

21 September 2021

[REDACTED]

Via email: [REDACTED]

Our reference: ACNC SUB2021/10

ACNC submission – Social Housing Regulation Review (Victoria)

1. The Australian Charities and Not-for-profits Commission (**ACNC**) welcomes the opportunity to provide input to the Victorian Government's Social Housing Regulation Review (**the review**). We understand that the review has a broad objective of assessing what regulatory framework is most appropriate for the future needs of social housing in Victoria.
2. Consultation Paper 3 states that:

"In Victoria, only non profit housing organisations registered as charities with the ACNC can be registered (as housing providers). The regulatory framework has been designed specifically to regulate the non profit sector and relies on other supporting mechanisms such as charities regulation".¹
3. This submission will outline the Commissioner's interpretation of the law, as it relates to the circumstances in which housing providers can be registered charities, and the sorts of activities housing providers can engage in without jeopardising their entitlement to charity registration.
4. This interpretation is framed by the legislation which the ACNC administers, particularly the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (**ACNC Act**) and the *Charities Act 2013* (Cth), as well as common law.

About the ACNC and the charity sector

5. The ACNC is the national regulator of charities. The ACNC does not regulate not-for-profit entities that are not registered charities. The objects of the ACNC Act are to:
 - a. maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector; and
 - b. support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and
 - c. promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.

¹ Part 4.2.3 Consultation Paper 3.



6. The ACNC maintains a Charity Register. There are currently around 59,000 registered charities in Australia. We note that all ten housing associations and all 30 housing providers currently registered with the Housing Registrar are registered charities (for the purposes of this submission, we will collectively refer to these charities as **providers**).
7. Registered charities must comply with the Governance Standards contained in the *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) (**ACNC Regulation**). They must also comply with the External Conduct Standards, also contained in the ACNC Regulation, if they operate overseas. All charities must submit an Annual Information Statement to the ACNC, which includes some financial information and details of a charity's activities and beneficiaries. Medium and large charities (those with revenue exceeding \$250,000²) must also submit a financial report.³ Various regulatory options are available to the Commissioner if charities do not meet these conditions, including revocation of their registration.

Requirements for charity registration

8. To be entitled to registration as a charity, an entity must:
 - a. be a not-for-profit entity;
 - b. only have purposes which are charitable purposes, and which are for the public benefit,⁴ or purposes which are incidental or ancillary to, and in furtherance of, a charitable purpose;⁵
 - c. be compliant with the Governance Standards and External Conduct Standards; and
 - d. not be an individual, political party, or government entity.⁶
9. A charity may be registered with one or more of the 14 charitable subtypes that are listed in the ACNC Act.⁷ To be entitled to registration as a particular subtype, the applicant entity must have the charitable purpose that corresponds with the subtype.

How a provider can be a registered charity

10. The ACNC has issued a Commissioner's Interpretation Statement (**CIS**),⁸ which sets out the circumstances in which a housing provider may be entitled to registration as a charity. A CIS provides guidance and clarity to ACNC staff, the sector, and the public about the Commissioner's

² The Commonwealth Government has announced that from 1 July 2022, reporting against the 2021-22 financial year, this threshold will be raised from \$250,000 to \$500,000: <https://ministers.treasury.gov.au/ministers/michael-sukkar-2019/media-releases/cutting-red-tape-charities>.

³ Basic Religious Charities, which are defined to include most charities that are not corporations and which have a sole purpose of advancing religion, do not need to submit financial information or demonstrate compliance with the Governance Standards. We are not aware of any housing providers that are Basic Religious Charities.

⁴ The Charities Act provides that some charitable purposes can be presumed to be for the public benefit (Section 7).

⁵ A charity also cannot have any 'disqualifying purposes' which are defined in s. 11 of the Charities Act.

⁶ Subsection 5(d) of the Charities Act.

⁷ Subsection 25-5(5) of the ACNC Act.

