

# The Australian Community Land Trust Manual

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# Abbreviations

ABN	Australian Business Number
ACNC	Australian Charities and Not for Profit Commission
AMI	Area Median Income
ATO	Australian Taxation Office
CCU	Co-operative Capital Unit
CGT	Capital Gains Tax
CLG	Company Limited by Guarantee
CLT	Community Land Trust
CPI	Consumer Price Index
DGR	Deductible Gift Recipient
NRAS	National Rental Affordability Scheme
PBI	Public Benevolent Institution
TCC	Tax Concession Charity
UK	United Kingdom
US	United States of America
UWS	University of Western Sydney

# Terminology

To provide clarity and consistency, this Manual adopts the following terms. All terms are capitalised in the Manual where these definitions apply.

<b>Agreement</b>	The contractual agreement that the Resident and CLT enter into, whether it is a long-term lease or a co-ownership deed.
<b>Interest</b>	The resident's equitable interest as lessee or co-owner in the home.
<b>Premium</b>	The upfront price that the Resident pays to secure their occupancy of the CLT home.
<b>Resale or Reversion</b>	The termination of the Agreement by the Resident and the return of the Resident's Interest to the CLT – i.e., the Resident selling their CLT home.
<b>Resident</b>	The occupant of the CLT home who enters into an Agreement with the CLT.  In the leasehold model, this individual is a lessee.  In the modified shared equity model, this individual is a co-owner.



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# Part I - Introduction



# 1 Overview of the Manual

Louise Crabtree

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## 1.1 The aim of the Manual

A community land trust (CLT) is an organisation that provides ongoing affordable housing and other community benefits, usually set up as a private non-profit community organisation. That definition places CLTs in the broader family of community housing providers. What makes them unique is their focus on community involvement in or ownership of the organisation, and their focus on balancing the rights of the household with the rights of the broader community or society. This is often referred to as unpacking the bundle of rights that are tied up in housing tenure; in doing so, CLTs aim to ensure that neither the household nor wider society benefits at the expense of the other. CLTs provide a range of affordable housing that includes resale-restricted home ownership, rental housing and housing cooperatives, as well as other commercial and/or community spaces. A more detailed description of CLTs is provided in part 2.1.

This Manual (first edition, 2013) represents Phase 1 of a broader project to develop comprehensive tools for prospective CLTs. Phase 2 will focus on detailed case studies and financial instruments, and will create material to be incorporated into later editions of the Manual.

The aim of this Manual is to provide the emerging community land trust (CLT) sector in Australia with useable resources to address the operational, legal and financial issues and decisions facing potential CLTs in Australia. It is intended that the Manual will continue to evolve as new information, knowledge and issues come to light. The Manual has aimed to be risk-averse while comprehensive in its coverage and address issues for all Australian jurisdictions.

The material provided is intended to be understood by lay readers while also useable by legal practitioners assisting the formation and operation of CLTs. The legal documents found in the Appendices—Constitution, 99 Year Lease and Co-ownership Deed—are intended as samples to be modified if needed by legal practitioners assisting CLTs in line with individual CLTs' objectives. All material should be understood to not constitute formal legal advice on the part of the University of Western Sydney (UWS) or its partners. The aim has been to provide a starting point for CLTs and their lawyers, not prescriptive models or iron-clad documents.

## 1.2 The creation of the Manual

This Manual is the result of several years of research and advocacy on the part of the nascent Australian CLT sector, including practitioners and researchers. The Manual was drafted by researchers at UWS, with specialist legal input from Derek Mortimer of DF Mortimer and Associates and Maddocks, under the guidance of a multi-party Steering Committee comprised of a forming CLT, community housing providers, local government and state government representatives from across three states. The Committee provided extensive guidance and feedback to the drafting process.

The UWS team consisted of CLT researcher Dr Louise Crabtree, housing economist and planner Professor Peter Phibbs, property law expert Professor Carolyn Sappideen, and housing and policy researcher Dr Hazel Blunden. Dr Crabtree was the project leader and coordinator. The UWS team also organised two legal roundtables on CLTs hosted by McCullough Roberts and King and Wood Mallesons over 2011 and 2012, which informed the final material in the Manual. The model documents provided in the Appendices were subject to review by legal practitioners who are listed in the Acknowledgements.

## 1.3 The process – the CLT Classic and Australian law

The Manual was conceived with the intention of identifying the viability of the ‘CLT Classic’ in Australia – that is, the widely-known United States (US) model in which a CLT holds title to land in perpetuity and conveys title to any improvements (buildings, etc.) on that land to the resident, who then owns the improvements via a Deed of Warrant. This was taken as the starting point for the Manual, as it is the most commonly known form of CLT.

The ‘CLT Classic’ has been found to currently not be possible under Australian law, due to the absence of a central registration system for such Deeds. This means it is currently not possible to separate title to buildings from title to land under Australian law. The legal impediment to the CLT Classic might be a rallying point for CLTs in years to come – models like residential villages, which have a separation of title to land and housing similar to the ‘CLT Classic’, have been possible due to specific legislation drawn up to allow this.

In light of the current challenges to the ‘CLT Classic’, the project team examined long term leases under Australian law and found that for the Australian Capital Territory, the Northern Territory, Queensland, South

Australia and Western Australia, long-term leaseholds to land and housing would be caught by residential tenancies legislation and that in those jurisdictions, the legislation is not appropriate for CLT aims and activities. However, in New South Wales, Victoria and Tasmania, it is possible to get an exemption from residential tenancies legislation. Exemptions to residential tenancies legislation are discussed in Chapter 7 and provided in detail in Appendix 8.

*The CLT Classic is not currently possible under Australian law – our law says that ‘fixtures’ (buildings) are part of the land.*

Residential tenancies legislation has been drawn up in the context of providing short-term rentals with tenants having no equity stake in the premises. It is primarily consumer protection legislation, to protect tenants from predatory landlordism, so this legislation does not naturally sit well with core CLT home ownership objectives such as charging up-front Premiums, making Residents pay local government rates, or allowing Residents to make repairs. Indeed, mandating such activities might expose CLTs to penalty as discussed in Chapter 7.

Consequently, the project team in consultation with the Steering Committee settled on two main models to be provided in this Manual – a long-term leasehold that is exempted from residential tenancies legislation and a modified shared equity model based on existing shared equity products currently used in some states. These are discussed in Chapters 7 and 8 respectively and model documents for these are provided as Appendices 5 and 6 respectively.

