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LAWYERS



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Submission to
Senate Economics References Committee
Inquiry into Affordable Housing

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1.0 INTRODUCTION

Neumann and Turnour Lawyers is a Brisbane based law firm which specialises in the area of Not for Profit ("NFP") law. We provide advice to an extensive number of NFP organisations, particularly charities and charities operating in the housing sector.

We write in response to the call for submissions to the Senate Economics References Committee Inquiry into Affordable Housing. In these submissions we address the following matters:

1. Charitable endorsements and affordable housing; and
2. Managed Investment Schemes and NRAS.

Our submissions principally focus on the provision of affordable housing by charities, including through the National Rental Affordability Scheme (NRAS), and in that context address the particular terms of reference (a), (e), (h), (l) and (m), replicated for ease of reference at Annexure A.

In formulating responses to what Minister Andrews has described as 'a looming social crisis'¹, Governments have seen the involvement of charities as key to addressing the shortfall of affordable housing in Australia. One example of the recognition of the role of the community housing sector has been the invitation to charities to partner with developers and maximise their charitable endorsements for cost-effective delivery of housing through the NRAS.

Described by the Australian Housing and Urban Research Institute as 'the largest government initiative ever directed at stimulating affordable rental supply in Australia',² the NRAS has provided an example of largely successful cooperation between Government and the charitable sector that has led to significant delivery of affordable housing to the benefit of the wider Australian community. With the benefit of five years of operation many of the principal uncertainties in the legislative scheme have been addressed and developer, investor and institutional confidence in the NRAS has grown. This is not to say that there are not further amendments required to enhance investor confidence and to enable the participation of charities and also of institutional funds, which we address in these submissions.

One of the chief questions arising for charitable housing providers considering an expansion into the NRAS is whether they will retain their charitable endorsements (which grant access to various tax exemptions and concessions). It has been recognised that those endorsements are critical to financial performance and to achieving the full scale of housing delivery capable through charitable organisations. This submission addresses certain concerns that have arisen to date in relation to ongoing endorsement for charitable housing providers operating in the NRAS and offers recommendations for legislative action to address any residual uncertainty. Such is considered to be a critical component of any

¹ Speech by the Minister for Social Services, the Hon Kevin Andrews MP, Closing Address to the National Housing Conference, 01 November 2013, Adelaide, available at: http://chfa.com.au/sites/default/files/sites/default/files/docs/kevin_andrews_speech_national_housing_conference_adl_1nov13.pdf, cited 07 February 2014.

² *Financing rental housing through institutional investment, Volume 1: outcomes from an Investigative Panel* authored by Vivienne Milligan, Judith Yates, Ilan Wiesel and Hal Pawson with Carrie Hamilton for the Australian Housing and Urban Research Institute at University of New South Wales March 2013 AHURI Final Report No. 202, at p 14.

expansion of affordable housing in Australia that is to involve charitable community housing organisations through market-based mechanisms such as the NRAS. As the Senate Committee is tasked to consider international mechanisms for expanding affordable housing (term of reference (h)) (such as the lower-income tax housing credit in the United States), our submissions should also be considered relevant to alternative models in addition to the NRAS to the extent that they seek to create investment in affordable housing through the engagement of charities.

2.0 Charitable Endorsements and Affordable Housing

2.1 Introduction

The report of the November 2008 Senate Inquiry Senate Standing Committee on Community Affairs on the National Rental Affordability Scheme Bill 2008 [Provisions] and the National Rental Affordability Scheme (Consequential Amendments) Bill 2008 [Provisions] dated November 2008 ('the November 2008 Senate Report') raised concerns that participation in the NRAS may call into question the ability of existing charitable housing providers to remain endorsed as charitable institutions. We consider that, given this framework of uncertainty, and consistent with the effective expansion of the legal definition of charity adopted at the enactment of the NRAS, legislative amendment to provide that participation in the NRAS (or any like scheme recommended by the Senate Committee), is charitable is warranted to provide industry certainty in advance of undertaking proposed activities, and possibly as a means to reflect growing community concern over the lack of affordable housing in Australia.

2.2 Housing Affordability Crisis?

The housing affordability crisis is well documented. It was extensively covered in the June 2008 findings of the Senate Select Committee on Housing Affordability in Australia 'A good house is hard to find: Housing affordability in Australia'. Adopting the 'Ontario measure' the June 2008 Senate Inquiry reported 'On this definition it is estimated that there are now over one million low and middle income families and singles in housing stress. This represents about 10 per cent of the population.'³ In his speech to the Housing Conference 2013, Minister for Social Services Kevin Andrews stated:

The National Housing Supply Council has estimated the national shortfall in housing stock in 2011 was 228,000 dwellings. Assuming historic demographic and supply trends continue, this gap will increase to nearly 370,000 dwellings by 2016, and 663,000 by 2031.

Moreover, if current growth trends are repeated in the coming five year period, then by 2016 the national dwellings shortfall will be around 512,000. And by 2031, the shortfall will be a staggering 1.28 million dwellings.⁴

The COAG Affordable Housing Report 2011 reported that 41.7% of low income households (lowest 40% by income) were in housing stress in 2009-2010 and that 60.8% of the lowest 10% of households were in rental stress in 2009-2010. A low income household is considered to be in rental stress if its rental costs exceed 30% of its gross income.

³ Senate Select Committee on Housing Affordability in Australia 'A good house is hard to find: Housing affordability in Australia', June 2008, available at <http://www.propertyoz.com.au/library/A%20good%20house%20is%20hard%20to%20find%20report%20JUNE%202008.pdf>, at para 3.17. The Ontario measure applies a '30/40' rule as the preferred measure of 'housing stress'; restricting it to households in the lowest 40 per cent of the income distribution paying over 30 per cent of income on housing.