⁸ Commissioner's Interpretation Statement: Provision of Housing by Charities

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



current understanding of a specific aspect of charity law. These statements are considered binding on ACNC staff. They are reviewed from time to time, and revised in consultation with key stakeholders, including when there has been a relevant legislative change. We have recently consulted with the sector on revisions to the CIS and anticipate releasing the updated CIS shortly.

Distribution of assets

11. A charity must apply any remaining assets towards charitable purposes similar to its own if it winds up. If there is a requirement in legislation, the entity's governing document, or elsewhere, for the assets to be distributed in another way then the entity is not a not-for-profit and it would not be entitled to charity registration. This may be a relevant consideration for providers.
12. Most of the providers registered with the Housing Registrar are charities registered with the subtype of advancing social or public welfare and/or as a Public Benevolent Institution (**PBI**). However, depending on the nature of the entity's operations, housing providers may be eligible for registration under a different subtype (for example, advancing health, if housing is provided to facilitate recovery from illness). It is necessary to discuss the advancing social or public welfare and PBI subtypes in more detail, as changes to the providers' operations could affect their entitlement to these subtypes:
13. **Advancing social or public welfare (relieving poverty).** This subtype includes the purpose of "relieving the poverty, distress or disadvantage of individuals or families".⁹ The Commissioner takes the view, based on the common law, that 'poverty', in this context, is not limited to absolute destitution, and refers to where a person has insufficient resources to provide a modest standard of living. Therefore, assuming it meets the other conditions of registration, a provider is likely to be entitled to charity registration if it provides housing to people who cannot secure private housing from their own resources, without forgoing a basic level of comfort.
14. **Public Benevolent Institution.** Factors relevant to entitlement to registration as a Public Benevolent Institution are set out in our CIS on PBIs.¹⁰ Essentially, a PBI must be organised, promoted or conducted for the relief of people who are in need because of poverty, distress, sickness, disability, destitution, suffering, misfortune or helplessness. Therefore, a housing provider may be a PBI if it provides accommodation to people facing a significant hardship (including destitution) that is beyond the sort of experience a person in Australia could reasonably expect to face. If a charity does not provide accommodation in these circumstances, it may not be entitled to be registered as a PBI. However, an entity may still be a charity even if it is no longer eligible to be a PBI.

⁹ Subsection 15(1) of the Charities Act, and as explained in the Commissioner's Interpretation Statement: Provision of Housing by Charities.

¹⁰ Commissioner's Interpretation Statements (<https://www.acnc.gov.au/tools/guidance/commissioners-interpretation-statements/public-benevolent-institutions>).



Providers engaging in non-charitable or commercial activities

15. We acknowledge that providers may engage in commercial ventures that enhance their viability and promote growth in the sector, for example: the use of special vehicle trusts and public/private partnerships; and engaging in projects aimed at delivering affordable housing. We understand that affordable housing means the provision of housing, for rent or via equity, to individuals and families with low to moderate incomes, some of whom may not meet the definitions of 'poverty' that are used in charity law. The provision of housing to some moderate-income earners, in particular, may not be considered to be provision of housing for the relief of poverty. Whether a charity's commercial activities are incompatible with its ongoing charity registration will depend on the circumstances, including the extent of the commercial activities and whether they enable to charity to pursue its charitable purpose.
16. Registered charities frequently engage in commercial activities, including partnering with for-profit entities to deliver a certain outcome. Charities must make their own operational decisions about what is in the best interests of the charity. Among the matters a provider would need to bear in mind before deciding whether to embark on a commercial activity, are:
 - a. **Purpose:** a charity can engage in commercial activities to raise funds for a charitable purpose. It may only engage in commercial activities for a non-charitable purpose if that purpose is incidental or ancillary to, and furthers, its charitable purposes.
 - b. **Not-for-profit:** A provider must consider how the proceeds of any commercial activity will be used. A charity's employees and contractors may be fairly remunerated, but a charity should not set out to generate private wealth for individuals through its activities, and any returns on investment that a provider receives must be applied or held to be later applied to its charitable purposes. While a commercial partner may be motivated by profit, its profits must be proportionate to its investment – in other words, it should not profit at the expense of a charity partner.
 - c. **Governance Standards:** registered charities must take reasonable steps to ensure, among other things, that their responsible persons: act in good faith in the charity's best interests;¹¹ ensure that the charity's finances are managed responsibly;¹² and disclose material conflicts of interests.¹³ For example, the Governance Standards will be a relevant consideration if a charity chooses to engage with a related party on a commercial venture.

