



Provision of Housing by Charities: The ACNC Commissioner's Interpretation Statement

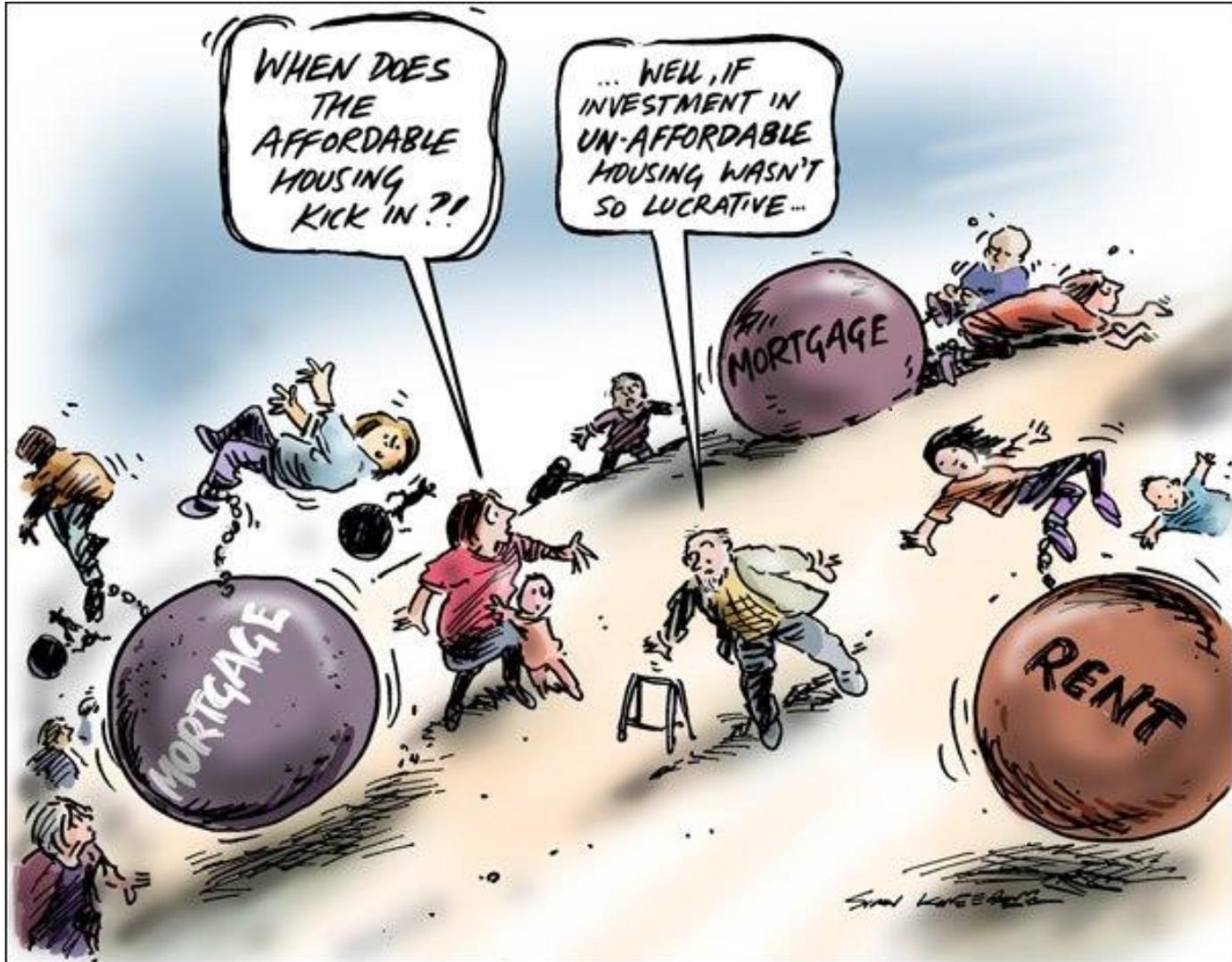
Murray Baird and Mark Fowler

Thursday 29 October 2015

© N & T Lawyers Pty Ltd
trading as Neumann & Turnour Lawyers (A.B.N. 11 955 351 885)



This presentation is does not provide legal advice and contains general comments on the operation of the law and forthcoming law in Queensland only. The operation of certain aspects of the forthcoming law may not be clear at the current date. You should consider whether the general comments made are suitable to your circumstances.