⁴ Andrews, *Ibid.*

The NRAS Policy Guidelines issued by the former Australian Department of Families, Housing, Community Services and Indigenous Affairs, also make direct reference to the growing community concern over housing affordability issues:

Governments, the business sector and community organisations recognise housing affordability is an issue of community concern. The increasing cost of housing is having an impact on the ability of many Australians to meet their financial commitments.

Rental housing has become increasingly unaffordable and vacancy rates in all capital cities have fallen well below the three per cent level which is widely used as a benchmark of fully-utilised supply.⁵

2.3 Charity Law Reflective of Community Concern

In discharging their role of interpreting the purposes to be considered charitable at law, the courts have long recognised that the law must adapt to reflect developing community norms. Accordingly, Lord Justice Sachs in *Incorporated Council of Law Reporting for England and New South Wales v Attorney-General* [1972] Ch 73 at 94 noted that the common law of charities 'has an admirable breadth and flexibility which enables it to be reasonably applied from generation to generation meeting changing circumstances'. Similarly, in 1968 Lord Wilberforce in *Scottish Burial Reform and Cremation Society Ltd v Glasgow City Corporation* [1968] AC 138 at 154 noted that 'decisions given by the courts ... have endeavored to keep the law as to charities moving according as new social needs arise. The law of charity is a moving subject which may well have evolved even since 1891'. Furthermore, in *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 at 49, Lord Wright noted that the definition of what is charitable was to be determined against the 'approval by the common understanding of enlightened opinion for the time being'.

The question for the Senate Committee is whether the Australian community now holds a concern in relation to the lack of affordable housing in Australia that is so sufficient as, 'by the common understanding of enlightened opinion for the time being', to warrant recognition as a purpose to which charitable endorsement should be given. Given the central role of tax exemptions and concessions to the operation of charitable housing providers and the central role purportedly to be played by those providers in any expansion of affordable housing (as further referred to below), the Committee may wish to specifically seek evidence on this question. Some guidance may be taken from the legislative history of the NRAS, to which we now turn.

2.4 The History of NRAS and Charitable Housing Providers

Three days after the enactment of the NRAS, the Parliament amended the *Extension of Charitable Purposes Act 2004* (Cth) to provide that a charity that is an approved participant in the NRAS will be extending a charitable purpose where the charity holds 'an allocation ... that specifies a date in the first 2 NRAS years from which the allocation will operate or is taken to have operated'.⁶

This was in response to the findings contained in the November 2008 Senate Report. Importantly the Coalition Senators sitting on that Committee recommended:

⁵ Australian Government National Rental Affordability Scheme Policy Guidelines, June 2011, available at <http://www.dss.gov.au/our-responsibilities/housing-support/programs-services/national-rental-affordability-scheme/national-rental-affordability-scheme-legislation-regulations-and-policy-guidelines>, cited 10 February 2014.

⁶ *Extension of Charitable Purposes Act 2004* (Cth), section 4A.

1.30 ... that the ATO confirms participation in the NRAS as charitable activity for those organisations otherwise qualifying for Public Benevolent Institutional (PBI) status.

The Coalition Senators noted that 'A major concern if the ATO confirms that public housing suppliers who undertake NRAS activities will have their PBI tax status overturned is that many organisations, including Aged and Community Services Australia members, will not participate in the scheme. This could result in a decrease in the amount of public housing available to people who desperately require affordable housing.'⁷ Senator Scott Ludlum in his dissenting report to the Senate Inquiry also noted that 'the impact on the community if not-for-profit organisations lost their charitable status due to NRAS not gaining recognition as a charitable activity would be enormous'.⁸

In addressing these concerns, the ACOSS Submission to the November 2008 Senate Committee argued that 'that the provision of housing for disadvantaged members of society should be recognised as a charitable purpose, therefore ensuring that involvement in NRAS would be considered a charitable venture.'

In his public Media Release on the amendment to the *Extension of Charitable Purposes Act 2004* (Cth), the Hon. Wayne Swan indicated that:

To ensure that the charitable sector can participate fully in the scheme, the Australian Government will introduce a transitional safety net by amending both charity and tax laws. The amendment will mean that the proposed participation of existing charities in the Establishment Phase of NRAS will not affect their charitable status.

To ensure that charitable tax concessions remain appropriately targeted, the Government considers that the safety net should apply to those charities that make applications for 11,000 incentives available in the Establishment Phase of NRAS - for projects that will be built in 2008-09 and 2009/10 of the Scheme. The safety net will expire at the conclusion of the Establishment Phase.

The Government is committed to reviewing the Scheme at the end of the Establishment Phase to ensure it continues to meet its twin objectives: to reduce rental stress and increase the supply of affordable rental housing.

The November 2008 Senate Report noted that the time limitation on the extension was imposed 'pending the outcome of broader reviews into the taxation system currently underway'.⁹

On introducing the amendments Ursula Stephens, Parliamentary Secretary Assisting the Prime Minister for Social Inclusion, provided the comments located at Annexure B. If one relies upon her comments, the principal mischief the amendment to the *Extension of Charitable Purposes Act 2004* (Cth) sought to address was to further the supply of affordable housing within Australia, which the Government acknowledged required the participation of the community housing sector. Therein the Government acknowledged that 'that the community housing sector is vital to the success of the National Rental Affordability Scheme'.

⁷ November 2008 Senate Inquiry Senate Standing Committee on Community Affairs on the National Rental Affordability Scheme Bill 2008 [Provisions] and the National Rental Affordability Scheme (Consequential Amendments) Bill 2008 [Provisions], Dissenting Report by Coalition Senators, para 1.26.

⁸ Ibid, at paragraph 1.22.

⁹ November 2008 Senate Inquiry Senate Standing Committee on Community Affairs on the National Rental Affordability Scheme Bill 2008 [Provisions] and the National Rental Affordability Scheme (Consequential Amendments) Bill 2008 [Provisions], para 2.11.