## 1.4 The structure of the Manual

The Manual has four Parts: Part I Introduction; Part II Starting a CLT; Part III Legal Considerations; and Part IV Financial Issues. The Parts are followed by the References and Appendices, which include the legal document templates and their commentaries.

### 1.4.1. Part I – Introduction

Part I consists of this Manual outline (Chapter 1) and Chapter 2 – an overview of CLTs as developed overseas, outlining their core features and operational objectives. The overview of CLTs also highlights their potential relevance in Australia and discusses the current state of the Australian sector.

### **1.4.2. Part II – Starting a CLT**

Part II consists of Chapter 3 – Initial Choices, which discusses: the main decisions CLT practitioners will have to make in establishing the business case and core activities of a proposed CLT; getting organised; identifying the CLT's operational area; the pros and cons of large-scale CLTs; possible CLT partners; and, launching your CLT.

### **1.4.3. Part III – Legal Considerations**

Part III consists of seven chapters (chapters 4 through 9). Chapter 4 – Legal Issues of Ownership discusses concepts of property and highlights the aspects of tenure that CLTs are aiming to embody. It also provides an overview of the various legal mechanisms used by CLTs overseas and their relevance here, and provides an overview of the mechanisms currently available to articulate CLT objectives in Australia. A core finding is that the 'CLT Classic', in which the CLT holds title to the land and the resident holds title to the building/s on that land, is not currently possible under Australian law. Chapter 5 – CLT Structures discusses the legal structures that are of relevance to CLT formation and activities in Australia. Chapter 6 – Taxation, discusses the taxation issues CLTs will have to address, including whether or not to attempt charitable status.

Chapter 7 – Leaseholds discusses how CLTs might use long-term leaseholds to deliver their objectives and identification of the jurisdictions where this is possible, as well as critical appraisal of the implications of Residential Tenancies legislation. Chapter 8 – Shared Equity discusses how CLTs might use a modified shared equity model to deliver their objectives. This would be applicable for organisations in jurisdictions where long-term leaseholds cannot escape Residential Tenancies legislation, or for organisations that do not wish to utilise long-term leaseholds.

Chapter 9 – Resale Formulas provides a discussion of the various resale formulas that can be incorporated into a CLT's documents to balance affordability and equity, and the rationale behind these.

### **1.4.4. Part IV – Financial Issues**

Part IV consists of one consolidated chapter (Chapter 10) that deals with several issues. It provides an overview of housing economics and then discusses the major cost and revenue streams for CLTs. This is followed by modelling for urban, suburban, and regional CLTs, different densities, and a discussion of independent versus partnered CLTs. The chapter also deals

with the role of local government in supporting CLTs, environmental performance, mixed income and mixed use developments.

#### **1.4.5. The Appendices**

The Manual has several appendices. These are:

1. Hypothetical CLT household model
2. ACT land rent scheme
3. Selected CLT resources
4. Discussion of CLT Definition for housing legislation
5. Model 99-Year Lease (RTA exempt) and commentary
6. Model shared equity agreement and commentary
7. Model Constitution and commentary
8. Residential Tenancies legislation exemptions per jurisdiction.

## 2 Introduction. An overview of Community Land Trusts overseas and in Australia

Louise Crabtree  
Hazel Blunden

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### 2.1 What are Community Land Trusts?

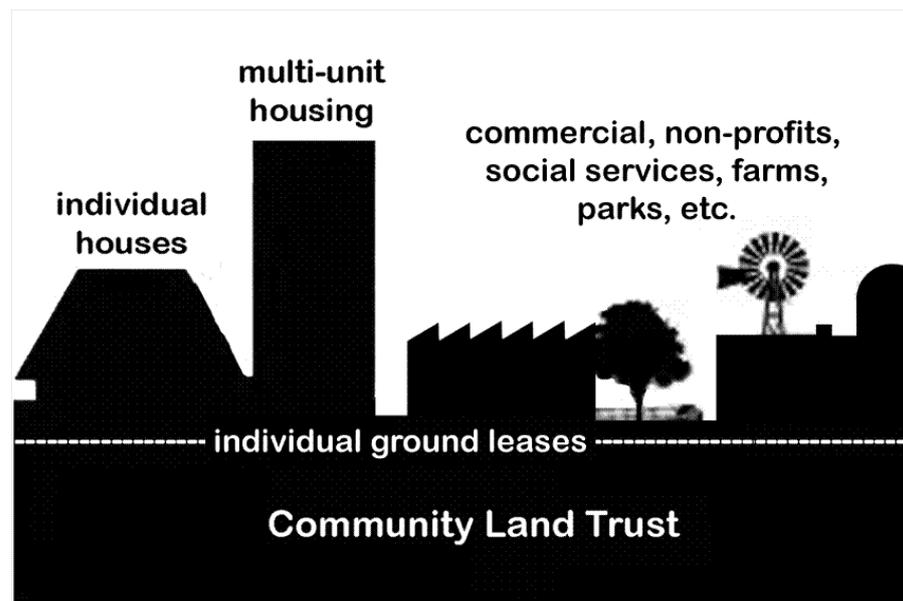
A community land trust (CLT) is an organisation that provides ongoing affordable housing and other community benefits, usually set up as a private non-profit community organisation. That definition places CLTs in the broader family of community housing providers. What makes them unique is their focus on community involvement in or ownership of the organisation, and their focus on balancing the rights of the household with the rights of the broader community or society. This is often referred to as unpacking the bundle of rights that are tied up in housing tenure; in doing so, CLTs aim to ensure that neither the household nor wider society benefits at the expense of the other. CLTs provide a range of affordable housing that includes resale-restricted home ownership, rental housing and housing cooperatives, as well as other commercial and/or community spaces.

In the US, CLTs refer to themselves as “the developers who don’t go away”<sup>1</sup> – meaning they not only provide the housing, but also stand by their residents, helping people remain in their homes despite changes in their life. CLTs are specifically designed to achieve these benefits under legal, financing, pricing and regulatory arrangements that improve affordability for residents, while also protecting the long-term affordability of the housing that is held for future generations. Those CLTs that provide home ownership provide an affordable ownership model for people who are unable to afford conventional home ownership.

In the “classic” CLT model in the US, the CLT achieves this as home owners buy the dwelling only (bricks and mortar) but not the underlying land, which is held by the CLT. Dwelling prices are controlled from excessive capital gain or rent levels through affordability formulas set by each CLT and contained in a ground lease that conveys full land usage rights to the home owner. When the owner sells their home, the resale price is limited, delivering modest equity gains to the seller while locking in the benefit of subsidies or donations to the CLTs for the next buyer.

