Housing Registrar

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Understanding the registration criteria – winding up provisions

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.

One of the registration criteria, in schedule 7 paragraph 3(5), provides that:

'A provision must be included [in the Agency's constitution] 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.'*

Some Agencies seeking registration have expressed concerns about the scope of paragraph 3(5), in particular, whether it could interfere with other, pre-existing or future, obligations or requirements to which Agencies may be subject.

Clear and simple 'winding up requirements' form a key part of the constitutional requirements intended, as part of the broader registration regime, to promote growth in the sector, provide confidence to investors and philanthropic organisations in committing funds for affordable housing, to preserve and protect publicly funded assets, and to enhance the reputation of the sector.

State Government Victoria

Questions and answers

The accompanying guide (**Guide**) provides comment, in the form of questions and answers, on this requirement of the Registration Criteria. It is designed to assist Agencies to understand the policy rationale for its inclusion, and is accompanied by an explanatory case study to this end.

The Guide also contains an example of a winding up clause which satisfies the requirements of Schedule 7 of the Act and which the Australian Taxation Office (**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 (**PBIs**). The draft clause is an example only and other appropriately drafted clauses may also satisfy the requirements of both the Act and the ATO.

The Guide does not constitute legal advice. It is intended to offer general guidance only to assist in understanding this particular element of the Registration Criteria. Entities considering applying for registration under the Act should seek their own independent legal advice regarding the subject of this Guide and registration generally.

In the Guide, the Agency which is being wound up is called 'the transferor Agency' and the Agency receiving the transferor Agency's assets upon winding up is called 'the recipient Agency'.

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Paragraph 3 (5) of schedule 7 provides as follows —

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.

1. What is required to satisfy this provision?

(a) An Agency's constitution must require that surplus assets are transferred to another registered Agency, approved by the Registrar, with similar purposes and which is not carried on for the purposes of profit or gain to its members.

(b) It will not be sufficient that an Agency's 'winding up' clause merely directs surplus assets to an Agency with similar purposes.

(c) No differentiation of asset types or exceptions are described in this provision. Therefore all assets of a registered Agency are affected by it.

(d) Agencies with Deductible Gift Recipient Status:

> A number of Agencies have 'deductible gift recipient' status pursuant to the *Income Tax Assessment Act 1997* (**ITAA**).
> As deductible gift recipients, the Agencies operate special purpose 'gift funds'.
> The ITAA imposes requirements on the way in which gift funds are to be wound up by requiring certain provisions to be included in an entity's constitution.
> The constitution of an Agency which operates 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 Act and the ITAA, it will satisfy the requirements of each in the event of a winding up.
> The Housing Registrar's preferred position is that the winding up provisions pertaining to a gift fund should specify that they apply in addition to those required by the Act.

(e) The Housing Registrar has no objection to an Agency's constitution containing a process whereby the board and/or members of the Agency select the receiver of surplus assets in the event of winding up of the transferor Agency, provided that the process recognises, and is not inconsistent with, the recipient Agency being required to meet each of the requirements in clause 3(5).

2. Why are the 'winding up requirements' required?

(a) On the winding up of an Agency, without any contrary agreement by the members or statutory requirements (such as a provision in the legislation pursuant to which the Agency was incorporated or legislation to which it is subject, for example the *Anglican Welfare Agency Act 1997* has a requirement that in the event of the winding up of an agency governed by that Act, the Archbishop in Council determines the recipient of any surplus assets after satisfaction of the agency's liabilities), general application of winding up principles would require the surplus assets to be distributed to the Agency's members (see for example section 501 of the *Corporations Act 2001*) unless the relevant assets are held in trust or subject to some other third party interest.

(b) Although paragraph 3(4) of schedule 7 requires an Agency's constitution to provide for assets and income to be applied solely for its purposes and not distributed to the members, the winding up requirement is necessary also to preserve the regime established at registration in circumstances where publicly funded assets may otherwise be distributed to recipients outside the affordable housing sector.

