

Community Housing Providers and Local Government Rates

Environmental Scan

December 2013

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Introduction

The payment of local government rates by community housing providers (CHPs) is an important policy consideration in light of the prospect of future housing stock transfers from the Department of Housing to CHPs and the variation of rates payment policy across different local governments and between the Department of Housing and CHPs.

This paper focusses on the legislative rates exemption for land used exclusively for charitable purposes and whether, based on current legislation and case law in Western Australia and other Australian jurisdictions, community housing qualifies for this exemption.

The Community Housing Coalition of WA (CHCWA) has surveyed its members to ascertain CHPs' relationship with their respective local governments with regards to rates and specifically to what degree they pay rates (if at all). There were 16 responses to the survey.

Below is an environmental scan which sets out:

- (a) what rates are;
- (b) individuals and entities who qualify for rates concessions and exemptions;
- (c) in relation to rates exemptions for CHPs:
 - (i) the current position in Western Australia;
 - (ii) the current position in each State and Territory; and
 - (iii) implications of the legal definition of 'charity' which will be in force from 1 January 2014;
- (d) a summary of the member survey results; and
- (e) alternative policy approaches.

What this document is not

Although the treatment of indigenous CHPs in relation to rates exemptions is discussed, rates exemptions in relation to native title have not been covered.

This document is not legal advice. While making every attempt to present general legal information accurately in this publication, CHCWA disclaims liability for any loss or damage arising from its use. This publication should not be relied upon as a substitute for legal or other professional advice.

Rates

Rates are calculated based on the Valuer General's Office's gross rental value of the land (being the Valuer General's estimate of the annual market rent that may be received if a property was leased). Rates contribute to the local government for the cost of providing facilities and services to the community, including maintenance of parks, library services, roads and recreational facilities.

In addition to rates, local governments:

- (a) levy a separate Rubbish Service charge for rubbish and recycling pick up;
- (b) can charge a swimming pool fee for properties with a swimming pool or spa; and
- (c) collect the Emergency Services Levy on the Department of Fires and Emergency Services' behalf, which funds the career Fire and Rescue Service, Volunteer and Rescue Service, Bush Fire Brigade, State Emergency Service units and Fire and Emergency Services Authority units throughout Western Australia.

Concessions and exemptions

People who own and occupy property as their ordinary place of residence on 1 July of the current financial year (or who are otherwise legally responsible for the local government rates) and hold a:

- (a) Pensioner Concession Card;
- (b) State Concession Card or
- (c) WA Seniors Card,

are eligible for a local government rates concession (as well as other concessions, including water service charges, Emergency Services Levy and underground electricity charges).

The concession amount is calculated based on the type of means tested card a person holds. Below is a summary of the concessions, which was published by the Department of Finance (WA).¹

Pensioner Concession Card OR a State Concession Card

- Entitled to receive up to a 50% rebate on local government rates charges, water service charges and emergency services levy.
- The option to defer rates may be available, subject to meeting the required criteria.
- Entitled to receive a rebate on water usage charges (a capped maximum amount applies each year).

WA Seniors Card AND a Commonwealth Seniors Health Card

- Entitled to receive up to a 50% rebate on local government rates charges, water service charges and emergency services levy.
- The option to defer rates may be available, subject to meeting the required criteria.

WA Seniors Card

- Entitled to receive up to a 25% rebate on local government rates charges, water service charges and emergency services levy.
- The rebate is limited to a maximum (capped) amount, which is reviewed annually.
- The option to defer rates is not available.

¹ Department of Finance, *Fact Sheet: Pensioners and Seniors Concession Scheme*, Available from: http://www.finance.wa.gov.au/cms/uploadedFiles/State_Revenue/Other_Schemes/Pensioners_and_Seniors/Pensioners-and-Seniors-Concessions-Scheme-Fact-Sheet.pdf?n=6470, pp 1-2.

We note that people who hold such cards make up a large proportion of tenants in community housing.²

The *Local Government Act 1995* (WA) also provides a number of circumstances where land is rates exempt, including for land used exclusively for charitable purposes.

We note that although the Department of Housing (and the State Government generally) is not obliged to pay local government rates, we are informed the Department of Housing pays local government rates in relation to public housing stock in order to maintain their relationship with local governments. If CHPs do not pay rates, stock transfers from the Department of Housing to CHPs has the potential to both decrease a local government's ability to cover its costs as well as have a detrimental effect on the CHP's relationship with the local government.