The NRAS and the associated amendments to the *Extension of Charitable Purposes Act 2004* (Cth) were effected in light of the findings of the June 2008 Senate Select Committee on Housing Affordability in Australia report referred to above. Parliament's actions then give rise to the question, did the amendments amount to a recognition that community concern was such that the purpose of providing affordable housing was itself to be considered charitable at law?

At the time of the enactment of the NRAS the then Government sought to encourage the participation of the NFP Sector in the NRAS. That encouragement extended to invitations to consider how charitable tax concessions might be utilised to maximise delivery in the NRAS, including through GST concession benefits or stamp duty right downs. One example was the prospectus provided by the Australian Government which provided the example of an investment scenario in which:

Debt service payments are made out of operating surpluses, generated from the annual Australian Government component of the national rental incentive payments and affordable rents. By acting as developer, possibly with the assistance of a professional project manager, the charitable organisation may be able to reduce the procurement costs of the units. Subject to requirements of the Goods and Services Tax Act, charitable organisations may also achieve GST savings.¹⁰

As a result of that encouragement, a number of charitable housing providers in Australia have grown sizeable property management rights holdings (some in the thousands) or now have direct ownership of a sizeable numbers of NRAS approved dwellings.

As the amendment to the *Extension of Charitable Purposes Act 2004* (Cth) only extended to the first two NRAS years, at the time of the November 2008 Senate Report Ms Stephens raised the prospect of a further extension to later NRAS Rounds and clarified that the position was to be reviewed based upon the initial success of the NRAS. For reasons put by the Hon Wayne Swan in a letter to the Community Housing Federation of Australia dated 14 January 2010 (enclosed at Annexure C), there was no further amendment to the *Extension of Charitable Purposes Act 2004* (Cth) to cover later NRAS Rounds. The then Treasurer wrote:

As a result of the Word Investments decision, there is now sufficient certainty that charitable CHOs [community housing organisations] participating in NRAS will continue to be charitable under the tax laws, where they direct surpluses from their NRAS participation towards their charitable purpose. Charitable CHOs may also establish distinct entities in which to conduct their NRAS activities. Consequently, it is unnecessary to extend the temporary legislative safety net, as the Word Investment decision achieves the same end as the safety net.

The 'Word Investments decision' (*Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204) has been the subject of considerable attention since its delivery by the High Court in December 2008. In response to the decision, the former Labor Governments proposed, but did not introduce, an Unrelated Business Income Tax (UBIT) which proposed to tax the commercial operations of charities. The prior Government's consultation paper on the UBIT dated 27 May 2011 provided that 'NFP entities who participate in the 50,000 National Rental Affordability Scheme allocations will be allowed to use their tax concessions in support of that activity.' By providing that participation in the NRAS was not to be considered to be a purpose unrelated to other charitable purposes, and therefore not separately taxable under the UBIT, the consultation paper arguably affirms the proposition that participation in the NRAS was to be considered to be charitable at law.

¹⁰ www.fahcsia.gov.au/internet/facsinternet.nsf/housing/nras_prospectus.htm. Cited 03 November 2008.

The reasoning of the High Court in the Word Investments decision is that where a charity effects commercial activities it is extending its charitable purposes, provided the charity turns the surplus arising from those activities to its charitable purposes. It is an established principle that private benefit may be taxed, but that public benefit should not be taxed and the Word Investments decision sits within that principle. The reasoning of the Court is consistent with the kind of engagement between commercial interests and affordable housing providers that was encouraged at the commencement of the NRAS and which, as shown above, has been regarded as necessary to expand affordable housing in Australia through the involvement of the charitable housing sector. Any proposal to tax income arising from participation in affordable housing schemes would be inconsistent with the principle of expanding the ability of charitable organisations to fulfil their purposes through the accumulation of surplus through commercial operations, and therefore, arguably, limit the contribution to the public benefit made by such charities.

From the above, a coherent theme appears; that legislative and Government treatment of the NRAS to date is consistent with the proposition that the provision of affordable housing through participation in the NRAS is a charitable purpose. Charity sector participation in the NRAS has grown as a result of the encouragement of the Government. It is however evident that the charitable sector requires certainty that the ongoing participation of charities in the NRAS, or any like scheme considered by the current Senate Inquiry, is in fact charitable. Such can be achieved by legislative recognition. This recognition is required as the ongoing effect of the Word Investments decision is likely to be subject to further legislative review and is also affirmed by the perceived need to extend the statutory definition of charity to participation in the NRAS in 2008.

In addition, given the above analysis of the affordable housing crisis, and the growing level of community concern in relation to the lack of affordable housing in Australia, the Senate Committee should consider whether there is reason to contain this legislated charitable purpose to activity in the NRAS, or like scheme, alone. The Committee should then consider whether the definition of charity should also be extended to the provision of affordable housing to persons who cannot otherwise obtain a modest standard of living in Australia.

2.5 Charities Are Considered Critical to the Success of the NRAS

As noted above, certain elements of the NRAS were effected on the recognition 'that the community housing sector is vital to the success of the' Scheme. As at 31 October 2012 charities accounted for 69% of tenanted dwellings in the NRAS and by 30 June 2013 (the most recent figures available at the date of this submission) the proportion was 66%.¹¹ At June 2013 charities accounted for 57% of NRAS incentives allocated, reserved or under offer and demonstrated far higher NRAS approval to tenanting rates than non-endorsed charities.

As noted above, there is wide recognition that charitable concessions are critical to enabling participation of charities in the scheme. By way of illustration, for those entities that operate head leasing models as a means to offer greater security of tenure, their tax exempt status has the effect that rent received as an intermediary is not taxable in the hands of the charity, but is taxable in the hands of the owner, thus avoiding double taxation. Tax exemption enables charities to apply further funds to their charitable purposes for the benefit of the public. As noted in the Government prospectus extract above, charities can apply their GST

¹¹ Australian Government, *National Rental Affordability Scheme Monthly Performance Report*, 30 June 2013, available at: <http://www.dss.gov.au/our-responsibilities/housing-support/programs-services/national-rental-affordability-scheme/national-rental-affordability-scheme-performance-reporting>, cited 10 February 2014.

concessions to allocate further funds to their charitable purposes, including through the creation of GST-free supplies associated with the provision of affordable housing.

