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Senate Economics Legislation Committee  
By email: [economics.sen@aph.gov.au](mailto:economics.sen@aph.gov.au)

Dear Secretariat

**Re: Submission to the Inquiry into Housing Australia Future Fund 2023 [No. 2] [Provisions], National Housing Supply and Affordability Council Bill 2023 [No. 2] [Provisions] and the Treasury Laws Amendment (Housing Measures No. 1) Bill 2023 [No. 2] [Provisions]**

Thank you for your invitation to make a submission on Housing Australia Future Fund Bill 2023 [No.2] and related bills which seek to legislate for the establishment of the Housing Australia Future Fund (HAFF). As you clarify, the provisions of that legislation are identical to the legislation formerly considered by the Committee in its prior inquiry into the Housing Australia Future Fund Bill 2023 [Provisions] and related bills.

Quoting the Minister's Second Reading Speech for the Housing Australia Future Fund Bill 2023, the Government provides the following outline of the fund's purpose:

In the first five years of operation, the Government intends to use disbursements from the Housing Australia Future Fund to help build:

20,000 homes to provide social housing— 4,000 of which will be allocated to women and children leaving domestic and family violence and older women on low incomes who are at risk of homelessness; and  
10,000 affordable homes for frontline workers like police, nurses and cleaners who kept us safe during the pandemic.

Although the legislation does not make reference to the community housing sector, presumably these ambitious targets will necessitate the involvement of community housing providers, who are registered charities. From my discussions with members of the sector, that is the clear expectation. Indeed, many housing charities are expecting to participate at very significant levels within the proposed legislative model.

However, having regard to both the common law and the *Charities Act 2013*, it is not at all clear that the provision of housing to key workers comprises a charitable purpose in Australia. If that view is correct, charitable housing providers would be effectively excluded from one-third of the 30,000 offering. If the Minister is of the view that one-third of the offering is targeted exclusively to for-profit providers, the community housing industry seems to be unaware of that.

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This brief submission is divided into three parts:

1. First, it considers an akin example of a housing scheme developed by the Rudd Government in which separate amendments were introduced to clarify that the provision of housing to key workers would be charitable for the purposes of that scheme.
2. Second, it considers the Australian Charities and Not-for-profits Commission's (ACNC's) view on when housing will be charitable, noting that that view does not say that the provision of housing to key workers is charitable and that the tests the ACNC applies would tend against that conclusion; and
3. Third, it considers the position adopted by the Charity Commission in England and Wales, which clarifies that the provision of housing to key workers is charitable, a position notably not adopted by the ACNC in its equivalent guidance.

As the Australian Charities and Not-for-profits Commissioner's Interpretation Statement on Housing (the CIS on Housing) presciently warns:

Australian governments have created, and may in the future create, schemes to encourage organisations to provide housing. The fact that a government has created a housing scheme does not necessarily mean that providing housing under the scheme is charitable under the Charities Act. The Commissioner will apply the principles in this Commissioner's Interpretation Statement and in other guidance material to determine whether the purpose of the organisation is charitable.<sup>1</sup>

A note provided with the above quote states: 'One such scheme is the National Rental Affordability Scheme (NRAS)', to which I now turn.

### **A Prior Similar Example**

Essentially the same concern arose with the akin housing affordability programme under the Rudd Government, the National Rental Affordability Scheme. The description of that Scheme provided by the then Government was as follows: 'It also helps bring much needed affordable rental housing on line for people on low to moderate incomes, targeting key workers and their families, like our police, nurses and teachers.'<sup>2</sup>

In that case the Government was prompted to introduce legislation to clarify that participation in that Scheme would not vitiate the charitable status of community housing providers. Those amendments were made in the *Extension of Charitable Purposes Act 2004* (Cth) (now repealed). They were as follows:

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<sup>1</sup> Australian Charities and Not-for-profits Commission *Commissioner's Interpretation Statement: Provision of Housing by Charities*, version 2, (05 November 2021), [54]