3. How is a recipient Agency selected?

(a) The constitution of an Agency may, for example, provide that selection of a recipient Agency is by its members, by its board or by its appointed liquidator.

(b) The selection of a recipient Agency must be approved by the Registrar. The Registrar's approval will be granted only when the recipient Agency is also a registered Agency with similar purposes to the transferor Agency and which is not carried on for the purposes of profit or gain to its members.

(c) In approving a recipient Agency, the Registrar will give consideration to the recipient Agency's ability to receive and manage the assets and the impact of the transfer of the asset on the Agency's ability to comply with the prescribed registration criteria and Performance Standards.

(d) In addition, section 132 of the Act allows the Registrar to give instructions to Agencies in certain circumstances including as to the winding up and dissolution of assets (section 132(2)d)

4. Are the winding-up requirements unusual or onerous?

(a) The 'winding up requirements' are not unusual or onerous. Similar provisions are common in the not for profit and related sectors where assets are dedicated to a purpose or activity and not for distribution to members before or upon winding up.

5. What if an Agency owns assets independently of any funding from the Director of Housing (Director)?

(a) Agencies sometimes acquire (housing or other) assets independently of any funding from the Director. Assets may be donated to an Agency on the proviso (or under a legal obligation) that should the Agency be wound up, the property will be passed on to another entity with similar purposes. Concern has been expressed that this may render the transferor Agency subject to conflicting requirements.

(b) Similar purposes is an element of the 'winding up requirements' and does not of itself cause any conflicts to arise. It is expected that an Agency will be deemed to have 'similar purposes' if, as a minimum, that Agency is a not for profit agency and one of its objects, specified in its constitution, is to provide affordable housing.

(c) The elements of the 'winding up requirements' equally apply upon initial registration and endure for the 'life' of a registered Agency. The 'winding up requirements' exist to preserve the status quo and do not add additional obligations or restrictions.

(d) No differentiation of asset types or exceptions are described in this provision. Therefore all assets of the registered Agency are affected by it.

(e) Concern by an Agency that holds non-Director funded assets subject to conditions which may be inconsistent with the Act's requirements (whether applying before or upon winding up) are best addressed, if they need to be addressed, prior to registration. This may be, for example, through a subsidiary if that can be satisfactorily accommodated.

6. What if an Agency has activities or provides services other than housing?

(a) Where an Agency has activities or provides services to which the provision of affordable housing may be ancillary, those issues are best addressed, if they need to be addressed, upon registration.

7. Will funding bodies, such as philanthropic trusts, be reluctant to provide future funding to Agencies because of the mandatory winding up clause?

(a) Where third parties have donated an asset to an Agency or are considering donating an asset, compliance with a known prudential and regulatory regime will be seen as a significant benefit, not a disincentive, in deciding to whom to gift the asset.

(b) Each individual funding body will normally be governed by its own rules and incorporated for different purposes and this Guide makes no representations about the effect that registration under the Act will have on a donor organisation's willingness to provide future funding to an Agency post-registration.

8. Example of a winding-up clause for agencies which are PBIs but not endorsed as a DGR

(a) *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.*

9. Example of a winding-up clause and a revocation clause for agencies which are PBIs and endorsed as a DGR

(I) Winding up clause

Where the company is endorsed as a deductible gift recipient under Division 30 of the Income Tax Assessment Act 1997 (ITAA) and in the event that the company is wound up or dissolved any surplus assets of the company must be transferred to another rental housing agency 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 ITAA provided that any surplus assets that are:

(a) gifts of money or property to the company for its principal purposes;

(b) deductible contributions described in item 7 or 8 of the table in section 30-15 of the ITAA; and

(c) money received by the company because of such gifts or deductible contributions;

may only be transferred to another such rental housing agency that is also endorsed as a deductible gift recipient under Division 30 of the ITAA.