2.6 NRAS Tenant Income Levels

The income levels permitted to tenants who occupy affordable rental dwellings the subject of an allocation of NRAS Incentives was the primary source of the concerns over the possible loss of charitable endorsements for those charities who commenced operation in the NRAS. Table 1 provides certain of the existing NRAS tenant income limits. If the household income of an existing tenant exceeds the indicated limit (25 per cent greater than the initial income limit) in two consecutive NRAS years, the tenant will cease to be an eligible tenant. Column C indicates figures which are 25 per cent higher than the household income limits for ease of reference for the purpose of the current discussion.

Table 1: Representative Selection of Existing NRAS Eligible Tenant Income Limits

A: Household composition	B: Initial household income limit (\$)	C: Existing tenant income limit (\$)
One adult	45,956	57,445
Two adults	63,535	79,419
Sole parent with two children	78,822	98,528
Couple with two children	94,021	117,526

Are persons falling within the upper income levels eligible for charitable relief? It is now readily accepted that the mere movement of tenants in receipt of the services of a charitable housing provider from an impoverished position to one of self-sustainability does not preclude the organisation from charitable recognition at law. Such outcomes are consistent with the charitable purposes of the organisation, to the extent that such are to alleviate poverty. The relevant income level to which attention is to be directed is then the initial entry income level for the respective NRAS tenant. If a tenant moves from low initial income to a greater level of income, this is to be seen as in line with the charitable purposes of the NRAS Approved Participant. The NRAS income levels permit the movement of a tenant from low income to a proportionally higher income over time, provided the tenant leaves the dwelling within two NRAS years. Such is consistent with established principles that the relief of poverty by charitable housing providers includes not only the provision of housing to those in

immediate need of housing, but also to permit tenants to obtain longer-term financial independence, including by permitting tenants to put aside income for a deposit to acquire housing, and therefore move out of rental stress.

There is the separate question as to whether those falling within the highest entry income levels are eligible for charitable relief. Government material issued at the time of the commencement of the NRAS stated that comparable incomes included childcare workers, nurses, police officers and fire-fighters. However as noted by the Coalition Senators in their dissenting report to the November 2008 Senate Report, 'Despite Government assertions that the scheme will address the needs of such key workers, many of these workers will fall outside of the eligibility criteria. For example the upper income limit for a single person is \$48,189 pa, yet award rates for police constables in Victoria and New South Wales are above that threshold.'¹² It is also salient to note that in its submission to the November 2008 Senate Report the Community Housing Federation of Australia drew attention to the fact that for certain tenant groups, the threshold used to define low income households for the purposes of the Commonwealth-State Housing Agreement (CSHA), was above that of the equivalent tenant group for the NRAS. As we consider it salient, and for ease of reference, that submission is contained at Annexure D. As noted by the November 2008 Senate Committee Report, 'that is, some people who fall outside income eligibility limits under NRAS would be considered low income earners under the CSHA.'¹³

2.7 Other Matters Relevant to NRAS and Charitable Status

We briefly turn our attention to the existing common law on the provision of housing by charities. Of the four heads of charity outlined by Lord Macnaghten in *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531, two have been generally considered to be relevant to housing charities, being the relief of poverty and other purposes beneficial to the community.

In addressing the bounds of charitable participation in the housing sector, it is notable that many of the questions addressed in this submission have also been addressed under the May 2009 England and Wales Joint Guidance issued by Her Majesty's Revenue and Customs, the Charity Commission and the Homes and Communities Agency issued *Affordable Home Ownership-Charitable Status and Tax* (Joint Guidance).¹⁴ The Joint Guidance provides:

As a general guide, a person may be regarded as 'poor' or in 'necessitous circumstances' in the housing context if they cannot afford from all their resources either the purchase price or the market rental of accommodation that would provide a modest and decent standard of living. However, this is only a general guide, and you will need to consider each applicant's circumstances individually.

Although the Joint Guidance has been issued to address the question of when the provision of affordable low cost home ownership may be charitable it contains a helpful overview of

¹² November 2008 Senate Inquiry Senate Standing Committee on Community Affairs on the National Rental Affordability Scheme Bill 2008 [Provisions] and the National Rental Affordability Scheme (Consequential Amendments) Bill 2008 [Provisions], Coalition Senators Dissenting Report, Para 1.18.

¹³ November 2008 Senate Inquiry Senate Standing Committee on Community Affairs on the National Rental Affordability Scheme Bill 2008 [Provisions] and the National Rental Affordability Scheme (Consequential Amendments) Bill 2008 [Provisions], Para 2.9.

¹⁴ Available at: <http://www.charitycommission.gov.uk/detailed-guidance/specialist-guidance/charities-providing-housing/affordable-home-ownership-charitable-status-and-tax/>, cited 10 February 2014.

many of the central questions concerning the provision of affordable housing and charitable status. The guidance finds that:

Historically, charitable RSLs [Registered Social Landlords] have mainly provided rented housing to beneficiaries but now you can consider a range of ways to assist beneficiaries and, where purposes allow, affordable home ownership may be an option.

The document provides that the following purposes are to be considered to be relevant to charitable status:

- that key workers are not priced out
- better mix of housing tenures creating stable, mixed-income communities
- urban and rural regeneration in areas of social and economic deprivation
- promotion of sustainable development

The Guidance is issued in the context of the *Charities Act 2006* of England and Wales, which creates a separate charitable head for 'the advancement of citizenship or community development', and which includes 'urban and rural regeneration' and 'the promotion of civic responsibility'. This head is also reflected in Ireland, Northern Ireland and Scotland. Ireland adds to this 'Harmonious community relations'.