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<sup>1</sup> Davis (2009) pers. comm.



**Figure 2.1. The 'CLT Classic'.**

Source: author.

While the Classic is perhaps the most well known version of CLTs, the US and UK sectors show great diversity due to the flexibility of the model. While most CLTs in the US separate land ownership from ownership of the home, there are jurisdictions in which that is not legally possible. In those instances, CLTs do not convey the ownership of the house but either keep it all as one leasehold or utilise modified shared equity models. In the UK the land-building separation is not legally possible. CLTs in the UK mainly use shared equity or freehold sale with covenants but do not always maintain the same house in CLT ownership over the long term. Likewise in Australia, the land-building separation is not possible (see Chapter 4), so long-term leasehold (ideally, 99-years) and shared equity of the entire house and land are the two main options.

CLTs range in size, can be rural or urban, and provide a variety of housing types from boarding houses, through apartments, to single-household housing, as well as community or commercial facilities, including workspaces, energy generation, community food spaces, farming and others, according to local need and aspiration. A CLT can provide a range of tenure types, from rental, through cooperative models, to resale-restricted home ownership. A CLT's stock does not have to all be on one parcel of land – most service a core area within a city or town, while some span a region. Nearly all tend to salt and pepper their housing and other developments throughout their service area. CLTs take a variety of legal forms, although in Australia, a Company Limited by Guarantee or a Trading Co-operative appear the most appropriate forms (see Chapter 5). Many CLTs overseas seek charitable status and the equivalent of Deductible Gift Recipient status, as their prime purpose is to provide affordable housing options for a

benevolent purpose. This allows tax concessions and for donors and sponsors to a CLT to receive a tax deduction, but might place constraints on CLT activities (see Chapter 6).

CLTs have widespread potential in Australia to: address affordable housing concerns (especially affordable home ownership concerns); increase the range of housing tenure options available; foster community development and social capital; and, maintain a stock of perpetually affordable housing. Various models of CLTs have succeeded overseas, especially flourishing in the United States of America (US) where there are over 245 CLTs currently in operation. These provide affordable rental housing, cooperative housing and resale-restricted home ownership. More recently, CLTs have been growing in the UK and most recently, are under development in Australia.

### 2.1.1. Why CLTs have significance for Australia

CLT proponents see the model as providing homeowners who live on CLT land with:

- **Security** – that is, a private place to call a home that has continuity;
- **Equity** – meaning whatever value a person has put into their homes through cash or labour is retained; and,
- **A reasonable legacy** – meaning that the property from which one derives security and has created value through equity can be passed from one generation to another.<sup>2</sup>

Currently Australia's housing market offers three primary tenure options: social rental (that is, public and community housing, including rental cooperatives and Indigenous rental housing), private rental housing and private owner-occupied housing. Over 2009-10, these sectors comprised roughly four per cent, 24 per cent and 70 per cent of the housing market respectively<sup>3</sup>. There are alternatives to these, however, that span a range of options often termed 'shared equity'. At their most basic, types of shared equity housing refer to housing tenure forms in which the equity or value of the home is shared amongst more than one party via co-ownership ('tenants in common' in legal parlance). All shared equity schemes aim to make housing more affordable but vary in the mechanisms they use to do this.

Currently in Australia shared equity schemes include Keystart in Western Australia and HomeStart in South Australia, in which the buyer and the government co-own the home. In some schemes, the buyer can buy the government out of their share and achieve total ownership (this is called

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<sup>2</sup> Institute for Community Economics (1982, p232).

<sup>3</sup> National Shelter (2011).

‘staircasing’ in the UK). In other schemes, the government retains a portion of equity in perpetuity.<sup>4</sup> These schemes are successful at making housing affordable to buy, but can struggle to either keep the price down to the next buyer or to keep a permanent stock of affordable homes in high cost areas, because at sale, any capital gain on the resident’s portion goes to the resident without any discount.

CLTs can address this by choosing a resale value that may not be based on market value at time of sale, or that reduces the amount of the resident’s share of any capital gain. In some shared equity schemes, the CLT has the first right to buy the resident’s equity when the resident chooses to sell. CLTs also focus more on resident training and community development than traditional shared equity schemes, due to their community basis and community focus. They also tend to provide more than one tenure option for their residents, so usually offer various forms of rental and co-ownership housing in response to local need and gaps in the market.

*In Australia, CLTs could provide:*

- *Perpetually affordable home ownership*
- *Co-operative housing*
- *Rental housing*
- *Community and commercial spaces*
- *Community input into development*

To think about CLTs in Australia, let’s look at a hypothetical 3-bedroom house in middle suburban Sydney that a young family want to move into. The family’s annual income is \$65,000. This house might be worth \$500,000 (just under the 2012 median house price in Sydney). To rent, this would cost in the order of \$500 per week, or 40 per cent of their gross income. At most, the resident would get a six or 12 month lease, after which they might renew the lease or go into a periodic agreement, in which the landlord can evict the resident with 90 days’ notice with no grounds (i.e. no reason has to be given and no breach of the Agreement has necessarily occurred). To buy, this would require at least five per cent as a deposit, plus mortgage insurance, conveyancing fees, any stamp duty, etc., to a total of roughly

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<sup>4</sup> For example, Keystart in WA offers fixed loans (where WA Housing maintains up to 30 per cent of the equity in perpetuity) or flexible loans (where the buyer can increase their equity share to 100 per cent). This depends on the type and location of the property (Government of Western Australia 2012a).

\$50,000 up-front costs. Assuming the family qualifies for a First Home Owner's Grant of say \$20,000, the family would need to take a mortgage of about \$470,000. The family would have weekly repayments of \$770, or 62 per cent of their gross income, excluding other costs such as rates, house insurance and bills.

A CLT could offer this house for a price determined by discounting the market value, removing the land component from the value, or by other agreed means. Let's say the CLT halves the price of the home, valuing it at \$250,000. If the up-front costs are reduced to \$30,000 due to the smaller deposit required, the family would have a mortgage for \$200,000, with weekly repayments of \$330 after receiving the \$20,000 First Home Owners Grant. This represents 26 per cent of their gross income, which is below the general benchmark for housing stress, which is 30 per cent of gross income.