<https://www.acnc.gov.au/tools/guidance/commissioners-interpretation-statements/commissioners-interpretation-statement-provision-housing-charities>

<sup>2</sup> The Hon Tanya Plibersek MP 'Government Launches Third Round Of National Rental Affordability Scheme' (12 October 2009) [https://formerministers.dss.gov.au/2030/nras\\_third\\_round\\_12oct09/](https://formerministers.dss.gov.au/2030/nras_third_round_12oct09/)

#### **4A Provision of a rental dwelling under National Rental Affordability Scheme is a charitable purpose**

- (1) Without limiting what constitutes a charitable purpose, **charitable purpose** includes the provision of a rental dwelling if:
- (a) the rental dwelling is provided by an entity that is:
    - (i) endorsed as exempt from income tax by the Commissioner of Taxation under section 50-105 of the *Income Tax Assessment Act 1997*; and
    - (ii) an approved participant in the National Rental Affordability Scheme; and
  - (b) either:
    - (i) an allocation in relation to the rental dwelling has been made to the approved participant by the Secretary that specifies a date in the first 2 NRAS years from which the allocation will operate or is taken to have operated; or
    - (ii) an allocation in relation to the rental dwelling has been reserved and it is genuinely intended by the approved participant that the conditions on which the allocation has been reserved will be fulfilled in the first 2 NRAS years.
- (2) To avoid doubt, the provision of the rental dwelling by the entity has effect as a charitable purpose only during the incentive period for the allocation.
- (3) This section applies:
- (a) for the purposes of a provision of a taxation law or any instrument made, granted or issued under a taxation law; and
  - (b) for the purpose of determining whether an entity that has been endorsed as exempt from income tax by the Commissioner of Taxation under section 50-105 of the *Income Tax Assessment Act 1997*, remains, for the purposes of a provision of a taxation law or any instrument made, granted or issued under a taxation law, entitled to be so endorsed.

Further amendments to the *Extension of Charitable Purposes Act 2004* to cover latter rounds in the NRAS were not introduced because the then Government took the view that housing providers could rely upon the decision in *Commissioner of Taxation of the Commonwealth v Word Investments Ltd*.<sup>3</sup> However, that view fails to take into account the subsequent position of the ACNC, to which I now turn.

#### **ACNC Commissioner's Interpretation Statement on Housing**

The Australian Charities and Not-for-profits Commissioner sets out her view on when a charity may supply housing in the Commissioner's Interpretation Statement on Housing available [here](#). Unlike the equivalent guidance issued by the Charity Commission of England and Wales, the CIS on Housing makes no comment on whether the provision of housing to key workers is charitable.

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<sup>3</sup> *Commissioner of Taxation of the Commonwealth v Word Investments Ltd* (2008) 236 CLR 204 ('*Word Investments*').

Some have thought that the provision of housing to key workers may be pursued in reliance upon the 'Ontario measure' ('the 30/40 rule').<sup>4</sup> The ACNC's Commissioner's Statement on Housing states:

The Commissioner recognises that in Australia, the 30/40 rule is often used as a benchmark for whether a household is experiencing "housing stress". The 30/40 rule refers to households with income in the bottom 40% of Australia's income distribution and housing costs of more than 30% of the household income. Households that meet the 30/40 rule have less income available for other essential costs and are less able to maintain a modest standard of living in Australia. Some housing providers discount costs for households that meet the 30/40 rule to ensure the housing costs do not exceed 30% of the household income. The Commissioner recognises that such discounting is likely to be consistent with a charitable purpose of providing housing for the relief of poverty and not unjustified private benefit. This is assuming that the households are unable to provide a modest standard of living in the Australian community.

The problem is that many key workers do not meet the 40% side of the Ontario measure. The ACNC considers that 40% rule is to be determined according to 'Australia's income distribution', being the national, not local, standard. The average Australian wage is \$68,900. By way of example, the average teacher salary in Australia is \$84,866 per year. Entry-level positions start at \$74,301 per year. Ambulance drivers earn \$67,847. In New South Wales a probationary constable receives \$80,733. Entry level registered nurses start at \$77,154. These won't meet the 40% rule.