2.7.1 Key Worker Accommodation

In respect of key worker accommodation, the Joint Guidance notes that the following is recognizable as a charitable objective:

- (1) ensuring that key workers can buy homes in the areas of high demand so that they are not priced out of urban and rural communities to whom their services are vital; and

The Joint Guidance provides

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.

2.7.2 Stable Mixed Income Communities

In respect of the creation of a better mix of housing tenures by charities, the Joint Guidance provides that the following can be a charitable purpose:

promoting a better mix of housing tenures creating stable, mixed-income communities rather than ghettos of poor and vulnerable people.

It provides:

The creation of a better mix of housing tenures creating stable, mixed-income communities in the context of a multicultural society is entirely consistent with the pursuit of the charitable purposes of 'the promotion of civic responsibility' and 'harmonious community relations'.

The Joint Guidance acknowledges that 'some LCHO [low cost home ownership] schemes may promote mixed development as a more effective way of relieving poverty or need, for example by preventing a high concentration of very poor families in one place.'

Such is relevant to the Committee's Term of Reference (h). It is to be noted that the statutory definition of charity in Australia includes 'promoting reconciliation, mutual respect and tolerance between groups of individuals'. It is arguable that such purpose may in some contexts be extended by the creation of balanced mixed-income communities.

In providing examples of charitable activity, the Joint Guidance cites a shared-home ownership scheme comprising a mixture of income levels:

A flexible approach to first-tranche sales can help to ensure that benefit is spread widely. Beneficiaries will have a range of personal circumstances and it is reasonable, within the overall scope of the scheme, to include some purchasers who, although poor and in charitable need, are slightly better off than other beneficiaries, to enable others who are less well off to be helped. Provided that this intention is consistent and clear, the whole activity is likely to be regarded as charitable.

In referring to the Joint Guidance, Picarda notes:

A reading of the opposition parties' policy statements on their websites (and they repay re-reading and analysis by social landlords and their advisors) shows that, despite some areas of difference, much is uncontroversial. Thus, the key worker issue appears uncontroversial, though the category should arguably be wider so as to go beyond state employees, and mixed-income communities are equally uncontroversial. Moreover, there is a broad acceptance of the need to promote urban regeneration, affordable housing and securer based communities.¹⁵

...

The Charity Commission has now accepted that urban and rural regeneration and the promotion of sustainable development may be charitable purposes or objects, and the Charities Act 2006 now classifies urban and rural regeneration as part of the new head of citizenship and community development... Underlying policy imperatives have, in turn, shepherded the common law definition of charities into new pastures... Such development will perhaps produce, the policy planners hope, coherent and cohesive communities to good charitable effect, melded by ancillary facilities of a recreational kind and by the overarching express direction that the activities are to be carried out 'for the benefit of the community'.¹⁶

The recognition of an intention of the providing stable, mixed communities as being relevant to charitable purpose finds support in Australian law. In *Common Equity Housing Ltd v Commissioner of State Revenue*,¹⁷ Ashley J held:

It was contended for the defendant that the evidence showed that some tenants do not meet departmental guidelines – either at time of commencement of tenancy or in consequence of becoming better off during its continuance ... This showed, counsel submitted, that the plaintiff's purpose was not charitable – because it could not be said that the benefits of its programme were exclusively directed to relief of poverty.

I reject that submission, the following matters are pertinent: First, the overwhelming proportion of tenants have been and are persons of limited means and of low income

¹⁵ Picarda, H QC, *The Law and Practice Relating to Charities* (4th ed) (2010) page 1124.

¹⁶ Picarda, *ibid.* page 1123.

¹⁷ (1996) 33 ATR 77.

by community standards. Second, the desirable object that tenants have secure accommodation does leave open the possibility that a person acquiring wealth may stay on. Anecdotally this has not occurred, but even if it did, it would be the consequence of a compromise designed to better protect the accommodation of those in need. I would not consider it a denial of the relevant charitable purpose...

Third, insofar as not all tenants meet departmental criteria for public housing, there must be considered the necessary ability of members of a co-operative to manage the provision of housing for which the co-operative is responsible. The undertaking by members of that function may well operate to increase the amount of funds available for purchase of suitable housing – that is, by reducing management costs. Insofar as selection of a group of which, with education, is able to manage the affairs of a co-operative results in an occasional person of the type now in question obtaining accommodation, I consider that to be an affirmation rather than a denial of the relevant purpose.

2.7.3 Application to NRAS?

What relevance does the outline provided in the Joint Guidance then have for the operation of the NRAS in Australia? It is noteworthy that the policy intents which the Joint Guidance regards as charitable strongly reflect the policy focus on key workers, sustainability and balanced social mix that underpin the NRAS. These are reflective of many of the key indicia against which applications for NRAS Allocations are to be assessed by the Commonwealth. The NRAS Assessment criteria includes, *et. Al* (our emphasis added):

- (c) the proposal delivers *accessibility and sustainability outcomes*, including the following:
 - (i) proximity of dwellings to transport, schools, shops, health services and employment opportunities;
 - (ii) types of dwellings and proposed household compositions that *facilitate a balanced social mix*;
 - (iii) use of universal design principles or other measures that make properties more accessible to people who are *ageing or live with disabilities*;
 - ...
- (f) the proposal details or forecasts, for each dwelling:
 - (i) the energy rating of the dwelling; and
 - (ii) the extent to which the dwelling incorporates efficient lighting, environmentally friendly hot water systems, ventilation and water tanks.

The NRAS Policy Guidelines note that the income brackets for NRAS incorporate those who fall within the key worker demographic and that NRAS:

... can provide significant benefits, including increasing the availability of affordable housing for key workers whose low to moderate incomes would impinge on their ability to pay rent in the area.¹⁸

It is submitted, given these strong parallels, that the direction adopted by England and Wales in endorsing similar activities as charitable should be instructive for determining charitable purpose for community housing providers within the NRAS.