² For more information about the various concession cards and their eligibility requirements see: Department of Human Services, *Eligibility for Pensioner Concession Card*, Available from: <http://www.humanservices.gov.au/customer/enablers/centrelink/pensioner-concession-card/eligibility>; Department for Child Protection and Family Support, *State Concession Card*, Available from: <https://www.dcp.wa.gov.au/SupportingIndividualsAndFamilies/Pages/StateConcessionCard.aspx>; Department of Local Government and Communities, *WA Seniors Card*, Available from: <http://www.communities.wa.gov.au/seniors-card/Pages/default.aspx>; and Department of Human Services, *Commonwealth Seniors Health Card*, Available from: <http://www.humanservices.gov.au/customer/services/centrelink/commonwealth-seniors-health-card>. For information on community housing tenants' income sources see CHCWA 2011, *Community Housing Sector Survey 2011 Final Report*, CHCWA, Available from: <http://community.webvault.ws/wp-content/uploads/2012/05/SectCons.pdf>, p 16.

The Current Position in Western Australia

Legislation

A Western Australian local government's ability to impose rates, and any exemptions to rates, arise under the *Local Government Act 1995* (WA) (**LGA**).

Under sub-section 6.26(1) of the LGA, the general position is that all land is rateable land.

Under sub-section 6.26(2)(a), land owned by the Crown is generally not rateable. However, under section 1.4, if the Crown leases the land to another entity, the lease agreement could contain a clause which causes that entity to be the 'owner' of the land for the purpose of rates. As noted above, the Department of Housing chooses to pay rates, although it is not obliged to do so.

The exemption potentially relating to CHPs is provided for by sub-section 6.26(2)(g), which states that land used exclusively for charitable purpose is not rateable.

This is clarified by sub-section 6.26(6), which states land does not cease to be used exclusively for a purpose merely because it is used occasionally for another purpose which is of a charitable, benevolent, religious or public nature.

There is no overriding Western Australian or federal legislative definition of 'charitable purpose', although a number of Western Australian Acts use the term 'charitable purpose' and there is an incoming federal legislative definition of charity (both discussed below). Currently, the legal concept of 'charity' or 'charitable purpose' is defined with reference to English law.

The Preamble to the *Charitable Uses Act 1601* (UK) (Statute of Elizabeth I) endeavoured to set parameters for identifying 'charitable purposes' and provided a list, including:

- (a) relief of the aged, impotent and poor;
- (b) maintenance of sick and maimed soldiers and mariners;
- (c) aid to schools and scholars in universities; and
- (d) the help of young tradesmen and handicraftsmen.

However, this list was never considered to be exhaustive and rather provided the 'spirit and intention' behind the meaning of 'charitable purpose'. Case law provides a modern interpretation.

Case Law

The universally acknowledged modern interpretation and application of the Statute of Elizabeth I definition of 'charitable purpose' is found in *Commissions for Special Purposes of Income Tax v Pemsel* [1891] AC 531, in which Lord Macnaghten stated the legal meaning of 'charity' was a trust for one of the following:

- (a) the relief of poverty;
- (b) the advancement of education;
- (c) the advancement of religion; and
- (d) other purposes beneficial to the community.

The High Court of Australia confirmed the Statute of Elizabeth I's incorporation in Australian law, finding that in order for an institution to be charitable, it must be:

- (a) within the spirit and intendment of the Preamble to the Statute of Elizabeth I; and
- (b) for the public benefit.³

The Western Australian case law (arising from both the Courts and the State Administrative Tribunal) summarise that for a purpose to be charitable:

- (a) it must fall within the purposes set out in the Statute of Elizabeth I (or by Lord Macnaughten above); and
- (b) (except possibly in relation to the relief of the poor) there must be a public benefit, being a benefit directed to the general community, or to a sufficient section of the community to amount to the public.⁴

Australian case law further establishes that poverty need not be destitution⁵ and may extend to the promotion of culture.⁶ Further, indigenous people have been judicially and statutorily recognised as being severely disadvantaged in Australian society and are a "class which, generally speaking, is in need of protection and assistance."⁷

In relation to indigenous housing, the Supreme Court has granted a rates exemption because:

- (a) the advancement of Aboriginal people was a charitable purpose;
- (b) the activities conducted upon the land were exclusively charitable.⁸

In this particular case, the land was used by an Aboriginal Corporation to provide low-cost rental housing for economically disadvantaged Indigenous people. The proceeds were used by the Corporation to pay bills, cover office costs and generally further the objects of the organisation, but not in order to generate profit. A number of not-for-profit projects were also undertaken on the land, which aimed to improve living conditions, keep people occupied, discourage excessive alcohol drinking, create self-respect and (theoretically) create income to further the Corporation's objects.