Four Traditional Pemsel Heads of Charity

- ‘The first head’ for the relief of poverty, the needs of the aged and impotent; or
- ‘The fourth head’ as an ‘other purpose beneficial to the community.’



Charities Act 2013

- CIS says:
 1. The purpose of advancing health (s.12(1)(a))
 2. The purpose of advancing social or public welfare (s.12(1)(c)), and
 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 paragraphs (a) to (j) (s.12(1)(k)).

- Any others?



Advancing Health (s.12(1)(a))

- The purpose of preventing and relieving sickness, disease or human suffering
- CIS: ‘Where housing is provided in order to prevent and relieve sickness, disease or human suffering, the provision of that housing can be charitable, for the purpose of advancing health’
- Example: ‘the provision of housing for patients and their families needing medical treatment, where that treatment is only available some distance from their home’



Advancing social or public welfare (s.12(1)(c))

- Relieving the poverty, distress or disadvantage of individuals or families (s.15(1));
- Caring for and supporting the aged or individuals with disabilities (s.15(2)); and
- Caring for, supporting and protecting children and young individuals (s.15(3)).



Relieving the poverty, distress or disadvantage of individuals or families (s.15(1))

- Disjunctive reading
- No 'bright line definition of poverty...no single fixed criterion...the law must be flexible to address new categories of need...the question is a fact specific one' *Queenstown Lakes Community Housing Trust NZ* High Court 2011



Relieving the poverty, distress or disadvantage of individuals or families (s.15(1))

- CIS: 'Poverty does not mean destitution, but an inability to provide, from within one's own resources, a modest standard of living in the Australian community. In the context of housing, relieving poverty therefore is the provision of housing assistance to those who cannot afford, from their own resources, such accommodation as would give them a modest standard of living in the Australian community.'



Affordable Housing?

- Definitional issues
 - Ontario standard: the lowest 40% on income paying 30% + on accommodation
 - 35%+ standard
- *Guinness Trust (London Fund) Founded 1890, Registered 1902 v Green* [1955] 1 WLR 872, 875 (Denning LJ):
 - ‘working classes’ = ‘lower income group’
 - ‘The people in the buildings provided by the trust include dockers from Bermondsey, railway workers at Vauxhall, office cleaners and dustmen in Chelsea, and furniture hands in Shoreditch’



Affordable Housing?

- 2008 Senate Inquiry Report
- *Extension of Charitable Purposes Act* and NRAS
- Wayne Swan's letter to CHFA 14 January 2010
- N&T Submissions to 2015 Senate Inquiry Report adopted
- *Queenstown Lakes Community Housing Trust*
 - National median
 - Local factors
- *Re Gillespie (deceased)* [1965] SCV



CIS: Relieving poverty relevant factors

- Income and assets
- Any specific disadvantage or distress suffered (for example, a person escaping domestic violence needing refuge or crisis accommodation)
- Eligibility for government assistance relevant to the relief of poverty or disadvantage (for example, social security payments, rent assistance, or access to public housing)
- The number of their dependants and the needs of those dependants
- The cost of providing the other necessities of life



CIS: Relieving poverty relevant factors

- Geographical location, and their need to obtain accommodation in that location. ‘the local or regional context, rather than a national average relating to income, cost of housing and housing availability, may be taken into account’
- Cost of accommodation in that area
- Availability of accommodation in that area, and
- The income required to acquire and maintain accommodation in that area.