¹⁸ Australian Government National Rental Affordability Scheme Policy Guidelines, June 2011, available at <http://www.dss.gov.au/our-responsibilities/housing-support/programs-services/national-rental-affordability-scheme/national-rental-affordability-scheme-legislation-regulations-and-policy-guidelines>, cited 10 February 2014.

2.8 Statutory Definition in Australia

On 01 January 2014 the statutory definition of charity contained in the *Charities Act 2013* (Cth) came into effect. The Addendum to the Explanatory Memorandum to the Charities Bill 2013 highlighted that the provision of housing may meet other charitable purposes in addition to the relief of poverty in providing: 'Charitable housing may also address particular or special physical, social or psychological needs or other special disadvantages of individuals and families.' The following elements of the statutory definition of charity may be relevant to the provision of housing by charities:

- 'advancing health' through the provision of secure accommodation. The Australian Housing and Urban Research Institute notes that:

Chronic shortages of affordable rental housing have adverse economic, as well as social, consequences. They ... contribute to wage pressures for employers and affect social outcomes by contributing to financial disadvantage and by exacerbating housing insecurity. Each of these social outcomes increases risks of associated family instability and employment and health problems for less well-off households;¹⁹

- 'advancing education' by providing stable accommodation free from the disturbance to children's education that follows disruption from lack of security of tenure;
- 'promoting or protecting human rights'. The June 2008 Senate Inquiry into Affordable Housing found that:

"Access to adequate housing has long been viewed as a basic human right [see article 25 of the Universal Declaration of Human Rights, and article 11 of the International Covenant on Economic, Social and Cultural Rights] and is considered to be an integral factor in the enjoyment of other economic, social and cultural rights. The UN Committee on Economic, Social and Cultural Rights has defined adequate housing as encompassing: legal security of tenure; availability of services, materials, facilities and infrastructure; habitability; accessibility; location (allowing access to employment, health services, schools etc); cultural adequacy; and affordability. Affordable housing is commonly viewed as "essential to the maintenance of a cohesive and just society" and "an issue that transcends political ideologies"²⁰

The Inquiry drew the conclusion that "Access to appropriate, affordable, housing is a fundamental human right, which 'is essential for individual, family and community wellbeing'.²¹

¹⁹ AHURI p 14; see also *In re Resch's Will Trusts* [1969] 1 AC 514.

²⁰ At para 2.1.

²¹ At para 2.50.

3.0 Managed Investment Schemes and NRAS

Several unanticipated consequences of the NRAS have come to light since its inception. Some of those consequences have arguably operated as constraints on the involvement of charities in the NRAS. One of these is the interaction of the NRAS and the Managed Investment Scheme (MIS) and the Australian Financial Services Licence provisions of the *Corporations Act 2001* (Cth) (the Act). The current Senate inquiry offers the opportunity to address these eventualities.

The Australian Securities and Investments Commission (ASIC) have expressed their view that, in the certain circumstances, the minimum twenty dwelling requirement for an application for NRAS Allocations may trigger the MIS Provisions of the Act. The concern raised here is held solely in respect of entities that are:

- 1) Operating as an NRAS Approved Participant;
- 2) Utilising a non-entity joint venture structure or an NRAS Consortium; and
- 3) Engaging in contracts with retail investors.

The concern is irrespective of whether the entity is constituted on a 'not for profit' or 'for-profit' basis, but is conditional upon the precise model operated by the NRAS Approved Participant. Property management rights and the right to lease a dwelling within a Body Corporate Scheme may also be interests within a managed investment scheme.

In the absence of a defined legislative solution, the Australian Securities and Investment Commission maintains a process for the issuing of a 'Relief Instrument' which grants relief to an Operator of an MIS from the relevant provisions of the *Corporations Act 2001* (Cth). ASIC will consider applications on an individual basis, with the intent of formulating relief specific to the exact structure operated by the NRAS approved participant. Depending on the circumstances, ASIC may also give consideration to a 'no action letter' which provides that ASIC will not take action against the NRAS approved participant for any existing or prior breach of the Act.

In many respects the Relief Instrument mechanism is not the ideal mechanism, as it requires that charities give consideration to the effect of any amendment that is proposed to their document suite. Such amendments are frequently requested both by investors, developers, financiers and property managers. Locking approved participants into a set of documents over time is against the original intent of the NRAS to inspire innovative solutions for the delivery of affordable housing.

The Relief Instrument mechanism also creates uncertainty due to the paucity of judicial treatment on the effect of a Relief Instrument and the silence of the Relief Instrument on critical issues (such as the requirements for disclosure on transferees and the extent to which charities are required to give financial advice to investors, a role they are often not resourced to provide). To allow for such innovation and for certainty for the charitable affordable housing sector, a legislative exemption from the applicable provisions of the Act for charities operating in the NRAS space should be enacted. This may be subject to certain conditions, such as minimum disclosure requirements, however such should allow charities to adapt their NRAS models in light of market pressures, investor request or changing legislative environment, features not currently available to charities under the existing Relief Instrument regime. Any such exemption should also extend to alternative models for expanding affordable housing through the involvement of charities, to the extent that such involvement has the potential to trigger the managed investment scheme provisions of the Act.

CONCLUSION

By way of conclusion, we thank the Committee for the opportunity to make submissions in respect of involvement of charities in the provision of affordable housing in Australia. The views expressed in this submission are not intended to form legal advice. In our opinion, the current legislation has enabled charities to make significant contributions to the provision of affordable housing in Australia.

If the Australian Government is to invite the participation of charities in the provision of affordable housing it must provide certainty for those charities as to the effect of their participation on their existing charitable endorsements and in relation to the application of the managed investment scheme and financial services licensing provisions of the *Corporations Act 2001* (Cth). Prima facie, it would seem inconsistent for the Government to invite participation by charities in a scheme like the NRAS as a means to address a perceived shortfall in affordable housing in Australia, but then fail to also recognise that the provision of affordable housing is a need that fulfils charitable purposes. Where the Government acknowledges that charities are critical to the success of measures to provide affordable housing in Australia, it should also create the legislative certainty that allows for the expansion of the sector that it seeks.

