



The National Housing Report

28 January, 2010 – Issue 4.1 UPDATE

Aged & Community Services Australia

Positive Developments on the National Rental Affordability Scheme Tax Issue

In order to resolve the uncertainty concerning whether participating in NRAS was a “legitimate” charitable activity the Treasurer, Hon. Wayne Swan MP, introduced an amendment to the *Extension of Charitable Purpose Act 2004* to expand the definition of charitable purpose to include participation in the NRAS by an organisation holding charity status. The definition of charitable purpose was extended only for the first 2 years of the Scheme's operation, the Establishment Phase, pending the outcome of broader reviews into the taxation system.

A recent letter to Carole Croce of the Community Housing Federation of Australia from the Treasurer now suggests that no further action is required. He has advised that involvement of charitable organisations in future NRAS rounds is covered by a 2008 High Court decision that held that where surpluses were directed towards its charitable purpose, commercial activities carried on by a charitable institution are charitable under the tax laws. The Treasurer's letter is printed on the following pages.

National Affordable Housing Exchange

In 2010 the Community Housing Federation of Australia (CHFA) is hosting the inaugural National Affordable Housing Exchange. The event will be held on 18-19 February at Australian Technology Park in Sydney. The Exchange is aimed at bringing together a wide range of people involved in all areas of the financing, development, and management of affordable housing programs, including delegates from the public, private, and community sectors.

Registrations are now open at www.chfa.com.au/exchange. You'll also find information on how to be part of the [exhibition](#) and [program](#) information.

Contact: Beverley Atkins at the Exchange Secretariat on 02 6162 0345 or chfa@in-sync.com.au if you have any questions or issues you'd like to discuss regarding the Exchange.



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14 JAN 2010

Ms Carol Croce
Executive Director
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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

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