Contested Spaces

- Where one can reasonably be expected to live?
- Support care of purchase price or rental?
 - UK: HMRC & Charity Commissioner's Joint Guidance 2009 identifies a spectrum between 'those who are too poor to cope with home ownership and those whose income is too high to qualify for assistance ... between these extremes are those proper beneficiaries whose needs may be best met through the offer of a home for sale'



Contested Spaces

- CIS: 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.



Aged or individuals with disabilities (s.15(2))

- CIS: If not intended to provide relief for the needs attributable to that age group, the purpose is unlikely to be charitable.
- CIS: 'The provision of housing such as that provided by not-for-profit retirement and aged care facilities can be seen to provide relief for the needs arising from old age, and so can be considered charitable'
- CIS: 'Other services which may be seen as 'luxuries', such as entertainment, can be seen as ancillary to the charitable purpose of caring for and supporting the aged, and so will not prevent recognition of charitable status'



Other Heads and Purposes Beneficial to the General Public (s12(1)(k))?

- CIS example: ‘accommodation offered to ex-offenders or ex-prisoners, including prisoner half way houses.’
- Health (s12(1)(a))
- Education (s12(1)(b))
- Stable, mixed income communities (s 12(1)(f))
- Human rights (s12(1)(g))
- Advancing the natural environment (s12(1)(j))
- Key workers & ‘the purpose of advancing the security or safety of Australia or the Australian public’ (s12(1)(h))?



Analogous Head? (s 12(1)(h))

Key Workers

- Health, education, and ‘the purpose of advancing the security or safety of Australia or the Australian public’ (s12(1)(h))?
- Joint Guidance: ‘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’



Analogous Head? (s 12(1)(h))

Key Workers

- UK Joint Guidance examples of public or voluntary sectors that:
 - advance education,
 - relieve sickness,
 - promote public health,
 - relieve charitable need,
 - protect human life and property,
 - promote the sound administration of the law, or
 - advance other charitable purposes for the general benefit of the community, including:
 - the maintenance for the benefit of the community of its infrastructure, including supplies of gas, water, electricity and food, of transport and other means of communication,
 - of telecommunication information and information technology services,
 - and of emergency services.



Housing Types

- CIS: Purpose critical determinant, type of housing not critical.
- CIS: The provision of 'housing' includes accommodation provided through hostels, crisis accommodation, shared accommodation, units or houses, and may be temporary or permanent.



Relationships with Government

- Re returning assets to State or Territory Governments
- CIS: ‘In the event of such a requirement, the Commissioner will treat the charitable housing provider as charitable on condition that the winding up clause in the governing documents makes explicit that:
 - (a) assets required to be returned to the government on winding up by State or Territory law or contract, will be returned;
 - (b) other remaining assets will be distributed to a charity with similar charitable purposes.’



Commercial Activities – NRAS

The National Rental Affordability Scheme:

- Seeks to increase access to affordable housing
- Offers financial incentives to entities in the business and community sectors to build and rent dwellings to low- and moderate-income households at a rate that is at least 20 per cent below the market value rent.



Commercial Activities – NRAS

Commissioner's Interpretation Statement:

“An entity can participate in the NRAS as a means to provide additional housing stock to fulfil its purpose of relieving poverty, distress and disadvantage, and may retain its charitable status, provided any income derived is put towards achieving the entity’s charitable purpose of providing charitable housing”



Commercial Activities – Other Examples

Commissioner's Interpretation Statement:

- Conducting Property and Tenancy Management Services
- Constructing new housing with an intention to sell a proportion of it to fund the acquisition of housing which is then made available to those in need of charitable housing
- Entering fee-for-service arrangements in the area of property modifications
- Entering into partnerships or joint ventures with private companies, such as credit unions or property developers, to acquire or develop affordable housing stock.
- Activities separate from the provision of housing



Conclusion

- Murray Baird's response
- Questions?

mfowler@ntlawyers.com.au

Phone: (07) 3837 3600