In return for secure and affordable housing, the family agrees to the terms of the CLT, which stipulates that the seller will gain 25 per cent of the capital gain that has occurred over the intervening years (based on market valuations), plus any amount they have paid off. Let's say the family decides to sell after 20 years as the kids have grown up and moved out. Assuming capital growth of three per cent per annum and income growth of three per cent per annum, after 20 years the home would be worth over \$900,000 on the open market and the median income would be just over \$117,000 per annum. Without a CLT in place, a new buyer would be looking at weekly repayments of roughly \$1,500, representing 67 per cent of gross income. With the equity gain to the seller restricted to 25 per cent, the resale price would be just over \$350,000, presenting mortgage repayments of under \$600 per week for a new buyer, or 26.5 per cent of gross income. Appendix 1 presents modelling for several equity, market and resale scenarios.

While some restrictions apply, CLTs offer more benefits than expensive and frequently unstable rental, and many of the benefits of home ownership, without the hefty price tag. CLT home residents have control of the property, are not told to 'move on' if their circumstances improve, and can leave the home to their inheritors.

### **2.1.2. Core characteristics**

CLTs can provide a mechanism for people who are unable to afford market-based home ownership. In the 'classic' CLT model in some state in the US, home owners can buy the home only (bricks and mortar) and lease the underlying land, which is owned by the CLT. The lease pertaining to the land is usually for a term of 99 years. A rent component (called 'ground rent' in the Classic) is payable to the CLT.

Dwelling prices are controlled from excessive capital gain through affordability formulas set by each CLT and spelled out in a lease that grants the home owner full rights of land use and access, as well as conditions regarding eligibility, inheritance, maintenance and so on. This may be accompanied (in some US jurisdictions) by a Deed of Warrant that conveys ownership of the dwelling to the resident.

When the owner sells their home, the resale price is limited and equity is shared with the CLT, locking in the benefit of subsidies or donations to the CLT while allowing a degree of equity gain to the seller. The home owner can be required to sell their interest back to the CLT, which then can make the property available to another buyer. Many variations exist on the Classic, depending on what is legally and financially appropriate in different jurisdictions<sup>5</sup>. While both the US and UK sectors show immense variability, several key characteristics can be identified. Crabtree et al<sup>6</sup> list the core characteristics of the US CLT classic as:

#### 2.1.2.1. Non-profit, tax-exempt corporation

All CLTs are registered non-profit organisations, chartered in the state in which they are located; since most CLTs focus on renewing derelict areas, providing housing to low-moderate income people, or some other charitable purpose, they are also eligible for a federal tax exemption under the US Internal Revenue Service.

#### 2.1.2.2. Dual ownership

Once the organisation acquires parcels of land throughout a targeted area, to hold in perpetuity, any buildings existing or developed on that land are subsequently sold off to individuals, condominium owners (bodies corporate), community rental housing providers, cooperatives, or other non- or for-profit groups.

#### 2.1.2.3. Leased land

Full usage rights to the land parcels are granted to the buildings' holders via a long-term (usually 99-year) renewable ground lease. A ground lease fee is attached to this lease and paid to the CLT. The fee is set at a level affordable to the target households; usually this is in the order of US\$20-50 per month. Commercial or for-profit lessees may be charged market land rents to assist the cross-subsidisation of housing activities.

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<sup>5</sup> See Crabtree et al (2012a) for an overview of this diversity.

<sup>6</sup> Crabtree et al (2012a, pp 9-10).

#### 2.1.2.4. Perpetual affordability

Each CLT holds an option to repurchase any homeownership properties on its land if an owner chooses to sell. The price is determined by a resale formula contained in the ground lease. Each CLT designs its resale formula so as to try to balance equity returns to the seller with affordability to the buyer. This is intended to maintain the affordability of the stock in perpetuity while enabling a degree of equity gain to the seller.

#### 2.1.2.5. Perpetual responsibility

As CLTs hold stock in perpetuity and hold a repurchase option, the organisations have an ongoing interest in the condition of the properties and the stability of the owners. CLTs establish maintenance responsibilities in their ground leases; typically, the CLTs will do major cyclical maintenance and residents do small and daily maintenance. CLTs also typically are notified by lenders if homeowners fall behind in mortgage payments and have the right to intervene to cure defaults and prevent foreclosures.

#### 2.1.2.6. Open, place-based membership

Each CLT holds land parcels and operates within a geographically determined area. For some CLTs, this area is very small, encompassing a single neighbourhood. In 2006, 70 per cent of CLTs served more than one neighbourhood, focusing on a city, county or multiple counties; 60 per cent of CLTs served urban areas, 31 per cent suburban areas and 52 per cent served rural or small towns<sup>7</sup>. All adults living in that target area—whether residing on CLT land or not—are eligible to become members of the CLT and to serve on its Board.

#### 2.1.2.7. Community control

The Classic CLT Board has two-thirds of its members elected from among residents of the CLT's service area – with one-third drawn from CLT residents, and one-third from non-resident CLT members.

#### 2.1.2.8. Tripartite governance

In addition to the two-thirds mentioned in 2.1.2.7, the last third of a Classic CLT's governing board is drawn from representatives of the public at large, such as local administrators, financiers, other non-profits, local businesses, chambers of commerce, etc. This three-part structure is intended to allow residents, the broader community and the public at large to have an equal

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<sup>7</sup> Sungu-Eryilmaz and Greenstein (2007).

voice in the governance of the organisation and ideally, to prevent any one interest dominating.

#### 2.1.2.9. Expansionist acquisition

CLTs aim to build and expand a mixed portfolio of properties throughout the area they serve. These are not usually physically contiguous sites – rather, CLTs aim to operate on scattered sites throughout their area and for their properties to be indistinguishable from non-CLT property.

#### 2.1.2.10. Flexible development

The US CLT sector has undertaken development of housing ranging from boarding houses, through affordable rentals and cooperatives, to single-family houses, townhouses, and condominiums (strata-type apartments). The physical stock includes individual apartments, entire apartment buildings, duplexes, individual homes, ecovillages and cohousing, as well as community, commercial and open spaces, including spaces for land conservation and food production.

Some CLTs focus on particular forms of housing depending on their local need, some provide a broad range of residential forms, while others mix these with non-residential development. Individual CLTs may undertake development themselves, or focus on their stewardship role and partner with non- or for-profit agencies when undertaking development. The common thread in these is an attempt to respond to local need and complement local existing housing provision by addressing gaps in this.