If these tenants are not eligible for charitable relief, the receipt of reduced rent will give rise to a concern that a purpose of conferring a private benefit may have arisen for a charity. As the ACNC CIS on Housing makes plain:

If an organisation provides housing to people who are not in need of charitable relief, the evidence will need to demonstrate that this is merely a fundraising activity and does not amount to an independent non-charitable purpose.<sup>5</sup>

The existence of a non-charitable purpose will, notwithstanding the existence of other charitable purposes, lead to the loss of charity status and its associated tax exemptions and endorsements.

Furthermore, the provision of 'housing to people who are not in need of charitable relief' for a *reduced rent* (noting the HAFF contemplates the provision of reduced rental accommodation) may also separately evidence a purpose of conferring a private benefit, which would itself also lead to the loss of charity status. The CIS on Housing acknowledges this when it states (in another context): 'Providing housing through a home ownership scheme rather than rental assistance or access to other forms of accommodation may lead to beneficiaries receiving a private benefit that is not ancillary or not incidental to a charitable purpose.'<sup>6</sup> The same issue arises when a person who is not in need of charitable relief (i.e. a key worker who does not meet the Ontario measure

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<sup>4</sup> Senate Select Committee on Housing Affordability in Australia *A Good House is Hard to Find: Housing Affordability in Australia, Final Report* (16 June 2008) [3.16].

<sup>5</sup> ACNC (n 1) [52].

<sup>6</sup> *Ibid* [42].

and who does not meet another charitable purpose) receives a reduced rent. The difference between market rent and the rent that the non-charitable beneficiary pays amounts to a private benefit conferred upon that person.

The dual questions of when an independent non-charitable purpose has arisen, and when conferrals of private benefit can be of such a degree as to evidence the existence of a non-charitable purpose are both to be answered according to the common law of charities. Whether a purpose is a main purpose or is ancillary or incidental is a question of degree, turning on the individual circumstances of each entity the subject of the enquiry, leading one commentator to conclude that the courts' approach is 'hardly exact'<sup>7</sup> and 'as with all matters of degree, a principle capable of certain application has appeared elusive.'<sup>8</sup> Nevertheless, I have enclosed a prior conference paper that offers an attempt at illustrating the nature of the test through an analysis of the case law. It will be clear from that analysis that the common law does not offer a bright line by which the conscientious directors of housing charities may seek to acquit their duty to act in good faith in the entity's best interests and to further its purposes (as required by the *Australian Charities and Not-for-profits Commission Act 2012* (Cth)). However, in the absence of any further clarification, it is according to that law by which a housing provider will stake its charity endorsements when participating in the key worker component of the Housing Australia Future Fund.

Importantly, notwithstanding the prior Rudd Government's reliance upon *Word Investments*, the disqualifying effect of an independent non-charitable purpose, or a non-charitable purpose of conferring a private benefit on non-charitable beneficiaries, is not cured by that judgement. The evidence in that matter did not give rise to a question of conferral of private benefit, as all the commercial arrangements entered into by the entity were on commercial terms. All the activities were properly engaged in for the purpose of giving rise to a surplus to be applied to charitable purposes. No question of private benefit arose as there was no evidence of transactions entered into at non-market rates for the benefit of persons not eligible for charitable relief. Similarly, there was no evidence of a purpose of conferring benefits upon persons not eligible for charitable relief.

The disqualifying effect of an independent non-charitable purpose, or a non-charitable purpose of conferring a private benefit on non-charitable beneficiaries, is also not cured by the following comment in the ACNC's CIS on Housing:

Another scenario is where a housing provider offers rental accommodation at two price points - one level at lower cost and the second at a higher cost. The lower cost accommodation may be more easily identified as being for the relief of poverty provided the individuals meet the requirements outlined in paragraphs 11-20. If the higher cost accommodation is to be provided for the purpose of relieving poverty, the individuals concerned must either be in need of relief from poverty (in which case the rent may be discounted if appropriate) or the rental arrangement must be structured to fund its

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<sup>7</sup> Gino Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2nd edition, 2010) [13.15].