Arguably, "Aboriginal people" could be substituted for another disadvantaged socio-economic group and the same qualification for rates exemption should apply for CHPs.

Australian case law has also confirmed and elaborated on the application of sub-section 6.26(6), being that some incidental uses of the land does not destroy the exclusiveness of the use of the land for charitable purposes and so fall within sub-section 6.26(2)(g).⁹

³ *Royal National Agricultural and Industrial Association v Chester* [(1974) 48 ALJR 304.

⁴ *Australian Flying Corps & Royal Australian Air Force Association (WA Division) Inc and City of Mandurah* [2013] WASAT 89; *West Australian Baptist Hospital & Homes Trust Inc v City of South Perth* [1978] WAR 65; *Uniting Church Homes (Inc) and City of Stirling* [2005] WASAT 191; *Retirees WA (Inc) and City of Belmont* [2010] WASAT 56.

⁵ *Lemm and Others v The Federal Commissioner of Taxation* (1942) 66 CLR 399.

⁶ *Tangentyere Council Inc v The Commissioner of Taxes* [1990] NTSC 14

⁷ *Aboriginal Hostels v Darwin City Council* (1985) 75 FLR 197 at 211, as cited in *Gumbangerrii Aboriginal Corporation v Nambucca Council* [1996] NSWLEC 99.

⁸ *Shire of Ashburton v Bindibindi Community Aboriginal Corporation* [1999] WASC 108.

⁹ *Salvation Army (Victoria) Property Trust v Fern Tree Gully Corporation* (1952) 85 CLR 159; *Technology Assisting Disability WA Inc and Town of Bassendean* [2011] WASAT 154.

Most of the recent Western Australian case law in relation to housing providers has centred on organisations providing housing for the aged successfully obtaining an exemption under sub-section 6.26(2)(g).

Utilities in Western Australia

Discussion about rates exemptions in relation to CHPs can also be informed by the exemptions CHPs qualify for from utilities providers.

It is noted that utilities providers receive an Operational Subsidy from the WA Government to compensate them for the concessions they provide to organisations such as CHPs. This subsidy is not provided to local governments. Given the State Government's current position of making budget cuts wherever it can, it is unlikely the Operational Subsidy will extend to local governments in the near future.

Water

Under sub-bylaw 4(1)(e) of the *Water Agencies (Charges) By-laws 1987* (WA), land used, occupied, or held exclusively for charitable purposes, not being land leased or occupied for any private purpose, is eligible for discounts for water service charges, sewerage service charges and drainage charges.

Sub-bylaw 4(3) defines charitable purposes as purposes that, in the opinion of the Water Corporation, involve:

- (a) the provision of relief or assistance to sick, aged, disadvantaged, unemployed or young persons; or
- (b) the conducting of other activities for the benefit of the public or in the interests of social welfare not otherwise mentioned in sub-bylaw (1),

by a private organisation that is not operated for the purpose of profit or gain to individual members, shareholders or owners.

Sub-bylaw 4(4) states that if, for the provision of relief or assistance referred to in sub-bylaw 4(3)(a) land is provided to a person for residential use, then for the purposes of sub-bylaw 4(1)(e) the use of that land by that person and any of his or her family for residential purposes shall not be taken to be use for a private purpose.

Although it is at the Water Corporation's discretion whether a purpose is classified as a charitable purpose (and an entity is eligible for the prescribed concessions), we understand CHPs receive these concessions.

The Water Corporation receives Operating Subsidy contributions from the WA Government to compensate the Water Corporation for the concessions it provides. In the 2012-2013, the Water Corporation received \$116 million from the WA Government for revenue concessions out of a total of \$437 million in operating subsidies.¹⁰

Electricity

Synergy provides concessions on electricity tariffs for premises wholly used by a charitable or benevolent organisation for providing residential accommodation other than for commercial gain in

¹⁰ Water Corporation, *Annual Report 2013*, Available from: <http://www.watercorporation.com.au/-/media/Files/About%20us/Our%20performance/Annual%20report/2013%20Annual%20report/Water%20Corporation%202013%20Annual%20Report.pdf>, p 12.

accordance with sub-bylaw 12(1) of the *Energy Operators (Electricity Retail Corporation)(Charges) By-laws 2006* (WA). The By-laws do not provide further definition of any of the terms within by-law 12(1).