### **2.1.3. CLT home ownership**

In the classic model in the United States of America, CLTs hold land out of the open market permanently, thus preventing rising land values from causing housing prices to rise. In the classic model, the land is then leased to the resident via a 99-year renewable ground lease which spells out conditions regarding eligibility, resale value of the home, inheritance, repairs and renovations, and so on, while granting full land usage rights to the home owner. The home owner in the classic model has title to the home, which they buy at a reduced price and then sell at a reduced price according to the terms of the ground lease; see Table 2.1 for an overview of Classic CLT home ownership compared to conventional home ownership.

The classic model is not used by every CLT, though. CLTs vary their structure and the mechanisms for providing and maintaining affordability according to what is legally feasible in their jurisdiction, the CLT's aims and their target market. As a result of this responsiveness to local conditions, constraints

and aspirations, the US and UK CLT sectors have shown a great deal of variability, flexibility and innovation in developing a range of models.

CLTs offer affordably-priced homes to households with limited incomes – the CLT keeps the price of homes affordable by reducing the purchase price of housing and then restricting its resale value. When a household decides to sell their interest in a CLT home, the home is resold or re-leased at an affordable price to another household with a limited income.

The goal of CLTs when providing home ownership is to balance the needs of homeowners to build equity and gain stability in their lives, with the needs of the community to preserve affordable home ownership opportunities for future generations. In the US, this has proved a more effective use of public home ownership subsidies similar to Australia’s First Home Owner Grant, as the subsidy is “locked in” to the housing stock, so serves more than one householder and helps maintain a stock of affordable housing that includes ownership.



*CLT home ownership aims to balance equity gains to the seller with affordability for the buyer, and uses a formula to do this.*

Each CLT aims to maintain control of its properties in the long term and ensure that the stock is still affordable for the next person, if and when the current household decides to sell. The householder receives their share of equity (what they paid into the property) plus a modest share of any positive revaluation at the time of resale. Most CLTs also have arrangements in place as to the rate of return on any money spent on renovations or additions, as well as the nature of allowed renovations or additions. CLTs aim to enable a sense of ownership through the householder’s ability to make improvements or renovations, but do not want these improvements to then price out the next buyer, so CLTs have to aim for a way to balance these objectives.

## 2.2 CLTs in the United States (US)

Precursors to the modern-day CLT arose out of philosophical and practical challenges to a dominant tradition of private ownership that treated land as a speculative commodity rather than a common legacy. The modern-day CLT, as both a model and a movement, is relatively new, with the first CLTs

appearing in the United States in the 1970s. The roots of the CLT are much older. From an ethic of land stewardship found in Biblical scriptures, Native American traditions, and the New England custom of the village commons, the CLT draws its inspiration for removing land from the speculative market and managing it for the common good.

<b><u>CLT Classic Home ownership</u></b>	<b><u>Conventional Home ownership</u></b>
Mortgage is with a bank	Mortgage is with a bank
Accumulates limited equity	Accumulates full equity
Purchase price is below market rate	Purchase price is market rate
Home owner pays rates (might be a discount rate) and insurance and for repairs and maintenance according to the ground lease Some CLTs split responsibility for repairs and maintenance between the CLT and the home owner	Home owner pays rates and insurance and for all repairs and maintenance
Home owner can make improvements and make their money back on them subject to the ground lease	Home owner can make improvements and make their money back according to what the next buyer will pay
The CLT owns the land and leases it to the home owner through a 99-year land lease; resident owns the house	The Home owner owns the land and house as a package
Home owner must sell to a low to moderate home buyer for a predetermined price	Home owner is not limited to who they can sell their house to or for what price

**Table 2.1. Similarities and differences between CLT classic home ownership and conventional home ownership.**

Source: Adapted from Community Land Trust of Palm Beach County, Inc. (2012)

From the social theories of Henry George and the social experiments of the Garden Cities Movement in England and the Jewish National Fund in Israel, the CLT derives its mechanisms for leasing land and capturing socially-created real estate gains for the benefit of a larger community. From Mahatma Gandhi and the Gramdan Movement in India, the CLT draws its concept of trusteeship, preserving access to land and housing for populations historically excluded from the economic and political mainstream. From the Civil Rights Movement in the American South, the CLT draws its commitment to open membership, inclusive governance, and direct accountability to the community it serves.<sup>8</sup>

<sup>8</sup> National Community Land Trust Network (n.d.).

The CLT principles were first articulated in the 1969 establishment of New Communities, Inc.—described in its Articles of Incorporation as “a non-profit organisation to hold land in perpetual trust for the permanent use of rural communities”<sup>9</sup>—and in the 1972 publication of *The Community Land Trust: a Guide to a New Model for Land Tenure in America*<sup>10</sup>. This was the first presentation of the principle of combining an ownership structure that separated title to lands and buildings with an organisational structure that included a majority of non-resident Directors on the CLT’s governing board.

The 1972 book also included the full text of the ground lease from a prototype leased-land community in Pennsylvania: Bryn Gweled. One of the book’s co-authors, Ted Webster, suggested the name ‘community land trust’ to differentiate the CLT model from intentional communities and conservation land trusts; however, it wasn’t until 1978 that organisations were formed that substantially combined the land leasing mechanism with the envisaged board structure.<sup>11</sup>

Building on this, the first urban CLT was established in Cincinnati in 1980, partly to house and empower an impoverished and marginalised community and partly to reduce the impacts of gentrification by restricting resale prices of CLT homes.<sup>12</sup> The emerging focus of CLTs on people of limited means made the organisations’ activities recognised as charitable under federal tax regulations in the US, which made CLTs eligible for additional funding and programs. Further, focusing on low-income households and low-income neighbourhoods made CLTs more relevant to policy-makers and community activists alike, as they worked to prevent displacement in the face of disinvestment or reinvestment and the withdrawal of the federal government from housing provision in the 1980s.<sup>13</sup>

The 1990s saw rapid growth of the CLT sector, with both urban and rural CLTs becoming established.<sup>14</sup> In 1992 a federal definition of a CLT was introduced via the Cranston-Gonzales Act of 1992; this enabled greater clarity among the sector as to their aims and activities, and provided a degree of certainty and familiarity to lenders, government and other partners. CLTs are now established in nearly every state in the US, and across urban, suburban and rural locations; see Figure 2.2.

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<sup>9</sup> Davis (2010a, p.16).

<sup>10</sup> Swann et al (1972).

