



Community Housing Federation of Australia

Submission to the Henry Review of Australia's Future Tax System

1 May 2009

This submission to the Henry Review of **Australia's Future Tax System** has been prepared by the Community Housing Federation of Australia (CHFA), the national peak body representing community housing organisations throughout Australia. It builds on previous work carried out by CHFA, including submissions and evidence provided to the Senate Community Affairs Committee Inquiries into the National Rental Affordability Scheme (NRAS) and the Nation Building and Jobs Plan (NBJP). This submission has been prepared using feedback from CHFA's members and Board.

This submission is focused on the tax treatment of not-for-profit organisations that develop and/or manage below market value rental accommodation. In doing so, it broadly deals with question 7.1 posed in the *Australia's Future Tax System Consultation Paper*, which is concerned with the appropriate tax treatment for not-for-profit organisations. Specifically, this submission is concerned with the impact that affordable housing activities conducted by community housing providers may have on their charitable status. The key taxation issues for the community housing sector fall in two areas:

- How 'relief of poverty' is classified as it relates to the provision of affordable rental accommodation; and
- What constitutes 'incidental' activity in the provision of affordable rental accommodation, both in terms of development activities and the tenant profile of people that they provide housing to.

A critical issue threatening the success of the NRAS and other affordable housing schemes is the risk that not-for-profit organisations will lose their charitable tax status if they participate in activities that are deemed by the Australian Taxation Office (ATO) to be inconsistent with the head of charity under which most community housing organisations derive their charitable status from, the relief of poverty.

Since the introduction of the GST and the requirement that the ATO endorse **organisations' charitable status, most community housing providers were endorsed based on their stated purpose of the alleviation of poverty.** The ATO has accepted **providers' use of existing low income benchmarks**¹ to articulate their compliance with the test for alleviation of poverty, i.e. providing accommodation for low income people is an allowable charitable activity.

¹ Examples include state public housing eligibility guidelines and the CSHA low income definition for data collection.

Further, the ATO has recognised that while an organisation's purpose must solely be to alleviate poverty, some activities are allowable if they can be shown to benefit the charitable purpose. For example, activities that raise funds for a charitable organisation are allowable as they contribute towards the purpose of alleviating poverty. The ATO has accepted that housing people on low incomes is a predominate activity that alleviates poverty. It is a logical extension that providing housing that may not directly alleviate poverty but contributes to the predominant purpose of the housing organisation would be an acceptable activity. For example, some tenants on modest incomes who pay more rent than those on very low incomes would effectively contribute to the charitable purpose through cross-subsidisation.

CHFA is aware of the recent Word Investment case in the High Court, and that this has broadened the range of activities that can be conducted by not-for-profit organisations. Nonetheless, the full implications of the decision are not yet clear. Additionally, the case centres on an organisation operating under a different head of charity to most community housing organisations. Accordingly, CHFA stills sees a strong need for the community housing sector to be specifically acknowledged in tax law (see below).

Community housing providers in Australia have traditionally concerned themselves with the *objects* or *purpose of their organisations' activities, seen as a whole across an organisation's set of activities*. After the introduction of the NRAS legislation by the Australian Government in 2008, concerns were raised by ATO representatives on the Charities Consultative Committee (on which CHFA is represented) about the possible **implications for an organisation's not-for-profit status** if they develop and/or manage NRAS-funded rental housing. The concerns raised by ATO representatives also have implications for community housing providers more broadly, and do not just relate specifically to NRAS-funded housing.

As a result of these concerns being raised in the Senate Inquiry into the Scheme, and in order to protect organisations participating in the NRAS, a legislative amendment to safeguard the charitable status of NRAS participants was introduced in December 2008. This amendment, however, only applies for incentives allocated by June 2010, (i.e for the first two rounds of NRAS), and does not apply to successful participants in subsequent rounds. Additionally, there are no safeguards for charitable organisations involved in affordable housing using other non-NRAS funds. Without some type of safeguard in place, charitable organisations may also be precluded from combining NRAS and stimulus package funds delivered by state and territory governments as part of the NBJP, **even if they are 'protected' for their NRAS properties**, because the non-NRAS properties could attract ATO scrutiny and jeopardise their tax status.

Regarding the NBJP, there appears to be an assumption on the part of governments at both the Federal and state and territory levels that community housing organisations providing housing as part of the stimulus package will not jeopardise their charitable tax status because the accommodation will primarily go to people on social housing waiting lists. It appears, however, that the ATO does not consider the provision of housing to people eligible for social housing as an activity that meets the **criteria for 'relief of poverty'**, and as such may not be considered an acceptable charitable activity.

A recent ATO ruling highlights this categorisation of housing activities. The Hume Community Housing Association (CHA) in NSW asked for a ruling on whether their involvement in a consortium arrangement would result in Hume CHA losing its charitable tax status. In their submission Hume CHA said that eligibility would be based on the NSW Department of Housing eligibility limits for public and community housing. In response, the ATO stated:

While it is accepted that the eligibility criteria ensure that accommodation is provided to low and moderate income earners it is by no means clear that people in those categories are in poverty in the charitable sense as discussed above.²

The ATO went on to say:

It is not accepted that moderate income earning households (up to \$75,900 per annum) as a general rule are living in poverty. It cannot even be said with certainty that low income earners are living in poverty, although in many cases that is likely to be the case.