Synergy also receives Operating Subsidy contributions from the WA Government to compensate Synergy for the concessions it provides. Synergy's 2012-2013 Annual Report does not set out how much it received from the WA Government for revenue concessions, however it states that Synergy received \$368,255,000 in 'other operating receipts'.¹¹

Other Legislative Definitions of Charitable Purpose in WA

Although other WA legislation refers to 'charitable purpose', it does not usefully inform the definition of the term in the LGA.

Sub-sections 5(a), (e), (f) and (g) of the *Charitable Collections Act 1946* (WA), defines charitable purpose as including respectively:

- (a) the affording of relief to diseased, sick, infirm, incurable, poor, destitute, helpless or unemployed persons, or to the dependant of any such persons;
- (b) the affording of relief, assistance or support to persons who are or have been members of [naval, military or air] forces or to the dependants of any such persons;
- (c) the support of hospitals, infant health centres, kindergartens and other activities of a social welfare or public character; and
- (d) any other benevolent, philanthropic or patriotic purpose,

each of which could conceivably encompass CHPs.

The *Charitable Trusts Act 1962* (WA) defines 'charitable purpose' as "every purpose that in accordance with the law of Western Australia is charitable", which is very broad and could easily encompass CHPs, but is not very helpful.

The *Trustees Act 1962* (WA) and the *Lotteries Commission Act 1990* (WA) both use the term 'charitable purpose', but do not define it.

¹¹ Synergy, *Annual Report 1 July 2012 – 30 June 2013*, Available from: <http://www.watercorporation.com.au/-/media/Files/About%20us/Our%20performance/Annual%20report/2013%20Annual%20report/Water%20Corporation%202013%20Annual%20Report.pdf>, p 33.

The Current Position in each State and Territory

Each State and Territory has its own way of dealing with community housing and local government rates. Below is only a brief summary in relation to rates exemptions potentially available to CHPs rather than an exhaustive analysis of the legislative and case law position in each State and Territory.

South Australia

Under sub-section 161(1) of the *Local Government Act 1999* (SA), community service organisations, are entitled to a 75 per cent rebate (or, at the discretion of the council, at a higher rate) on local government rates.

Community housing providers qualify as ‘community service organisations’ under the criteria set out in sub-section 161(4)(iii) of the *Local Government Act 1999* (SA).

Earlier in 2013, the South Australian Government announced it would transfer about 5,000 public houses to community housing providers. In response, the South Australian Local Government Association commented that because housing in the community sector received a 75 per cent rates discount, such a transfer could have a significant impact on councils with a large proportion of government housing and could cause those councils to shift the rates burden across to other ratepayers.¹²

Tasmania

Under sub-section 87(1)(d) of the *Local Government Act 1993* (Tas), land or part of land owned and occupied exclusively for charitable purposes is rates exempt. It is more onerous than the Western Australian legislation, as ownership is part of the criteria.

Although the ‘exclusive charitable purpose’ limb of the criteria is similarly worded to the Western Australian legislation, it has been distinguished in the courts, albeit at a Magistrates Court level.¹³ The focus of the legislation is ‘occupation’ rather than ‘use’. While a charitable organisation may own the land and provide residential units for low income elderly persons at a below market rent, thereby relieving poverty, a strict application of sub-section 87(1)(d) means that land does not qualify for a rates exemption because the land is *occupied* by the low income elderly tenants for a residential (rather than charitable) purpose.

This decidedly uncharitable interpretation, individual local councils limit such an application and exercise their discretion via their individual exemption policies. For example Launceston City Council uses aged persons homes and homeless hostels as examples of charitable organisations which may be eligible for an exemption.¹⁴ However, it does specify “residential properties and manses owned by Religious institutions even when occupied by a minister” as an example of non-charitable activities, which is consistent with the above referred to court interpretation.

¹² ‘Public housing changes could hit SA council revenues’, *ABC* (online), 14 June 2013, Available from: <http://www.abc.net.au/news/2013-06-13/public-housing-changes-could-hit-south-aust-council-revenues/4750930>.

¹³ *Roman Catholic Church Trust Corporation of the Archdiocese of Hobart v Meander Valley Council* [2012] TASMC 34 at [24]-[29].