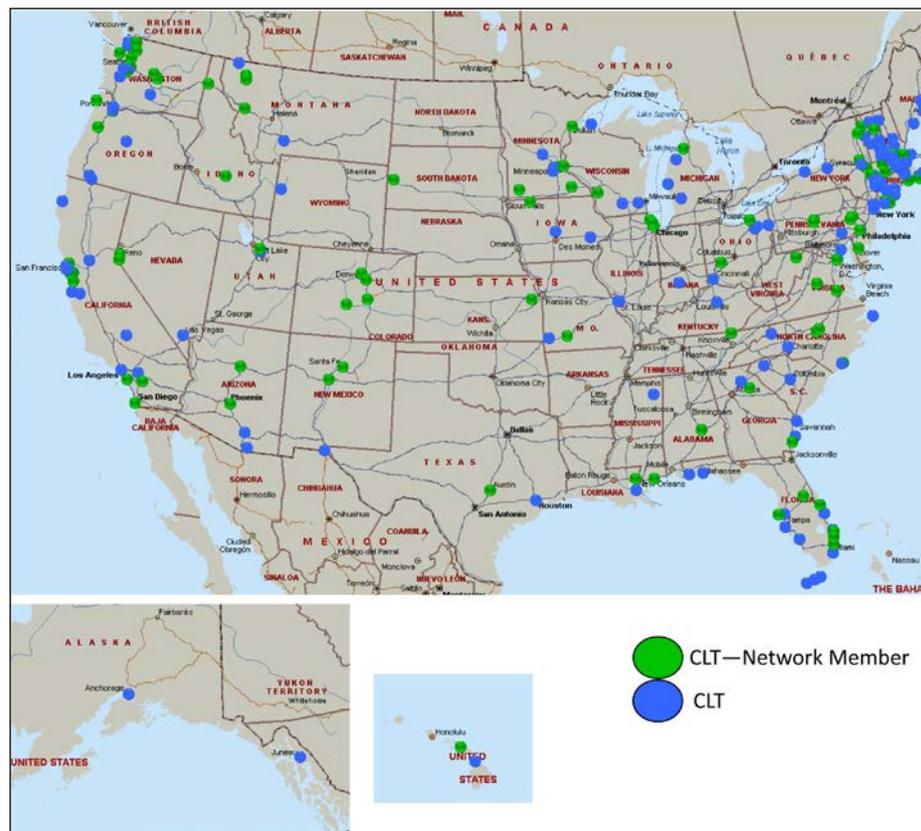
<sup>11</sup> Davis (2010a).

<sup>12</sup> Davis (2010a).

<sup>13</sup> Davis (2010a).

<sup>14</sup> Much of this section draws upon Crabtree et al (2012a).

In the US, there are a number of ways CLTs structure their arrangement with their buyers, depending on the aims of the CLT, its target market and what is legally feasible in its jurisdiction. As mentioned earlier, in the classic model, the CLT owns the land and leases this to the home owner via a renewable 99-year lease that grants full rights of use to that land. The home owner has title to the home and the ground lease spells out conditions regarding resale value, eligibility, renovations, repairs, inheritance and so forth.



**Figure 2.2. Location of CLTs in the United States, 2010.**

Source: National Community Land Trust Network

In legal terms, that separation refers to separating ‘improvements’ or ‘fixtures’ (the home) from the land, and in some jurisdictions in the US this is not legally permissible. In those jurisdictions, CLTs have used a 99-year lease only, with no conveyance of the dwelling, or shared equity arrangements that use covenants or contracts to spell out the conditions that would be contained in the ground lease in the classic model. The pros and cons of these mechanisms and the CLT classic in Australia are discussed in Chapters 4, 7 and 8.

As well as diversity in their structures, mechanisms, housing and other activities, CLTs in the US have shown a lot of diversity in how they have come into being. Most CLTs in the US have started as independent community-led organisations which then might partner with non-profit

developers, local government or other organisations that match the CLT's aspirations and intentions.

Starting up independently has allowed a high degree of autonomy, but can create challenges in terms of securing land and/or housing due to costs. Increasingly, CLTs in the US are developing from within existing organisations or being initiated by government – usually local government, via start-up funds, staff, or land transfers and/or ongoing revenue streams such as local affordable housing levies. Of these, some then separate from the parent organisation once at scale, while others remain within the parent organisation as a specialist program.

### **Box 2.1. Champlain Housing Trust**

The Champlain Housing Trust (CHT) in Burlington, Vermont was formed by the merger between the Burlington Community Land Trust and Lake Champlain Housing Development Corporation in 2006. The Trust has over 4,000 members and over 2,000 households. These consist of 1,500 rental units, 115 cooperative homes and 430 owner-occupied homes<sup>15</sup>. The Trust has a portfolio of new-built and refitted homes, including rental apartments, cooperatively owned apartments (in several limited equity cooperatives), limited equity condominiums, cohousing, seniors living and free-standing single family homes. Many of CHT's properties are multi-use, such as combined artists' live/work apartments, rental units above retail spaces in the centre of Burlington and a senior living complex that also houses the local health clinic and an Indigenous after school care centre.



**Figure 2.3. Thelma Maple housing cooperative on CHT land.**

Source: author.

<sup>15</sup> Champlain Housing Trust (2008, 2010).

**Box 2.2. Dudley Neighbors, Inc.**

Dudley Neighbors, Inc. (DNI) in Boston, Massachusetts is a CLT operating as a subsidiary of the community-based planning and organising entity Dudley Street Neighborhood Initiative (DSNI). Since its inception, DNI has overseen the development of 225 perpetually affordable housing units and DSNI has overseen more than 1,300 development applications in the area, often with several hundred community members at development application meetings. DNI has commissioned for-profit developers to build their affordable housing according to criteria established by residents regarding room size and housing types, materials and rate of infill.

The Trust has recently expanded into affordable rentals through purchase and the construction of Dudley Village. Dudley Village combines 50 permanently affordable rental apartments with ground floor commercial on the main street of Roxbury. The development application was overseen by 350 community members and the development process supervised by a sustainable development committee covering land use, civic building, density and building material and design. This relatively dense development was driven by local residents and social service agencies which recognised that density gain was necessary for social services' viability. Other DNI projects have included parks, community gardens and a commercial greenhouse on 2,000m<sup>2</sup> of land in partnership with the Food Project, to address local food security and youth employment concerns.



**Figure 2.4. Dudley Village apartments under construction.**

Source: author.

While often making it easier for a CLT to start up due to access to existing skills and capacities within the parent or partner organisation, this can place

constraints on autonomy or community involvement. Recently some of the southern states in the US have developed an ‘umbrella’ CLT or centralised CLT server to provide support to existing and emerging CLTs across the region. The pros and cons of these options are discussed further in Chapter 2 on operational choices and Chapter 10 on financial viability.