If the Australian Government saw fit to hold that the affordable housing crisis warranted the extension of charitable purposes at law to involvement in the NRAS then it is the natural extension to provide some certainty in the form of the statutory definition of charity. To that extent the Senate Committee should investigate whether the community concern in Australia has now necessitated clarification that the provision of affordable housing to persons who do not otherwise hold the means to that housing is a charitable purpose. By its terms of reference, the Committee is tasked to consider international mechanisms for expanding affordable housing. Many of these have necessitated partnerships between the charitable housing sector and private industry. To ensure the participation of charities, any further expansion of the NRAS, or like program to invite institutional investment into affordable housing, should afford charities the legislative certainty to operate in the program by means of a statutory extension of the charitable purposes recognised at law and by way of an legislated exemption from the managed investment scheme and financial services licensing provisions of the *Corporations Act 2001* (Cth).

~~Mark Fowler~~
Director

Neumann & Turnour Lawyers

Contact:
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Neumann & Turnour Lawyers

ANNEXURE A

Senate Economics References Committee Inquiry into Affordable Housing

Applicable Terms of Reference

- a. the role of all levels of government in facilitating affordable home ownership and affordable private rental, including:
 - i. the effect of policies designed to encourage home ownership and residential property investment,
 - ii. the taxes and levies imposed by the Commonwealth, state, territory and local governments
 - iii. the effect of policies designed to increase housing supply,
 - iv. the operation, effect and future of the National Rental Affordability Scheme,
 - v. the regulatory structures governing the roles of financial institutions and superannuation funds in the home lending and property sectors, and
 - vi. the operation and effectiveness of rent and housing assistance programs...
- e. the implications for other related changes to Commonwealth government policies and programs, *including taxation policy*, aged care, disability services, Indigenous affairs and for state and territory governments; ...
- h. planning and policies that will ensure emergency and essential service workers have access to affordable housing close to where they work; ...
- l. the role of innovative and responsible funding mechanisms used in other countries, including the United Kingdom, United States of America, France, Canada, Austria and the Netherlands, that provide a stable and cost effective way of funding affordable rental and social housing, such as affordable housing supply bonds and an affordable housing finance corporation;
- m. the role and contribution of the community housing sector in delivering social and affordable renting housing.

ANNEXURE B

Ursula Stephens, Parliamentary Secretary Assisting the Prime Minister for Social Inclusion

Australian Senate debates

Monday, 24 November 2008

I just wanted to speak very briefly about the government's amendments to this bill. The scheme is a new opportunity for all levels of government to work together with business and not-for-profit organisations to increase the supply of affordable rental housing for Australian families. We acknowledge that the community housing sector is vital to the success of the National Rental Affordability Scheme, which is why the Australian government is amending the Extension of Charitable Purpose Act 2004 so that participation by charities in the National Rental Affordability Scheme during its establishment phase will not put tax concessions for existing charities at risk. These amendments give effect to a transition safety net to cover not-for-profit community housing providers looking to participate in the scheme. The Rudd government is taking decisive action on the issue of rental affordability, which is why it is acting to make participation in the scheme as broad as possible.

The amendments to the National Rental Affordability Scheme (Consequential Amendments) Bill 2008 extend the definition of 'charitable purpose' to include the provision of rental dwellings under the scheme. The amendments will apply to charities endorsed by the Commissioner of Taxation which are approved participants of the National Rental Affordability Scheme in the establishment phase of the scheme for years 2008-09 and 2009-10. The safety net will cover these not-for-profit providers for the 10 years that they receive incentives under the scheme. The government will monitor the scheme and conduct a post-implementation review following the completion of the first two rounds in the establishment phase to ensure that the scheme is meeting its objectives. The scheme and the safety net the government has introduced for community housing providers will bring substantial growth to the community housing sector, whether it is as tenancy managers or as owners and developers in a consortium.

ANNEXURE C



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14 JAN 2010

Ms Carol Croce
Executive Director
Community Housing Federation of Australia
PO Box 302
WODEN ACT 2606

Dear Ms Croce *Carol*

Thank you for your letter of 7 October 2009, on behalf of the Community Housing Federation of Australia, concerning charity law and the National Rental Affordability Scheme (NRAS). The Federation's concerns relate to whether participation in NRAS may put Community Housing Organisations' (CHOs) charity status at risk.

NRAS is a significant Government commitment to stimulate the construction of 50,000 new affordable homes by offering tax incentives to encourage the mobilisation of private capital towards housing investment.

I note that since the inception of NRAS in 2008, charitable CHOs have taken a lead role in the Establishment Phase of NRAS. The Establishment Phase is critical in demonstrating to institutional investors the potential of NRAS and affordable housing as a new asset class; thereby mobilising greater capital towards the affordable housing sector in Australia.

As you would be aware, the tax laws do not define charity, but rather refer to the common law definition of charity that has evolved over 400 years. The Commissioner of Taxation impartially administers the tax laws as they apply to charities. In order to be endorsed as a charitable institution, an institution must have the dominant purpose of either relief of poverty; advancing education; advancing religion; or other purposes recognised by the common law as charitable. The taxation concessions for charitable institutions are highly valued by recipients, and the integrity of the tax concession is crucial to ensuring the public has confidence in the donations they make towards charitable activities.

In 2008, the Government legislated to deem participation of charitable CHOs in NRAS to be charitable for the purpose of the tax laws. This allowed organisations to participate in the Establishment Phase of NRAS without jeopardising their charitable endorsement under the tax laws.

Since the 2008 legislative extension to charitable purpose for NRAS, the High Court has decided the *Word Investments* case. In *Word Investments*, the High Court held that where surpluses were directed towards its charitable purpose, commercial activities carried on by a charitable institution were charitable under the tax laws.