¹⁴ Launceston City Council, 31 May 2013, *Rating Exemptions and Remissions for Charitable Organisations Policy*, Launceston City Council, Available from: http://www.launceston.tas.gov.au/upfiles/lcc/cont/services/household/rates/23pl002_rating_exemption_for_properties_owned_and_occupied_by_charitable_organisations_policy.pdf.

Victoria

Under sub-section 154(2)(c) of the *Local Government Act 1989* (Vic), any part of land used exclusively for charitable purpose is rates exempt. The interpretation of 'exclusive use' and 'charitable purpose' is similar to that in Western Australia.

Victoria differs to Western Australia in that affordable housing is referred to in the *Local Government Act*, with sub-section 169(1D) stating that "a Council may grant a rebate or concession in relation to any rate or charge, to support the provision of affordable housing to a registered agency" (a registered agency being a housing association or housing provider registered with the Victorian Department of Housing). Thus, CHPs are a distinct group recognised under the legislation which do not automatically qualify as organisations which use land for a charitable purpose. The practical effect of this section is that the local governments can exercise their discretion and are not specifically compelled to grant exemptions to CHPs.

CHPs recently received a reprieve in relation to fire service levies in Victoria. In July, the Victorian Government introduced a fire services property levy on all property owners to fund the Metropolitan Fire Brigade and Country Fire Authority.¹⁵ Some councils inadvertently applied the commercial rate rather than the residential rate to CHPs. However, the Victorian Government confirmed that CHPs qualified for the residential rate and the incorrect invoicing was rectified.

Properties managed by registered housing associations and providers on the Director of Housing's behalf are exempt from the fire services property levy.

New South Wales

Under sub-section 556(1)(h) of the *Local Government Act 1993* (NSW), "land that belongs to a public benevolent institution or public charity and is used or occupied by the institution or charity for the purposes of the institution or charity" are exempt from all rates (other than water supply special rates and sewerage special rates). Under sub-section 558(1)(c), a council has the discretion to also exempt a public charity from the payment of water supply special rates and sewerage special rates.

Similar to Tasmania, the land must be owned by the institution or charity to be eligible for the general rates exemption. However, in New South Wales (as opposed to Tasmania) the distinction between use and occupation is moot because if the ownership limb is satisfied, either qualifies the land for an exemption.

The Courts define a public benevolent institution as an institution organised for the relief of poverty, sickness, destitution, helplessness or misfortune and while they vary in scope and character, give relief freely to those who are in need of it and who are unable to care for themselves.¹⁶ When considering whether an organisation is a public benevolent institution, they look to the objects in the organisation's constitution (or similar document).

The Courts use the Elizabeth Statute to define charity, in line with other States' interpretation.

The majority of the case law in relation to CHP rates exemptions in NSW relate to Aboriginal housing corporations, some of which have been successful in obtaining exemptions.¹⁷ This may be because

¹⁵ Richard Willingham, 'Housing groups win levy reprieve', *The Age* (online), 26 August 2013, Available from: <http://www.theage.com.au/victoria/housing-groups-win-levy-reprieve-20130825-2sjxr.html>.

¹⁶ *Perpetual Trustee Co Ltd v Commissioner of Taxation* (1931) 45 CLR 224, per Starke J at 232, Dixon J at 233 and Evatt J at 235-236.

¹⁷ For example: *Gumbangerri Aboriginal Corporation v Nambucca Council* [1996] NSWLEC 99; *Coomoalla Aboriginal Housing Company Ltd v Wentworth Shire Council* [1999] NSWLEC 211; *Murray Darling Community*

of the reference to ‘public benevolent institution’, which arguably is broader than the definition of a charity when the above referred commentary regarding indigenous people is applied.

Australian Capital Territory

Under sub-section 8(1)(b) of the *Rates Act 2004* (ACT), benevolent institutions and buildings used exclusively for public charitable purposes are rates exempt. Sub-section 8(2) specifically excludes community housing purposes from the meaning of ‘public charitable purposes’.

Community housing has the meaning prescribed to it under sub-section 73A(4) of the *Duties Act 1999* (ACT), being housing provided for:

- (a) people on low and moderate incomes or with special needs; or
- (b) nonprofit community organisations.

Queensland

Under sub-section 93(3)(i) of the *Local Government Act 2009* (Qld), local governments can resolve to give a rates exemption for particular land if is used for a charitable purpose. The power is discretionary and lies with the individual local government to grant an exemption.