In 2006 the National Community Land Trust Network was incorporated in the US, building on the earlier work and roles of the Institute for Community Economics; the Network now runs an annual conference, plus advocates for and provides resources to the sector, including training. The documented and growing success of the CLT sector in the US has led to its investigation and initiation in other countries such as the UK and Australia. This was further propelled by an international study tour to the Champlain Housing Trust in Burlington, Vermont, US, due to it receiving the UN Habitat Award for the Global North in 2008. The annual CLT conference is attracting an increasingly international attendance and the exchange of experience, knowledge and ideas is driving activities further in the US and elsewhere.

## 2.3 CLTs in the UK

The recent development of the UK CLT sector was initially driven by the efforts of Community Finance Solutions at the University of Salford in Southampton, UK during the mid 2000s. More recently, the continuing work of Community Finance Solutions, the establishment of a national CLT network in 2010, and the attendance of UK CLT practitioners and activists at the US conferences and study tour have helped propel the sector. In 2010, a campaign for a London CLT emerged from within London CITIZENS, a broad alliance of over 150 member organisations across London.<sup>16</sup> At the time of writing, the East London CLT had secured future freehold title to the St Clements Hospital site as London’s first CLT.

The work at Community Finance Solutions was initially undertaken via a National Demonstration Program funded by the Housing Corporation (the non-departmental public body responsible for funding new affordable housing and regulating housing associations), the Higher Education Funding Council for England and the Carnegie UK Trust (an independent charity focused on social wellbeing). The National Demonstration Program consisted of rural and urban development streams.

At the time that Community Finance Solutions started researching and supporting CLTs, there were very few recognised CLTs in the country and very little political awareness; the aim was to provide emerging CLTs with

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<sup>16</sup> Aird (2010); Smith (2010).

practical support and tools to become established.<sup>17</sup> By 2009, that support had led to the development of around 30 CLTs, with over 150 homes built or funded. With the sector growing, a national definition of CLTs was passed into the national Housing and Regeneration Act in 2008 similarly to the US. In 2010, a national association of CLTs was organised in the UK – the National CLT Network. This now performs many similar roles to the US Network, such as communication, training, resources and conferences.

In the UK, there is threefold interest in CLTs: for regenerating or preserving rural areas; for regenerating urban public housing and providing affordable housing in cities; and, for renewal and stewardship.<sup>18</sup> Furthermore, the current policy environment of the UK Conservatives' policies of the Big Society, favours CLTs as there is much interest in expanding models of community ownership in the UK, building on the country's history with mutual societies and cooperatives.

Most UK CLTs are small-scale non-urban CLTs, focusing on community access to, or preservation of, affordable housing in rural areas. These often build on the capacity of existing community development organisations, such as almshouse trusts or development trusts and operate within these organisations, while some are established as separate CLTs.<sup>19</sup> Local government in the UK has been able to assist CLTs in a number of ways including planning gains and grants, but can also be suspicious of the unfamiliar CLT model, frequently perceiving it as risky. Similarly, UK CLTs have found partnering with existing affordable rental housing providers—the housing associations—to be a mixed blessing, with some able to provide skills and resources, and others lacking the flexibility and skills to work with the community. Most, however, found that existing associations came to see the benefits of partnering with CLTs.<sup>20</sup>

As in the US, the emerging rural CLT sector in the UK referred to a high level of support drawn from philanthropic organisations. As in the southern states of the US, some areas in the UK are developing an 'umbrella' CLT to serve a large area. These umbrella organisations can: assist the formation of CLTs within that area; liaise and lobby at a higher level than smaller organisations might be able to; and, develop specialist products such as appropriate mortgages or revolving loan funds. As in the US, funding has been a core issue for all CLTs in the UK, whether this came from private and philanthropic sources, low-interest loans, or public subsidisation.

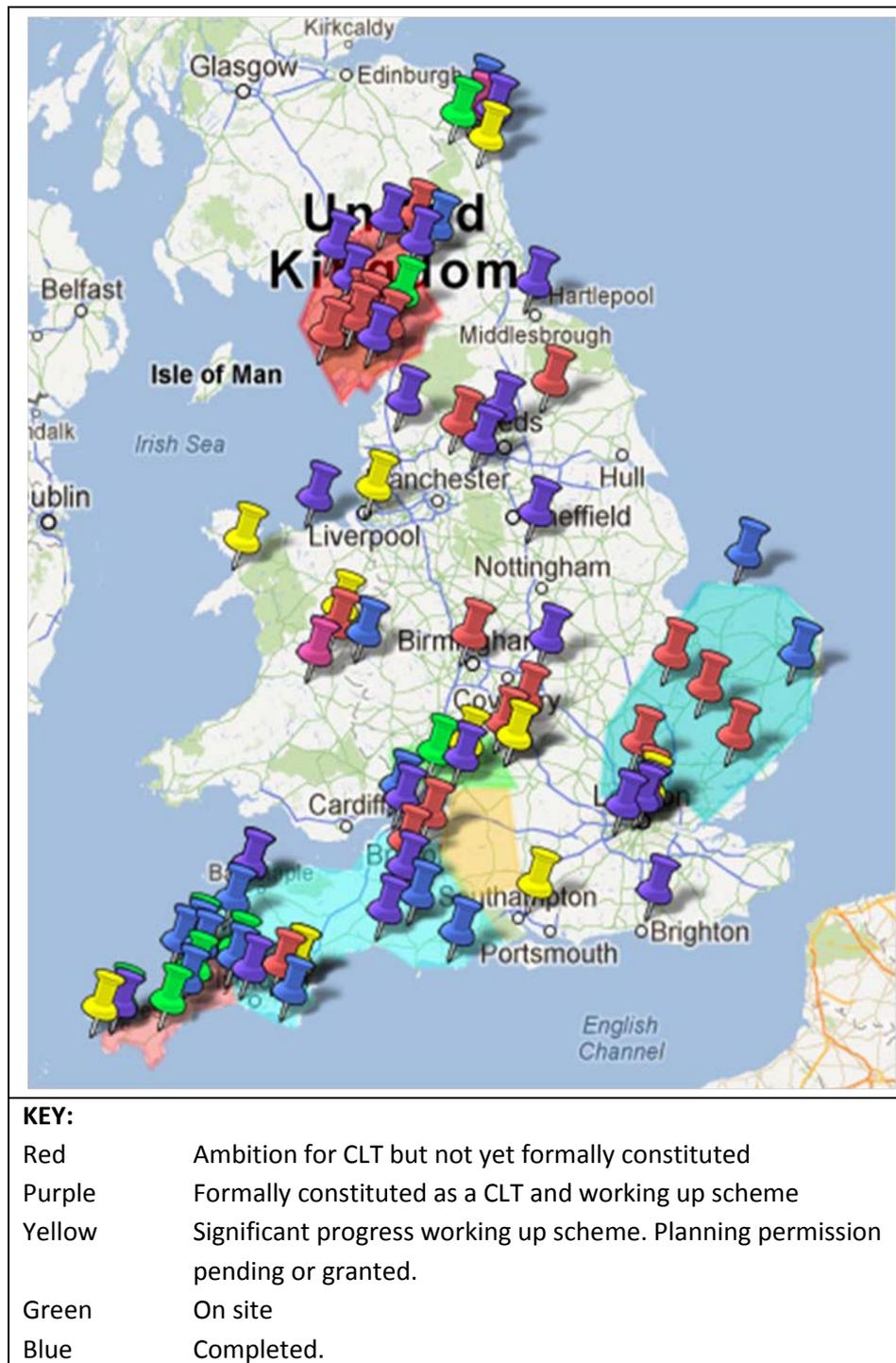
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<sup>17</sup> Aird (2010).