(II) Revocation clause

'Where the company is endorsed as a deductible gift recipient under Division 30 of the Income Tax Assessment Act 1997 (ITAA) and in the event that such endorsement is revoked by the Commissioner of Taxation any surplus assets of the company that are:

(a) gifts of money or property to the company for its principal purposes;

(b) deductible contributions described in item 7 or 8 of the table in section 30-15 of the ITAA; and

(c) money received by the company because of such gifts or deductible contributions;

must be transferred to another rental housing agency 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 ITAA and as a deductible gift recipient under Division 30 of the ITAA.

Case Study:

The 'XYZ Housing Agency Ltd' (**XYZ**), a not for profit company limited by guarantee, decided to register as a housing agency. One of XYZ's purposes, as contained in its statement of purposes in its constitution, was the provision of affordable rental housing to people on low incomes. Another stated purpose of XYZ was to provide free food and clothing services to those in need. XYZ reviewed the terms of its constitution and identified a number of changes that it needed to make for its constitution to comply with schedule 7 of the Act. One of those changes was to the winding up provision. XYZ's winding up provision read as follows:

'If on the winding up or deregistration of XYZ there remains, after satisfaction of all its liabilities, any surplus assets, those surplus assets shall not be paid to or distributed amongst the members of XYZ, but shall be transferred to an organisation which is not carried on for the purposes of profit or gain to its members and which is a deductible gift recipient for the purposes of the Income Assessment Act 1997.'

Accordingly, XYZ changed the winding up provision of its constitution to the following:

'If on the winding up or deregistration of XYZ there remains, after satisfaction of all its liabilities, any surplus assets, those surplus assets shall not be paid to or distributed amongst the members of XYZ, but shall be transferred to an organisation which:

(a) is nominated by a majority of the members of XYZ;

(b) is a registered housing agency under the Housing Act 1983;

(c) is not carried on for the purposes of profit or gain to its members;

(d) is a deductible gift recipient for the purposes of the Income Assessment Act 1997;

(e) has similar purposes to XYZ; and

(f) is approved by the Registrar under the Housing Act 1983.'

In 2004, prior to its registration, XYZ received a large property called XYZ House from a philanthropic trust, on the proviso that if XYZ was ever wound up, that asset was to be transferred to another organisation with similar purposes to XYZ. XYZ used that property as a place where those in need could come and receive free meals and clothing. It was not used for accommodation purposes. By becoming registered as a housing agency, XYZ became subject to the Housing Act regime and was required to comply with the Performance Standards, reporting and other requirements of that Act. The requirements of the regime did not affect XYZ's ability to operate XYZ House in much the same way as it did pre-registration. XYZ House was not an asset which was subject to a Director's interest pursuant to section 107[1] merely by the fact of XYZ's registration.

Four years after being registered, XYZ was subjected to a members' voluntary winding up. A liquidator was appointed and the debts and liabilities of XYZ were satisfied from the organisation's cash reserves. However, there remained a number of surplus properties. The liquidator, in accordance with XYZ's constitution, convened a meeting of the members of XYZ, who overwhelmingly voted to transfer the surplus assets of XYZ, including XYZ House, to ABC Housing Agency Ltd (**ABC**). ABC satisfied requirements (a) – (d) as a matter of fact. In satisfying requirement (e), the liquidator looked to the purposes of ABC, one of which was to provide affordable housing and food to those in need in the Melbourne CBD, which is a similar purpose to one of XYZ's purposes. As the Registrar was satisfied that the requirements of the Act and the constitution were satisfied ABC was approved as the recipient of the assets.

What occurred by the transfer to ABC is the preservation of the status quo. The assets previously owned by XYZ could no longer be so owned because of XYZ's winding up. They are now owned by ABC, which is an organisation that is substantially similar to XYZ. XYZ House remains a house owned by a registered housing agency, as it was before.

1 Section 107 provides that the Director is deemed to have an interest in all land of a registered agency that is declared by notice published in the Government Gazette to be land to which this section applies. Such a declaration will be made either by agreement between the agency and the Director because the land has been purchased or developed with funds provided by the Director, or because the land was transferred to the rental housing agency by the Director.