Section 73 of the *Local Government Regulation 2012* (Qld) further specifies certain qualification criteria for land relating to *inter alia* charitable purposes. Criteria where CHPs may qualify include:

- (a) land owned by a religious entity if the land is less than 20ha and is used for at least of the following purposes:
 - (i) provision of education, health or community services, including facilities for aged persons and persons with disabilities; or
 - (ii) housing incidental to any of these given purposes(with other purposes under this criteria relating to religious purposes);
- (b) land vested in, or placed under the management and control of, a person under an Act for a charitable purpose; and
- (c) land owned by a community organisation if the land is less than 20ha and is used for providing a service, including the following:
 - (i) accommodation associated with the protection of children; or
 - (ii) accommodation for students.

The Act came into force in 2009 and the Regulations came into force in 2012. There does not appear to be any case law in relation to the relevant sections. However, it is reasonable to assume that the federal case law cited above inform the interpretation of the relevant sections. A plain English reading of the exemptions under the Regulation indicate that the criteria are quite restrictive and would be interpreted as such.

Northern Territory

Under sub-section 144(1)(f) of the *Local Government Act* (NT), land used for a non-commercial purpose by a public benevolent institution or a public charity is rates exempt. Under sub-section

Care Incorporated and Coomealla Aboriginal Housing Company Ltd v Wentworth Shire Council [2000] NSWLEC 236.

144(2), if land is used for two or more purposes and not all the purposes are exempt, the non-exempt purposes must be merely incidental for the land to qualify for the exemption.

Under sub-section 144(3), the fact that the user is a public benevolent institution or a public charity is irrelevant in determining whether the land is a commercial or non-commercial purpose. The relevant question is the nature of the use (rather than the nature of the user).

Under section 3, Aboriginal community living area means an area granted as such under legislation or designated as such by the Minister through a *Gazette* notice. An Aboriginal community living area association is an incorporated association in which an Aboriginal community living area is vested.

Sub-section 144(1)(k) provides specific exemption for land owned by a Land Trust or an Aboriginal community living area association except:

- (a) land designated in the regulations as rateable; or
- (b) land subject to a lease or licence conferring a right of occupancy; or
- (c) land used for a commercial purpose.

Arguably, Indigenous CHPs fall in to the second exception and there for are liable for rates. However, Land Trusts and Aboriginal community living area associations qualify as a special cases under section 145 which appears to grant them a special exemption for rates (although the lessees of their land may not qualify).

This Act came into force on 1 July 2008. There does not appear to be any case law in relation to the relevant sections. However, it is reasonable to assume that the federal case law cited above inform the interpretation of the relevant sections. It is arguable that CHPs do not carry on a commercial purpose because any profit that is generated is fed back into the organisation in order to provide the charitable purpose housing to those in need.

Federal Legislative Definition of Charitable Purpose

The *Charities Act 2013* (Cth), which comes into effect on 1 January 2014, defines 'charitable purpose' at section 12 to include, *inter alia*, "the purpose of advancing social or public welfare". Section 15 broadly defines what constitutes the purpose of advancing social or public welfare by including (without limitation):

- (a) relieving poverty, distress or disadvantage or individuals or families;
- (b) caring for and supporting the aged or individuals with disabilities; and
- (c) caring for, supporting and protecting children and young individuals.

Each of these broad definitions arguably encompass the provision of housing to such individuals, families and children who would otherwise be unable to access housing.

The Explanatory Memorandum of the Charities Bill 2013 (Cth) specifically states the 'advancing social or public welfare' referred to in section 12 to include "providing housing and accommodation support for people with special needs or who are otherwise in a special disadvantage in terms of their access to housing."¹⁸

The Addendum to the Explanatory Memorandum of the Charities Bill 2013 (Cth) further states in relation to the definition of charitable purpose and under the head of 'charitable housing':

*The examples of purposes are not intended to limit charitable purposes to those specifically mentioned. Particularly under the broad category of advancing social or public welfare, the purposes of an entity may encompass a range of circumstances. For example, a charitable purpose that includes providing housing may address housing needs arising from financial disadvantage under the relief of poverty. Charitable housing may also address particular or special physical, social or psychological needs or other special disadvantages of individuals and families. A special disadvantage is disadvantage suffered by an individual or family that is something more than the issues commonly experienced by the public, such as general problems with housing affordability.*¹⁹

Recent case law suggests that the definition of charitable purpose with reference to charitable housing in the Explanatory Memorandum should not be relied upon because the Explanatory Memorandum carries little weight in a court dispute.²⁰ However, it is arguable that the inclusion of housing in the charitable purpose definition is distinguished in that the wording of the section in the Act intended the definition to be as broad and inclusive as possible, and to interpret the legislative definition as not being as broad and inclusive so as to encompass the including the explanatory memorandum definition would be a misguided interpretation of the intention behind the Act.

