

Understanding the registration criteria – Constitutions

Schedule 7, Housing Act 1983

Introduction

Recent amendments to the *Housing Act 1983 (Act)* have introduced a regulatory framework for the registration and performance monitoring of rental housing agencies (**Agencies**). The registration system applies to non-governmental non-profit organisations that provide affordable housing for low-income people.

The regulatory framework is designed to achieve a number of objectives, including:

- 1 provision of quality assurance for services provided by Agencies to protect tenants and users of such services; and
- 2 provision of safeguards to facilitate public and private investment in affordable housing by requiring Agencies have appropriate governance structures.

The Office of the Registrar of Housing Agencies (**Registrar**) has the power to register Agencies and the responsibility for monitoring the performance of Agencies in accordance with standards set by the Minister for Housing.

To be registered, an Agency must satisfy the Registrar that it meets the registration criteria set out in Schedule 7 of the Act (**Registration Criteria**). The Registration Criteria principally requires consideration of the Agency's constitution or rules (**Constitution**). In addition, the Agency will need to demonstrate its capacity to meet the performance standards.

Given the important objectives which the registration system seeks to achieve, the Registrar's responsibility is to ensure strict compliance with the Registration Criteria.

Guide to Registration Criteria

The accompanying guide (**Guide**) provides comments on the Registration Criteria designed to assist Agencies in self-assessing whether their Constitution complies with the Registration Criteria.

The Guide **does not** constitute legal advice. It is intended to offer general guidance only to assist where the requirements of particular elements of the Registration Criteria may be unclear to some Agencies. The Guide does not provide model drafting to be used by Agencies as such drafting requires separate consideration of the Constitution of the individual Agency.

As a guiding principle however, where an Agency's Constitution is drafted to mirror or closely align with that prescribed by the Registration Criteria, it is highly likely to comply with the requirements for registration.

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The criteria for determining whether a rental housing agency should be registered under Part VIII are as follows—

1 General

1) The rental housing agency must be a non-profit body.

Comment:

- > The agency must be a 'non-profit body' as defined in the Act under the definitions section. It will not be sufficient that the agency has achieved 'non-profit' status in another context, for example, Deductible Gift Recipient (DGR) status with the Australian Tax Office.
- > Under the Act, 'non-profit body' means:
 - a) *a corporation limited by shares or by guarantee that by its constitution is prohibited from carrying on its business for profit; or*
 - b) *a body that – (i) is not carried on for the purposes of profit or gain to its individual members; and (ii) is, by its constitution or rules, prohibited from making any distribution, whether in money, property or otherwise, to its members.*
- > Under the Act, a non-profit body does not include a Government agency.
- > The key provisions of the agency's constitution which will indicate whether an agency is a 'non-profit body' are those relating to the 'application of property and income' and 'winding up'. These are also addressed in sub-clauses 3(4)&(5). Additionally we would not expect to see contradictory provisions which would or may enable members, as members, to gain financially.

2) To be registered as a registered housing association the rental housing agency must be a company limited by shares or by guarantee.

3) To be registered as a registered housing provider the rental housing agency must be a company limited by shares or by guarantee or a co-operative or an incorporated association.

Comment:

- > An agency that is intending to incorporate or is in the process of obtaining incorporation does not meet the requirements for registration.
- > The Registrar must be able to verify that that the agency is incorporated in accordance with either sub-clause 1(2) or 1(3) as applicable.
- > Under the Act, a 'co-operative' means only a 'co-operative' under the *Victorian Co-operatives Act 1996* and an 'incorporated association' means only an association incorporated under the *Victorian Associations Incorporated Act 1981*.

4) The rental housing agency must be established to provide affordable rental housing to people on low incomes.

Comment:

- > This criteria will principally be determined with reference to the 'Statement of Purposes' or 'Statement of Objects' within the constitution or governing rules of the Agency. This is also addressed in sub-clause 2(2).

5) Unless the Registrar otherwise approves under section 82 or 103, the rental housing agency must not act as a trustee for any person other than a registered agency.

Comment:

- > This requirement ensures that the Registrar knows the true nature of the entity which is being registered. This will be satisfied if the agency's constitution includes the provision required by sub-clause (3)(3).

6) Unless the Registrar otherwise approves under section 82 or 103, the rental housing agency must not be a subsidiary of any body other than a registered agency.