As a result of the *Word Investments* decision, there is now sufficient certainty that charitable CHOs participating in NRAS will continue to be charitable under the tax laws, where they direct surpluses from their NRAS participation towards their charitable purpose. Charitable CHOs may also establish distinct entities in which to conduct their NRAS activities. Consequently, it is unnecessary to extend the temporary legislative safety net, as the *Word Investment* decision achieves the same end as the safety net.

As the Commissioner is responsible for the administration of taxation laws, I have asked him for his comments on the participation of charities in NRAS. The Commissioner has advised me that a common NRAS arrangement — where a charity secures a head lease over a property and subsequently sub leases the property to NRAS qualified tenants under a Non-Entity Joint Venture (NEJV) arrangement — will not put the charitable status of the entity at risk. The charity must continue to pursue its charitable purposes for this to be the case of course. The Commissioner notes that his comments are based on the models he has observed to date.

I am also aware of concerns of charitable CHOs about whether or not the NRAS Incentive is able to be passed through to investors. NEJVs utilising a head lease is a viable model for the provision of housing within NRAS, and it is the policy intent of the Australian Government that such a model be one of the various structures that deliver NRAS dwellings. I have agreed with the Housing Minister, the Hon Tanya Plibersek MP, that it is important that NRAS dwelling owners investing through NEJVs are able to receive the full value of the NRAS Incentive.

The Minister and I acknowledge that the Australia Taxation Office's recent release of Interpretive Decision 2009/146 has created concern for certain investors in NRAS as to whether they will receive the full value of the NRAS Incentive.

It is the role of the Tax Office to provide impartial interpretation of the tax legislation. Where it receives a request for a private ruling which raises a precedential decision, the Tax Office will publish an interpretative decision so that all taxpayers are able to have access to the same information. This improves the fairness and transparency of the tax system.

ATOID 2009/146 is about a NEJV structure for participation in NRAS. The interpretative decision concludes that a particular structure — of a head lease from property owners to a lead participant in a NEJV, with a further sub lease from the lead participant to NRAS eligible tenants — does not allow property owners to receive the NRAS Incentive. Instead, the lead participant of the NEJV is entitled to the Incentive in relation to every property within the NEJV.

I seek to assure CHOs that it is the Government's intention that investors receive their full entitlement to the NRAS Incentive, and that the Government commits to providing a workable solution to give practical effect to this policy intent. The Government proposes an administrative solution to resolving the tax issues for NEJVs until regulatory and legislative amendments can be introduced in 2010 to effect a permanent fix.

The Tax Office has provided more information about NRAS and ATOID 2009/146 on its website at www.ato.gov.au. The website will be updated as new NRAS models or other relevant information becomes available.

There are a large number of possible models that might be adopted and it would be prudent for a charitable CHO to seek advice from the Tax Office about the detailed structure of their particular model before they proceed too far in negotiations with other parties. If any of the Federation's members have any queries regarding charity status or tax questions arising about NRAS in the future, the relevant contact officer in the Tax Office is Mr Michael Hardy, who can be contacted on 02 6216 1798 or at michael.hardy@ato.gov.au.

In addition, the Australia's Future Tax System Review, established by the Rudd Government in 2008 to review our tax and transfer system, delivered its final report to the Government at the end of 2009. One of the issues taken into account by the review was the current taxation arrangements for not-for-profit organisations. The Government is currently considering the review's recommendations and will release the report, and its initial response in early 2010.

The Government greatly appreciates and encourages the role the members of the Federation and other charitable housing providers are playing in ensuring the continued success of NRAS.

Yours sincerely

WAYNE SWAN

ANNEXURE D

Community Housing Federation of Australia



TO: Senate Community Affairs Committee
Inquiry on the National Rental Affordability Scheme Bills
FROM: Carol Croce, CHFA Executive Director
DATE: 11 November 2008
RE: **SUPPLEMENTAL SUBMISSION TO THE NRAS INQUIRY**

The Community Housing Federation of Australia (CHFA) requests an opportunity to submit this supplement submission to our previous submission. We wish to expand on the point about whether providing housing services to people who are said to have 'moderate incomes' under NRAS guidelines is within the scope of charitable purpose.

As noted in our submission, community housing providers have been endorsed as charities based on their stated purpose of alleviation of poverty and the ATO has accepted their use of existing low income benchmarks as an appropriate measure of their compliance with that charitable purpose. One such benchmark is the definition of low income used as a performance measure for reporting under the Commonwealth-State Housing Agreement (CSHA). This definition sets out the maximum income levels for different households used to determine low income status as part of performance measures under the CSHA.

According to the National Housing Assistance Data Dictionary, low income households are those "*most in need in terms of tenants who have low income or special needs that would not find appropriate, affordable and secure housing in the private rental market*".¹ The maximum income level of 'low income' is effectively the cut-off point for the receipt of government income support benefits at the pensioner rate.

When these maximum income levels are compared with the National Rental Affordability Scheme (NRAS) initial income criteria, many households fall within the CSHA definition of low income:

¹ National Housing Assistance Data Dictionary, AIHW, p. 130-131

Household	NRAS income eligibility weekly	CSHA low income B weekly
Single person	\$750	\$760
Couple, no children	\$1,250	\$1,269
Working family (single parent) two children	\$1,288	\$784
Working family (couple) two children	\$1,288	\$1,294
Working family (single parent) three children	\$1,538	\$809
Working family (couple) three children	\$1,538	\$1,307

It would appear that providing housing to households whose income falls within the CSHA low income measure would meet the test for charitable purpose without concern to the ATO. Providing housing to households with incomes higher than the CSHA levels (but within NRAS maximum levels) does not alter the charitable *purpose* of the organisation and should be considered an ancillary or incidental activity.

As stated in our main submission, the use of existing benchmarks of low income should be acceptable as a measure of compliance with ATO requirements for alleviation of poverty in the absence of any clear definition or guideline on what constitutes 'poverty' in the eyes of the ATO.