<sup>8</sup> *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue* [1992] 1 NZLR 570, 577-83 (Tipping J).

charitable purpose. If the latter is asserted, the charity must be able to demonstrate a clear intention to generate funds that can be applied to the core charitable purpose.<sup>9</sup>

That statement does not engage with the law concerning independent non-charitable purposes and the law concerning a purpose of conferring private benefit. Moreover, the ACNC does not provide any legal authority in support of the claim. With respect, it is not clear that it is correct. I am not aware of any authority that would support the claim. Rather, what the law makes clear is that the provision of housing to persons not in need of charitable relief may evidence a non-charitable purpose, as may the provision of private benefit through reduced rents to such persons. If it is that reasoning on which the HAFF relies in protecting housing charities against the loss of charitable status, we are in unsupported legal territory. This is not a firm foundation for such a substantial governmental scheme.

Separately, it might be argued that the provision of housing to individuals who are engaged in the advancement of one or more of the charitable purposes in section 12(1)(a) to (j) or are providing an essential service to the benefit of the public, may also qualify as a charitable purpose analogous to the charitable purposes in section 12(1)(a) to (j) where there is a shortage of workers available to provide the services which may be overcome by the provision of affordable housing for key workers in the area.<sup>10</sup> So conceived, key workers might include public sector employees, voluntary sector personnel or other employees that are engaged in the advancing of charitable purposes. In that case, the charitable purpose is that advanced by having the worker engaged in the task, rather than the provision of housing to a person who is not otherwise in charitable need. However, there is no certainty that such activity would be in furtherance of a charitable purpose. It may well be an undertaking that is too remote from the achievement of a charitable purpose to satisfy the requirements of the *Charities Act 2013*.<sup>11</sup>

The central issue I am concerned about is that the community housing sector is being invited into a government scheme unwittingly assuming that the government has already ensured that they can do so while maintaining compliance with the requirements of charity law. The current state of the Australian law of charities, including as interpreted by the ACNC in its CIS on Housing, does not provide sufficient certainty that that compliance can be maintained. This concern is only heightened by the scale of the proposed investment in key worker housing and the likely significant engagement of the community housing section in that investment.

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<sup>9</sup> ACNC (n 1) [46].

<sup>10</sup> His Majesty's Revenue and Customs, the Charity Commission of England and Wales and the Homes and Communities Agency, *Affordable Home Ownership: Charitable Status and Tax* (May 2009) <http://www.charitycommission.gov.uk/detailed-guidance/specialist-guidance/charities-providing-housing/affordable-home-ownership-charitable-status-and-tax/> ('Joint Guidance'). See also the Preamble to the *Statute of Elizabeth 1601*, which refers to 'supportation, aid and help of young tradesmen, handicraftsmen'.

<sup>11</sup> See, for example, Australian Charities and Not-for-Profits Commission, 'Decision Impact Statements', *ACNC Decision Impact Statement: Global Citizen Ltd* (Web Page) [15]-[16].  
<<https://www.acnc.gov.au/tools/guidance/decision-impact-statements/acnc-decision-impact-statement-global-citizen-ltd>>.

