the changing Australian context.

20. Yet the example of accommodation for ex-offenders given in 2.7.3 Appendix is, with respect, a narrow example of the “fourth head “ and one which probably falls into the first head and almost certainly within concepts of advancing social or public welfare. It falls back on an implied requirement that the beneficiaries must suffer an identified disadvantage.

21. In our submission a more apt example of the “fourth head” (or its statutory reflection in paragraph 12(1)(k) of the Charities Act) is the provision of housing on a not for profit basis to encourage community betterment through housing affordability. It is analogous to the improvement of agriculture or the promotion of industry or commerce.⁹

⁸ *Central Bayside General Practice Association Limited v Commissioner of State Revenue* [2006] HCA 43

⁹ *Commissioner of Taxation v Triton Foundation* [2005] FCA 1319; (2005) 142 FCR 371.

Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation [2005] FCA 439; (2005) 147 FCR362. *Inland Revenue Commissioners v Yorkshire Agriculture Society* [1928] 1 KB 611 (CA).

22. The Committee commends the Charity Commission Report: Promotion of Urban and Rural Regeneration¹⁰ for recognising, subsequent to public consultation:

the promotion of urban and rural regeneration for public benefit in areas of social and economic deprivation as a charitable purpose in its own right...[including] the provision of housing for those who are in conditions of need and the improvement of housing in the public sector or in charitable ownership...¹¹

23. Although it was ultimately found in *Re Queenstown Lakes Community Housing Trust*¹² that private benefit outweighed public benefit, McKenzie J made these observations affirming that affordable housing could fall under the fourth head:

[69] The nature of the public benefit claimed under the fourth head in this case is the betterment of the community, which is said to arise from the retention in the district of useful members of society, in the way described in the passages cited at [7] and [8]. The promotion of urban and rural regeneration for public benefit, at least in areas of social and economic deprivation has been recognised as a charitable purpose. The Charity Commissioners in England have issued detailed guidance, to which I was referred. The provision of affordable housing has similarly been recognised by them as potentially charitable. Mr McLay also referred to the analogy, in terms of the category of persons whose presence will benefit the community, to the reference in the Preamble to the aid and help of young tradesmen and handicraftsmen.

[70] I consider that, in principle, and bearing in mind that the categories of beneficial purposes under the fourth head are not closed, purposes which are directed to the composition and social cohesion of a particular community are capable of falling within the fourth head, by analogy with gifts for the benefit of a locality, and with the promotion of urban and rural regeneration. I consider that, addressing the question posed in [51](a) from the perspective of the nature of the public benefit, the claimed benefits are capable of falling within the fourth head. [emphasis ours].

[71] The next question, in [51](b), is whether the means by which that claimed benefit is achieved is a charitable means. In the present case the intended benefit to the community is that workers and other persons whose presence in the community is important for the overall welfare of the community will be able to live in the district. That public benefit is indirect. The means by which that public benefit is achieved involves conferring a private benefit (assistance in meeting housing costs) on private individuals (persons selected from applicants meeting the Trust's criteria).

[72] In addressing the question of the means by which the claimed public benefit is achieved, some comparison with analogous situations, accepted under the fourth head, is useful. The promotion of urban and rural regeneration for public benefit in areas of social and economic deprivation has, as I have noted, been recognised as a charitable purpose by the Charity Commissioners in England. The Charity Commissioners noted that regeneration organisations might do some or all of a number of things, including providing housing for those in need and help to improve

¹⁰https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/358867/rr2text.pdf

¹¹ Ibid, 2-3.

¹² *Re Queenstown Lakes Community Housing Trust* HC Wellington CIV-2010-485-1818 [2011] NZHC 617; [2011] 3 NZLR 502; (2011) 25 NZTC 20-059 (24 June 2011); <http://www.nzlii.org/nz/cases/NZHC/2011/617.html>

housing in an area of deprivation where poor housing is a problem. The criteria which the Commissioners use to assess such an organisation include that it has effective criteria to determine whether or not an area is in need of regeneration, and that the public benefit from its activities outweighs any private benefit.

[73] In the case of affordable home ownership the Charity Commissioners in England have issued guidance which recognises that it is a requirement of charitable status that applicants be in need. My attention was drawn to the figures given in the Commissioners' guidance for regional house prices and household incomes. Mr McLay submits that there are wide regional variations, and that the levels of incomes are not indicative of poverty in the strict sense. I have earlier rejected the submission that the Trust's activities are charitable under the first head of charity, as involving the relief of poverty. That rejection does not of itself mean that housing affordability in the Queenstown Lakes district is not a relevant consideration in determining whether the provision of housing assistance, with the motive of community betterment to which I have referred, may be charitable. However, in considering the means by which the desired objective, namely retention of useful members of society within the district, is achieved, the individual benefits which are provided in achieving that objective weigh against the conclusion that the Trust's purposes are charitable under the fourth head.

24. For an extended discussion on matters of degree between private and public benefit see *South Australian Employers' Chamber of Commerce & Industry Inc. v Commissioner of State Taxation*.¹³
25. There are many instances in charity law where a non-excludable good is not subject to identification of disadvantage – education, human rights, religion, infrastructure are some examples. Housing is a basic need, just as basic as food, medical care and education. There is no reason why housing should be treated any differently than other recognised needs. There is no logical reason why it has to be confined to cases of destitution or disadvantage. For example, charity law in Australia does not restrict the provision of education on a charitable basis to just basic need. Private schools are charitable.
26. Education is a path to career success, and in that sense is a private good which, when provided to a sufficient section of the public, satisfies the public benefit test. Education is also a public non-excludable good in the sense that we are better off as a society when citizens can read, write, exercise capacity for critical thought, invent things, create things and solve society problems.
27. The same can be said about provision of housing including home ownership. No doubt it is a private good. However, it is also related to a range of benefits that everyone enjoys, from civil peace, relief of government revenue, attractive urban environments and engagement in civil society.
28. The orientation is therefore away from relief of those being housed to the benefits to the community as a whole. Arguments of how much provision should be made and what level of housing is enough and what level is too much, fall away. Whether a charity will want to offer subsidised housing regardless of means is a practical question but, it is submitted, not a matter of principle.

¹³ [\[2017\] SASC 127](http://classic.austlii.edu.au/au/cases/sa/SASC/2017/127.html) [108]-[122] <http://classic.austlii.edu.au/au/cases/sa/SASC/2017/127.html>

29. In summary, the Housing CIS ought to consider the place of charitable housing under the fourth head of charity as well as its focus on disadvantage.

Design

30. The design of the Housing CIS as a Statement with reasoning set out in an Appendix is confusing in two respects:
- (i) There is much repetition of material from the Statement in the Appendix, often using the same words as in the Statement.
 - (ii) The use of a separate but similar numbering system makes referencing subject to ambiguity.
31. The combined Statement and Appendix is not so long as to preclude consolidation into one statement.

Conclusion

32. The Committee would be pleased to discuss any aspect of this submission or assist further in the development of the revised CIS if requested.
33. The Committee would welcome the opportunity to discuss this submission with the Department. In the first instance, please contact the Charities & Not for Profits Committee Chair, Jennifer Batrouney AM QC on jennifer_batrouney@vicbar.com.au

Yours sincerely



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