Maintaining charity registration

17. We understand that the Housing Registrar may wish to rely on the ACNC Charity Register as evidence of a provider's charity status. The integrity of the ACNC Charity Register is important to

¹¹ Governance Standard 5(2)(b) (Subsection 45.24(2)(b) of the ACNC Regulation).

¹² Governance Standard 5(2)(f) (Subsection 45.24(2)(f) of the ACNC Regulation).

¹³ Governance Standard 5(2)(g) (Subsection 45.24(2)(g) of the ACNC Regulation).



us – maintaining it aligns with the ACNC Act’s objective of maintaining, protecting, and enhancing public trust and confidence in the Australian not-for-profit sector.¹⁴

18. We register an entity when the Commissioner is satisfied that it meets the requirements for charity registration set out above. We receive concerns about potential non-compliance by charities from a range of sources, including the public and other agencies, and we will investigate those concerns when appropriate. If a registered charity is not meeting its ongoing governance or reporting obligations, or if we have another reason to believe that it is no longer entitled to registration, the Commissioner may take regulatory action, including revocation of charity registration. When we revoke a charity’s registration, we will typically inform the public that we have made that decision on our website. We may directly inform other agencies if those agencies may also need to take action because of the entity’s changed status, although our secrecy provisions prevent us from routinely disclosing the reasons for our decision.

Reducing the regulatory burden for charities

19. As explained in Consultation Paper 3:

“Non profit providers of diverse health and community services can face a very high cumulative regulatory burden due to the need to comply with an array of accreditation, standards and program reporting requirements”¹⁵

20. While the ACNC is eager to reduce the regulatory burden for charities as much as possible,¹⁶ this must be balanced with a reasonable degree of transparency and accountability. The ACNC Act and ACNC Regulation set out minimum reporting requirements for registered charities.
21. Registered charities are required to report annually to the ACNC by submitting an Annual Information Statement and financial reports (noting that small charities do not need to submit financial reports). This information is published on the ACNC Charity Register.
22. Where a provider is a registered charity, it may be open to the Housing Registrar to rely on a provider’s reporting to us as evidence of its performance.
23. The ACNC has successfully worked with regulators across Australia to reduce [unnecessary regulatory burden on charities](#). For example, the ACNC has implemented an arrangement with Consumer Affairs Victoria (CAV) where we collect information on behalf of CAV in our Annual Information Statement.
24. Additionally, the ACNC has established the ‘[Charity Passport](#)’ for government agencies. The Charity Passport allows agencies to access ACNC data in a spreadsheet format.

¹⁴ Subsection 15-5(1)(a) of the ACNC Act.

¹⁵ Part 5.2, Consultation Paper 3

¹⁶ Subsection 15-5(2)(1)(c) of the ACNC Act.



25. The ACNC can provide the Housing Registrar with access to the Charity Passport. We can also work with the Housing Registrar on other issues to minimise the regulatory burden on providers that are registered charities. Likewise, transparency of any reporting the Housing Registrar receives about a provider's operations could assist in our assessment of whether a charity is complying with the Governance Standards (for example, whether a provider is complying with state-based regulations, or is adequately safeguarding the interests of its beneficiaries).

Next steps

26. If you have queries about this submission please contact [REDACTED], Policy Officer, on [REDACTED]
[REDACTED]



[REDACTED]

Commissioner
Australian Charities and Not-for-profits Commission