¹⁸ Explanatory Memorandum, Charities Bill 2013 (Cth) 24-25, [1.124], Available from: http://www.austlii.edu.au/au/legis/cth/bill_em/cb2013114/memo_0.html.

¹⁹ Addendum to the Explanatory Memorandum, Charities Bill 2013 (Cth) and Charities (Consequential Amendments and Transitional Provisions) Bill 2013 (Cth) 5, [1.5], Available from: http://www.austlii.edu.au/au/legis/cth/bill_em/cb2013114/memo_1.html.

²⁰ Particularly *The Hunger Project Australia v Commissioner of Taxation* [2013] FCA 693 per Perram J at 118.

Member Survey

A preliminary review of the survey results reveals that rates exemptions are inconsistently applied to CHPs across local government areas to the point where the same CHP is exempt in one local government area and pays full rates in another. This demonstrates the lack of clear definitions in the legislation as well as a lack of guidance for local governments in applying the legislation.

The survey results also include views about whether CHPs should be obliged to pay local government rates. These views highlight the arguments for and against CHPs paying local government rates. Some CHPs acknowledge that rates form a local government's income to provide facilities and services, from which CHPs and their tenants benefit. Therefore, CHPs should not withhold from the local government that source of income. However, other CHPs consider that as they are providing a community service of social housing at below market rent, they should be exempt from rates. Further, any money that is saved from not paying rates can then be used to better maintain and improve the services provided.

The respondent group was located in both regional and metropolitan local government areas with a number of different CHPs owning and/or managing properties within the same local government area.

The survey received responses from a range of CHP types, including senior, Indigenous, crisis and transitional, youth, mental health / intellectual disability, Co-op and general. There was a mix of ownership types, with some CHPs managing properties owned themselves, some CHPs managing properties owned entirely or jointly by the Department of Housing, some CHPs managing properties owned by a third entity and some CHPs managing a mix of two or three of the above.

Interestingly, although some CHPs reported not owning any properties themselves, but managed properties owned either jointly or entirely by the Department of Housing, the same CHPs reported paying full local government rates for those same properties. A prima facie reading of the Act suggests this set of circumstances contravenes the Act. However, it is acknowledged that CHCWA is not aware of any arrangements those CHPs and the Department of Housing have in relation to local government rates payment.

The responses also revealed that CHPs within the same local government area were being treated differently, with some CHPs benefiting from exemptions and some paying full local government rates after unsuccessful exemption applications. Again, it is acknowledged that local governments assess whether an exemption should be granted based on the application they are given and CHCWA is not aware of the contents of CHPs' rates exemption applications in either of the above described situations.

However, it is clear there is no uniform approach to granting exemptions to CHPs and both local governments and the community housing sector would benefit from a more equitable application of sub-section 6.26(2)(g) of the Act, removing the present uncertainty.

Alternative Policy Approaches

Given the lack of uniformity in relation to CHPs receiving local government rates exemptions, CHCWA has identified four alternative approaches:

- (a) interpreting sub-section 6.26(2)(g) as inclusive of CHPs;
- (b) granting a partial exemption to CHPs;
- (c) excluding CHPs from exemptions under sub-section 6.26(2)(g);
- (d) exemptions based on CHP structure.

Each alternative is problematic, as each potentially involves amendments to the Act, which would need to go through State Parliament. A policy adoption approach could be challenged on the basis of previous case law which interprets the legislation as it stands.

As shown by the survey responses, the CHPs themselves do not agree whether CHPs should receive local government exemptions and it is naïve to suggest that local governments would wholeheartedly support a policy with the potential to curtail their income.

However, any amendment will leave an entity with less money. If CHPs are ruled to be exempt, local governments who have previously had CHPs in their electorate paying full rates will have that income taken away from them with ongoing ramifications to their budgets and other ratepayers. If CHPs are given a partial or no exemption, CHPs which have previously been granted an exemption would have to find the money to pay this new expense with ongoing ramifications to their budget and the possibility that those CHPS would be unable to continue to provide their services to the same extent, if at all.

Below, the pros and cons of each alternative are discussed, with reference to responses to the survey.