The consequences for a charity that participates in non-charitable endeavours can be disastrous, leading to the loss of tax exemption and associated concessions, reputational damage and (in the context of housing schemes such as the HAFF) exposure to investors and financiers. Many housing charities rely upon the GST-free concession at section 38-250 of the *A New Tax System (Goods and Services Tax) Act 1999* in order to maximise their participation in government schemes. That exception can only be utilised by registered charities. Large-scale development undertakings by charities rely upon the concession for their financial viability. Loss of the concession mid-stream can be detrimental to that viability. Loss of charity endorsement can also affect pre-existing property portfolios where participation in the HAFF is undertaken in existing charitable vehicles (as opposed to special purpose vehicles). As noted in the introductory remarks to this submission, and as the CIS on Housing warns: '[t]he fact that a government has created a housing scheme does not necessarily mean that providing housing under the scheme is charitable under the Charities Act.'<sup>12</sup>

### **Joint Guidance: Affordable Home Ownership**

In 2009, His Majesty's Revenue and Customs, the Charity Commission of England and Wales and the Homes and Communities Agency released the *Joint Guidance: Affordable Home Ownership: Charitable Status and Tax* ('Joint Guidance'). It aims to provide guidance on when charities may provide options for purchase of affordable housing to persons in charitable need. The Joint Guidance provides that:

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. In the respective examples, the charitable services provided are advancing education and promoting health<sup>13</sup>

The Joint Guidance goes on to state:

Some charitable RSLs provide LCHO to key workers. The charitable purpose is that furthered by having the key worker in post; for example, the advancement of education if the key worker is a teacher, or the promotion of health if they are a health worker. So the key workers themselves are not necessarily charitable beneficiaries.

However, it is only reasonable for a charity to provide assistance to such workers if:

- there is a need for the charitable service that the key worker will provide; and
- there is a shortage of such workers due to difficulties in recruiting and retaining key workers; and
- those difficulties can be overcome by enabling suitable people to afford appropriate accommodation in the area.<sup>14</sup>

These are statements pertaining to the law of charities as applies in England and Wales. Although Australian charity law originates from English common law, these statements are not statements

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<sup>12</sup> ACNC (n 1) [54].

<sup>13</sup> Joint Guidance (n 10) [B3].

<sup>14</sup> Ibid [C2.4].

of Australian law. Comparatively, the ACNC's equivalent guidance (the CIS on Housing) is noticeably silent on the issue of key workers. It does not offer the same clarification.

It may be helpful to draw your attention to following definition of key workers, accepted by the UK Charity Commission:

The Commission accepts that it may be charitable for trusts to provide accommodation for key workers, and has also agreed the following model definition of 'key workers':

'those persons (and their dependants living with them) who have need of such accommodation by virtue of:

- (i) their employment in the public or voluntary sectors or in a relevant employment in the locality in such manner or capacity as to 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 in particular (but without prejudice to the generality of the foregoing) 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; and
- (ii) the fact that they could not afford from resources available to them to secure such accommodation on normal commercial terms; and

for the purposes of this object:

'public sector' means any department of central or local government or health or other statutory authority;

'voluntary sector' means charities and voluntary organisations;

'charities' means organisations which are established for exclusively charitable purposes in accordance with the law of England and Wales;

'voluntary organisations' means independent organisations which are established for purposes that add value to the community as a whole, or to a significant section of the community, and which are not permitted by their constitution to make a profit for private distribution. Voluntary organisations do not include local government or other statutory authorities;

‘relevant employment’ means employment by an employer which though not in the public or voluntary sector, is engaged in the provision of services equivalent to those referred to in sub clause (i) above.<sup>15</sup>

### **Conclusion**

This submission has set out concerns that should be anticipated and addressed in the legislation establishing the HAFF. In its prior report on the Housing Australia Future Fund Bill the Committee acknowledged this concern, but made no recommendations to address it, albeit the concern was put with greater brevity in my prior submission. It may be that an amendment similar to that made to the *Extension of Charitable Purposes 2004 (Cth)* with necessary alterations *mutatis mutandis* is required. Finally, I encourage you to consult with the ACNC and to seek its views as to whether further clarification is required. If the Government seeks to encourage charities to participate in the HAFF by providing housing to key workers, it should offer greater certainty to charities that their charitable endorsements will not be vitiated as a result.

Yours faithfully  
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<sup>15</sup> Joint Guidance (n 10) [C2.5].