Comment:

- > A 'subsidiary' is not defined in the Act. Under the Corporations Act a body corporate is a subsidiary if another body corporate controls or is in a position to control that body corporate. Accordingly, 'subsidiary' refers not only to wholly owned subsidiaries.
- > Upon making an application for registration, an agency must provide a declaration that the agency is not a subsidiary. This is prescribed by sub-clause 81(6)(d) of the Act.

2. Constitution—objects and powers

1) Subject to sub-clause (3), the constitution or rules of the rental housing agency must contain the provisions required by this clause.

Objects

2) The rental housing agency's statement of objects must include an object to the effect of one of the following objects—

- a) to promote the relief of poverty, sickness or the needs of the aged by providing affordable rental housing to persons in housing need as low-income households, or through infirmity or age; or
- b) to promote other purposes beneficial to the community through the provision of affordable housing and associated services.

Comment:

- > The agency's constitution must contain a 'statement of objects' or 'statement of purposes.'
- > The agency's 'statement of objects' or 'statement of purposes' is to be distinguished from its 'activities' or 'primary activity' which some agencies may also include in their constitution. Whilst, this distinction is not made by some legislation, such as the Co-operatives Act 1996, the Act treats each type of entity (i.e. company, incorporated association or co-operative) identically for the purposes of this sub-clause.
- > Sub-clause 2(3) provides that the agency's statement of objects need not comply with 2(2) if the agency has satisfied the Registrar it is a 'non-profit body'. However, sub-clause 1(4) requires that the agency show that it is 'established to provide affordable rental housing to people on low incomes'. Objects to the effect of 2(2) are necessary to meet this requirement.

3) The rental housing agency's statement of objects is not required to include an object set out in sub-clause (2) if the rental housing agency otherwise satisfies the Registrar that it is a non-profit body.

Powers

4) The rental housing agency's powers must include powers to—

- a) acquire, by way of purchase, lease, transfer or otherwise, real property;
- b) dispose of any real property, subject to the consent of the Director under section 109 of the *Housing Act 1983*;
- c) provide security for the payment of money, subject to the consent of the Director under section 109 of the *Housing Act 1983*;
- d) apply for and accept, grants or loans from any Federal, State or local government or authority;
- e) enter into contracts and joint ventures with any public or private entity;
- f) do anything incidental to or in furtherance of its objects.

Comment:

- > Sub-clause 2(1) requires that the agency's constitution contain the provisions set out in clause 2. Accordingly, each of the above powers must be expressly included in the agency's constitution.
- > It will not be sufficient that the agency is given such powers by virtue of its incorporation under the *Corporations Act* or other applicable legislation.
- > It will not be sufficient that the agency is, for example, given 'all the powers of a natural person'.
- > Clause 4(b)&(c) are express limitations on the agency's powers.
- > To ensure compliance with the requirements, the agency can use the words of the Act to define its powers. The powers set out in agency's constitution need not be limited to those required by clause 2(4). However, any additional powers must not be inconsistent with the requirements of the Act.

3. Constitution—additional provisions

1) The constitution or rules of the rental housing agency must also include provisions to the effect of the provisions in this clause.

Comment:

- > Sub-clause 3(1) requires that the agency's constitution expressly give effect to the provisions set out in clause 3.
- > It will not be sufficient that the 'replaceable rules' of the *Corporations Act* or other applicable legislation by reference give effect to the provisions in this clause.

Alteration of Constitution

2) A provision must be included to the effect that the constitution or rules of the rental housing agency may only be amended by special resolution in accordance with the legislation under which the rental housing agency is incorporated.

Agency not to act as trustee without approval

3) A provision must be included to provide that the rental housing agency must not act as trustee for any person other than a registered agency without the written approval of the Registrar under section 82 or 103 of the *Housing Act 1983*.

Comment:

- > This provision ensures that the Registrar knows the true nature of the entity which is being registered.
- > Please also refer to sub-clause 1(5).

Application of property and income

- 4) A provision must be included to provide that the assets and income of the rental housing agency must be applied solely for the purposes for which the rental housing agency is incorporated and cannot be distributed directly or indirectly to the members of the rental housing agency except as bona fide compensation for services rendered or expenses incurred on its behalf.

