



Constitutional Wind-up Clause Fact Sheet

Community Housing Regulatory Framework

The purpose of this fact sheet is to assist Community Housing Providers understand the wind-up clause requirements of the Community Housing Regulatory Framework and to raise awareness of its interaction with other legislative requirements applicable to charitable organisations.

However, this fact sheet is not intended to provide or take the place of independent legal and/or tax advice relied on by the Community Housing Provider.

1. Conditions of Registration

As a condition of registration, the Community Housing Regulatory Framework (Framework) Appendix C (b) requires a Community Housing Provider (CHP) to have an appropriately worded wind-up clause in its constitution. Appendix C (b) states:

*“the CHP must have provision in its constitution for all its remaining **Community Housing Assets** on its winding up to be transferred to another **registered CHP** in Western Australia or to the Housing Authority.”*

CHPs are not required to use the exact words provided in Appendix C (b), but must capture the intent of Appendix C (b) in their Constitutions. That is, to ensure Community Housing Assets are protected for their intended purpose and remain in Western Australia upon winding up, and/or, if required, they are returned to the Housing Authority.

Note: The transition of the Housing Authority into the Department of Communities has no material impact on the inclusion of reference to “Housing Authority” in a CHP’s constitution. The Housing Authority is a statutory corporation established under the *Housing Act 1980 (WA)* and continues to be a separate legal entity for the purposes of CHP registration.

2. Definitions

An understanding of the definitions in the Framework that relate to the wind-up clause requirement is key for CHPs to determine if their Constitutions meet the requirements of Appendix C (b). Understanding and using these definitions in the Constitution also assists CHPs clarify their compliance with other legislative requirements they may be subject to.



Community Housing Assets are defined in the Framework as:

- (a) land and/or premises transferred to the CHP by the Housing Authority, but does not include land or land and premises that the Housing Authority sells at market value to the CHP;
- (b) land and/or premises acquired by the CHP wholly or partly with funding provided by the Housing Authority, including but not limited to where such funding is comprised of:
 - i. funding provided directly by the Housing Authority
 - ii. GST input tax credits claimed by the CHP in connection with any supplies which are funded wholly or in part by the Housing Authority;
- (c) a legal interest in land and/or premises acquired by the CHP wholly or partly with funding provided or where the acquisition is facilitated by the Housing Authority;
- (d) land and/or premises acquired by the CHP wholly or in part with borrowings leveraged off or cash flow generated from any assets in the CHP's portfolio in which the Housing Authority has or had an interest;
- (e) land and/or premises where the Housing Authority is identified as having an interest in any legal agreement;
- (f) land and/or premises procured with the proceeds of sale of land and/or premises in which the Housing Authority has previously had an interest; or
- (g) housing constructed by the Housing Authority or improvements made on land and/or premises by the Housing Authority.

Community Housing Provider is defined in the Framework as an organisation that provides community housing.

Registered means a CHP that has successfully achieved registration under the Framework as a Tier 1, 2 or 3 provider.

3. Understanding the requirements

Appendix C (b) only relates to CHP assets that meet the above definition of **Community Housing Assets**. **Community Housing Assets** are not intended to be interpreted as surplus assets.

To ensure these key differences are captured in a CHP's constitution, CHPs must include the following:

- a) A definition of **Community Housing Assets**, **Community Housing Provider** and **Registered** as per the Framework and outlined in section 2 above.
- b) A winding-up clause specifying the distribution of **Community Housing Assets** which complies with the requirements of Appendix C (b) as outlined in section 1 above.
- c) A winding-up clause covering the distribution of surplus assets in accordance with the CHP's legislative obligations.

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4. Related Legislative Requirements

a. Registered Charitable Status under the Australian Charities and Not-for-profits Commission Act 2102 (Cwth)

Charitable status is a key concern for CHPs, and a prerequisite for a CHP having access to certain Commonwealth tax concessions (s20.5(2) *Australian Charities and Not-for-profits Commission Act 2012 (Cwth)* (ACNC Act)).

The Australian Charities and Not-for-profits Commission (ACNC) released the Commissioner's Interpretation Statement: Provision of housing by charities (CIS 2014/02) to provide guidance to charitable housing providers in meeting the requirements of the ACNC Act.

Section 5.3 of CIS 2014/02 states:

^{1.} *"In the event of such a requirement, the Commissioner will treat the charitable housing provider as charitable on condition that the winding up clause in the governing documents makes it explicit that:*

(a) assets required to returned to the government on winding up by state or territory law or contract, will be returned, and

^{2.} *(b) other remaining assets will be distributed to a charity with similar charitable purposes."*

The requirements of Appendix C (b) for the return of Community Housing Assets to the Housing Authority will be satisfied if Community Housing Assets fall within (a) of Section 5.3 of CIS 2014/02.

The requirements of Appendix C (b) for the transfer of Community Housing Assets to another CHP registered in Western Australia will only fall within (b) of Section 5.3 of CIS 2014/02 if that other CHP is a charity with similar charitable purposes.

b. Deductible Gift Recipients under the Income Tax Assessment Act 1997 (Cwth)

CHPs are entitled to be endorsed as deductible gift recipients if they meet the requirements of s30-125(6) of the *Income Tax Assessment Act 1997 (Cwth)* (ITAA) which includes transferring any surpluses to another deductible gift recipient upon winding-up.

Community Housing Assets are not intended to be interpreted as **surplus assets**. The requirements of Appendix C (b) therefore do not preclude CHPs complying with the ITAA provided CHPs comply with all other requirements of the ITAA applicable to entitlement to deductible gift recipient status.

c. Registration under Associations Incorporations Act 2015 (WA)

The *Associations Incorporations Act 2015 (WA)* s24(1) includes specific requirements for the distribution of surplus assets upon the winding-up of an Incorporated Association.

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A “Community Housing Regulatory Framework and Associations Incorporations Act Guidance Note” has been published by the Department of Communities - Housing and the Department of Mines, Industry Regulatory and Safety – Consumer Protection to assist CHPs in meeting the requirements of the Associations Incorporations Act and the Framework. This guidance note can be found at:

https://www.housing.wa.gov.au/investorsandpartners/communityhousingorganisations/Regulation/Pages/related_information_and_documents.aspx

5. For more information

Community Housing Regulatory Framework

For more information on the requirements of Framework, please visit the Housing Authority website at: [Housing investors and partners - Community Housing Organisations \(www.wa.gov.au\)](http://www.wa.gov.au) or contact the Community Housing Registration Office via e-mail registrar@communities.wa.gov.au.

Associations Incorporation Act 2015

For more information regarding the requirements of the Associations Incorporations Act, please visit the Associations Branch website at www.dmirs.wa.gov.au/associations or contact their offices on telephone number 1300 30 40 74 or by e-mail consumer@dmirs.wa.gov.au.

Australian Charities and Not-for-profits Commission Act 2012

For more information on Registered Charitable Status and the requirements of the *Australian Charities and Not-for-profits Commission Act 2012*, please visit the Australian Charities and Not-for-profits Commission (ACNC) website at www.acnc.gov.au or contact the ACNC by telephone on 13 22 62 or e-mail advice@acnc.gov.au.

Income Tax Assessment Act 1997

For more information on Deductible Gift Recipient Status under the *Income Tax Assessment Act 1997* please visit the Australian Taxation Office (ATO) website at www.ato.gov.au/Non-profit.

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