Interpreting sub-section 6.26(2)(g) as inclusive of CHPs

This would save CHPs' resources being paid into rates or used to apply for rates exemptions. Those resources could then be invested in providing and maintaining housing to those in need, such as the homeless, disadvantaged and people with mental health issues. A rates exemption acknowledges the community service CHPs provides within a local government area.

In the survey, some respondents appreciated that local governments relied on rates as a revenue stream, but argued that the cost of rates is not built into the reduced rent CHPs charge their tenants.

They likened rates exemptions to any other tax exemption not-for-profits receive and did not see why rates should be an exception. It was suggested that in some cases, the CHP maintained its internal infrastructure, such as roads and security lighting and the local government has no claim to rates where that is the case. By providing affordable housing, CHPs are providing a service which the local government may otherwise have to provide because of the need in the community.

However, respondents to the survey also acknowledge that to the extent one group is exempted, all other ratepayers must pay more for the local government to cover its budget. It was also noted that the exemption is legislated at a State government level; however the foregone income occurs at a local government level.

Granting a partial exemption to CHPs

A partial exemption, similar to that in South Australia is considered by some CHPs to be the happy medium. CHPS could pay reduced rates, which acknowledges that the tenants tend to on one form of pension or another and would otherwise qualify for rates exemptions, while also helping support the local government.

If a CHP is currently paying full rates, a partial exemption would contribute to its ability to maintain their housing stock and continue to provide affordable, below-market rents to their tenants. However, if a CHP currently has a full exemption, it is possible the CHP would have find more funding or scale down its maintenance and/or increase rents in order to cover this new cost.

Excluding CHPs from exemptions under sub-section 6.26(2)(g)

Other CHPs argue stock transfers from the Department of Housing come with costs and community responsibility. Local Governments cannot be expected to be denied legitimate rates income which they have previously come to expect from the Department of Housing and factored into their long term budgets. It was also suggested that CHPs which cannot manage profitably without rates exemptions should not expect to own and manage State assets.

Similar to the granting of a partial exemption, if a CHP currently has a full exemption, removing that exemption could have a detrimental effect on the CHP as it tries to cover this new, unexpected cost.

Exemption based on CHP structure

Arguably, another alternative would be to grant the exemption based on the size of the CHP, as well as their type and financial status (e.g. amount of stock, annual turnover.) However, it would appear that this is what local governments already try to do by assessing a CHP's application for a rates exemption, without any clear uniformity across different local governments.

Setting out clear criteria in terms of size and turnover could generate uniformity. However, it could also discourage growth as CHPs weigh up the benefits of growth against the cost of rates. This could be detrimental to the ongoing supply of affordable housing.

About CHCWA

CHCWA is the industry Peak Body for community and affordable housing organisations in WA. It advocates for affordable housing and supports the industry to grow and develop in response to housing need around the State.

CHCWA's vision is a world class social and affordable housing system in Western Australia.

CHCWA's core operating principle is that all West Australians are entitled to safe, secure and affordable housing because it is fundamental to individual and community well-being. Inclusiveness, ethical practice, respect, collaboration and innovation are the core values underpinning our business activities.

Policy and advocacy

CHCWA represents the WA Community Housing Sector at all relevant levels of State and Federal Government. In so doing, CHCWA adopts a consultative and collaborative approach with key sector and Government stakeholders to ensure that our policy reflects the views of the sector and is mindful of the requirements of Government policy makers. We are proactive and seek to identify emerging issues as well as contribute to policy debate initiated by the Government.

One of CHCWA's objectives is to raise awareness of housing affordability issues in the broader community. The community and affordable housing sector is only one part of a much larger continuum and is heavily affected by the behaviour of the broader housing market. As such our policy and advocacy strategy is not limited to community and affordable housing.

Promotion

The growth of the Community Housing Industry is central to the State Government's Affordable Housing Strategy 2010-2020. At a national level, community and affordable housing organisations using not-for profit business models are becoming the engines for growth in terms of social and affordable housing provision. CHCWA promotes the sector to a range of stakeholders, including those in the private sector, highlighting both the sector's successes and its vast potential to address WA's chronic shortage of social and affordable housing.

Sector development and sector efficiency

CHCWA takes a lead role in facilitating the development of the sector. We do this by offering guidance to Community Housing Organisations regarding best practice management as well as offering training courses and workshops designed to improve their operating models in a variety of ways. CHCWA believes that the most important objective for our sector is to increase the number of community and affordable housing units there are in the State. To realize this, CHCWA aims to facilitate alliances and partnerships between Community Housing Organisations that create efficiencies and maximise the sector's potential for growth.