Comment:

- > The 'Application of property and income' clause must have the effect of ensuring that all payments made by the agency are for the agency's purposes.
- > The 'Application of property and income' clause must have the effect of preventing the payment or transfer of property to a member where the payment arises because of the recipient's status as a member of the agency and not, for example, because of a contractual relationship.
- > The only exception to this rule which can be expressed in the constitution is where the payment is of "bona fide compensation for services rendered or expenses incurred".
- > The constitution may specify that the agency has the power to make certain payments to members but the power to make these payments must be made subject to and can not otherwise limit the intent of the clause.

The following clause would comply with the Registration Criteria:

Example clause 1

"(i) The assets and income of the Agency must be applied solely for the Agency's purposes and cannot be distributed directly or indirectly to the Members except as bona fide compensation for services rendered or expenses incurred.

(ii) Subject to paragraph (i), the Agency may make the following payments:

- (a) payment of rent for premises let to the agency by a member;*
- (b) payment of interest for money borrowed by the agency from a member; and*
- (c) payment of remuneration to members for positions held, if made in good faith and on terms no more favourable than if the member were not a member."*

- > A constitution may replace the term 'distributed' with the term 'paid or transferred' or similar. If this wording is used, the following example clause would also comply:

Example clause 2

"(i) The assets and income of the Agency must be applied solely for the Agency's purposes and cannot be paid or transferred directly or indirectly to the Members except as bona fide compensation for services rendered or expenses incurred.

(ii) Despite paragraph (i), the Agency may make the following payments for the Agency's purposes provided the payments are not distributions of assets and income:

- (a) payment of rent for premises let to the agency by a member;*
- (b) payment of interest for money borrowed by the agency from a member; and*
- (c) payment of remuneration to members for positions held,*

if made in good faith and on terms no more favourable than if the member were not a member."

Winding up

- 5) **A provision must be included to provide that in the event of the rental housing agency being wound up, any surplus assets remaining after payment of its liabilities must be transferred to another registered agency under the Housing Act 1983, approved by the Registrar under that Act, with similar purposes and which is not carried on for the purposes of profit or gain to its members.**

Comment:

- > The constitution must require that surplus assets are transferred to another registered agency, approved by the Registrar.
- > It will not be sufficient that the agency's 'winding up' clause merely directs surplus assets to an agency with similar purposes.
- > No differentiation of asset types or exceptions are described in this provision, therefore all assets of the registered agency are affected by this provision.
- > A number of rental housing agencies have 'deductible gift recipient' status pursuant to the Income Tax Assessment Act 1997. As deductible gift recipients, special purpose 'gift funds' are operated by the agency. The Income Tax Assessment Act 1997 also imposes requirements on the manner in which the gift fund is to be wound up by requiring certain provisions to be included in the constitution of that entity. The constitution of agencies which operate a gift fund may contain separate winding up provisions for the gift fund and the agency itself and, in that case, provided the constitution complies with the provisions of the Housing Act 1983 and the Income Tax Assessment Act 1997, it will satisfy the requirements of each in the event of a winding up. However, the preferred position is that the winding up provisions pertaining to the gift fund should specify that they apply in addition to the Housing Act 1983 winding up provisions.
- > An agency's constitution may provide a process whereby the board and/or members of the agency select the recipient of surplus assets in the event of winding up of the agency, provided that process recognises, and is not inconsistent with, the recipient being required to meet each of the requirements in clause 3(5).
- > Following is an example of a winding up clause that the ATO has confirmed will satisfy the requirements of the Income Tax Assessment Act 1997 for Agencies to become, or to remain, entitled to both tax concession charity and deductible gift recipient endorsements on the basis of being Public Benevolent Institutions. It also satisfies the requirements of the Housing Act 1983.

On the winding up of the Agency, surplus assets must be distributed to another rental housing agency registered under Part VIII of the Housing Act 1983, approved by the Registrar under that Act, with similar purposes and that is not carried on for the purposes of profit or gain to its members, and that is also endorsed by the Commissioner of Taxation as a public benevolent institution under Item 4.1.1 of section 30-45 of the Income Tax Assessment Act 1997.

- > The draft clause above is an example only and other appropriately drafted clauses may also satisfy the requirements of both the Act and the ATO

4. Capacity to meet performance standards

To be registered in a particular category, the rental housing agency must demonstrate the capacity to meet the performance standards applicable to that category of agency.

Comment:

- > The assessment of an agency's capacity to meet performance standards is outside the scope of this guide and is subject to the agency meeting the Registrar's satisfaction.