That being the case it cannot be said that the provision of housing under the Project will relieve poverty.³

At the Senate Inquiry hearings on NRAS on 7 November 2008, the ATO provided written responses to several questions posed by the Committee on charitable tax status. They outlined several potential interactions between endorsed charities and NRAS:

- 1. An endorsed charitable housing provider participates in NRAS and continues to provide housing to people in poverty. This charitable housing provider will not put its charitable endorsement at risk.*
- 2. An endorsed charitable housing provider participates in NRAS and provides housing to people who are not considered to be in poverty. The charity will now be pursuing a second purpose and it may put its charitable endorsement at risk.*
- 3. An endorsed charitable housing participates in NRAS and provides housing to people who are in poverty. Over the life of the scheme, some of these people improve their financial circumstances and are no longer in poverty. Depending upon the factual mix of tenants, the charitable housing provider may now be pursuing a second, non-charitable, purpose and may put their charitable endorsement at risk.*
- 4. An endorsed charitable housing provider participates in NRAS and provides housing to people who are in poverty. Outside of the NRAS arrangements, the charity begins to provide housing to people who are not considered to be in poverty. The charity will now be pursuing a second purpose in its activities outside of its participation in NRAS and it may put its charitable endorsement at risk.⁴*

² ATO ruling to Hume Community Housing Association, 7 October 2008, page 12

³ Ibid, page 12

⁴ ATO, Submission to Senate Community Affairs Committee, 7 November 2008, pages3-4

How the ATO defines 'poverty' and how it assesses activities that 'relieve poverty' is highly relevant when it comes to the provision of housing and the potential impact on the charitable status of community housing organisations under both NRAS, housing funded through the NBJP, and the broader range of activities conducted by not-for-profit organisations that develop and/or manage below market value rental accommodation.

As indicated in the Hume CHA decision, the ATO appears to no longer accept benchmarks of low income as measures of poverty. The scenarios outlined in the **ATO's Senate submission all hinge on an assessment of poverty.** In the absence of a precise definition of poverty, community housing organisations are in the untenable position of having to deduce at what point a low income household ceases to be considered in poverty and therefore their tenancy no longer is a permissible charitable purpose.

Despite the Word Investment case noted above, the ramifications of the ATO position are monumental. Their current position is inconsistent with previous rulings and endorsements of existing charitable housing organisations. Further, it could potentially undo much of the work that Commonwealth and State governments have undertaken developing and promoting the community housing sector. It also jeopardises the ongoing existence of hundreds of community housing organisations whose operations for more than two decades have been recognised as charitable purposes by the ATO.

Among the Agreed Reforms in the National Partnership Agreement on the Nation **Building and Jobs Plan on Social Housing is the "leveraging of government capital investment to enhance the provision of social housing". In order for community housing organisations to successfully attract private investors and leverage stimulus dollars, they must be able to accommodate a mix of low and moderate income tenants.** Such tenants are usually drawn from a pool of people eligible for public and/or community housing eligibility criteria at the beginning of their tenancy, and this eligibility varies from jurisdiction to jurisdiction. The uncertainty of whether this **mix of tenants will satisfy the ATO's criteria for allowable charitable activities will impact on the sector's ability to participate in the stimulus package.** This is especially true if there are no operating subsidies forthcoming from State governments and community housing organisations must rely solely on rents collected and Commonwealth Rent Assistance.

Further, the capacity of organisations leveraging their capital to attract finance and investment from the private sector to finance debt is dependent upon their ongoing income stream, rather than the value of their assets. To do this, some organisations currently operate a model that allows for a mixed tenure composition, to allow for an improved income stream. Other organisations also rely on profits generated from their development activities to be reinvested in their organisation, allowing them to cater to the needs of low and very low income tenants.

To ensure the ongoing viability of community housing organisations, and to provide the sector with assurance about their not-for-profit status into the future, CHFA recommends that **legislation is introduced to deem the not-for-profit provision of affordable housing as a charitable purpose under tax law.** CHFA believes it is essential that affordable housing delivered by not-for-profit organisations be recognised as a charitable purpose to ensure the long term viability of the not-for-

profit housing sector and affordable housing initiatives such as NRAS. There is a precedent for this extension of charitable purpose in relation to non-profit child care services:

“From 1 July 2004 there is a statutory extension to common law meaning of charity. The change means that non-profit child care providers are now charities for Australian tax law purposes provided they meet all the characteristics of a charity.”⁵

CHFA strongly advocates that the legislative amendment outlined above is required to provide the necessary assurance for the community housing sector to actively participate in NRAS, housing funded through the NBJP, and housing funded through the National Affordable Housing Agreement or other similar initiatives at the State and Territory level. This certainty is needed for all other below market rent housing and activities that are incidental to the above, but that support the objects and purposes of organisations providing not-for-profit affordable housing, as well as pursuing their existing activities in the confidence that their not-for-profit status will not be threatened.

⁵ ATO website