<sup>18</sup> Aird (2010); Smith (2010).

<sup>19</sup> Aird (2009, 2010).

<sup>20</sup> Aird (2009).



**Figure 2.5. Community land trusts in the UK in 2012.**

Source: Catherine Harrington, pers. comm.

Some rural CLTs in England have not only provided housing but also schools, garden allotments, community halls, community woodland, community health centres, live-work space, workshops and a community-run pub. This echoes the activity of many US CLTs in developing and stewarding multiple uses and forms. CLTs in urban areas are less common and there are none in London, although there is potential within major redevelopment sites and

the East London CLT has secured future freehold title to the St Clements Hospital site, which is a major breakthrough for the UK sector. CLTs in the UK are currently trying to address some outstanding legal and planning issues to make operations easier, in both rural and urban areas. This is also currently the case in Australia.

## 2.4 CLTs in Australia

At the time of writing, there is much interest, activity and research focusing on establishing a CLT sector in Australia. In 2012, two key research papers were released by the Australian Housing and Urban Research Institute (AHURI) – one exploring the basis of CLTs<sup>21</sup> and another examining the potential of CLTs as a housing option for Indigenous communities.<sup>22</sup> Additionally, a project undertaken by the University of Western Sydney and funded by government and non-Government partners created this Manual. There are at least two groups that have formed that wish to start CLTs in NSW and Victoria. Governments at various levels are also interested in the CLT model in various jurisdictions.

Australia's housing market currently presents little by way of options between social rental housing and market-rate ownership, except for some state-based government low income home ownership schemes that operate in a number of the smaller state jurisdictions.<sup>23</sup> Largely through the application of subsidies provided under the National Rental Affordability Scheme (NRAS) from 2008, the not-for-profit housing sector is expanding and providing rentals to households further up the income ladder, although income caps apply and if a household's income rises above that cap, they are given a certain period of time after which they have to vacate the home. There are few affordable housing schemes in Australia that provide the stability of owning or the potential for equity gains to the resident, while maintaining affordability over time.

There are instances of CLT-like schemes operating in Australia that might be drawn on to develop applicable models. One example is the ACT Land Rent Scheme, which leases land to new home owners, who then may build a house on the land. Buyers are required to pay annual rent for the land to the ACT Government, set at either two or four per cent of the land value per annum. This scheme is underpinned by the ACT's 99-year leasehold system, as the ACT Government owns all land in the ACT. Details of the scheme are provided in Appendix 2. This model does not confer ownership of the house to the resident: the resident has a long-term lease to the house and land, but can get a mortgage to build the house. Unlike a CLT however, there is no

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<sup>21</sup> Crabtree et al (2012a).

<sup>22</sup> Crabtree et. al. (2012b).

<sup>23</sup> Pinnegar et al (2009).

restriction on the resale of the leasehold, and the premises can be sold as a land rent block, or the purchaser can choose to buy the land value as well. A CLT could obviously emulate this model with tighter means-testing and restrictions on resale of leaseholds written into the lease.

Another example is the various shared equity schemes governments run to assist people into home ownership. However, Australian governments have yet to apply any form of resale restrictions to their shared equity schemes as normal practice, apart from requiring the equity to be sold back to Government. A CLT could also adopt this model, with an accompanying agreement limiting the resale value of the resident's equity portion. The shared equity mechanisms that can be considered in an Australian context are discussed in Chapter 8.



**Figure 2.6. Attendees at the first CLT short course in Australia, 2009.**

Source: author.

CLTs also have resonance with current efforts to increase home ownership on Indigenous lands, particularly in ways more in line with the range of housing objectives and ambitions highlighted by research with Indigenous communities. That research found less interest in the house as a wealth creation vehicle, and more in issues of stability and inheritability.<sup>24</sup> Some Indigenous organisations such as Local Aboriginal Land Councils or Aboriginal Corporations can already grant long-term leases of 99 years for residential purposes, or sell equity in housing, and many are landholders with the land and housing necessary to kick-start CLT home ownership. The potential of CLTs in the Indigenous sector is being explored in ongoing AHURI research.<sup>25</sup>

<sup>24</sup> Memmott et al (2009); see also Crabtree et al (2012b).

<sup>25</sup> See Crabtree et al (2012b).

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# Part II – Starting a CLT



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## 3 Initial Choices

Hazel Blunden

Louise Crabtree

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As community-driven and community-focused organisations or programs, CLTs are highly variable in their composition and activities, as each CLT serves its community in its own way. In deciding to start a CLT or similar program, there are several key issues that need to be determined:

1. What is the CLT's rationale and objectives?
2. How will the CLT get organised?
3. What is the CLT's service area and how big will it be?
4. What structure will the CLT use?
5. Who might the CLT partner with?

Each of these are discussed below in turn; some are also explored more fully in subsequent sections of the Manual. It is quite possible that CLT-type activities will be undertaken by and/or within a range of organisations that do not identify as community land trusts;<sup>26</sup> however, for the sake of consistency and readability, we use 'CLT' here to refer to any organisation or program aiming to deliver the core objectives of CLTs.

### 3.1 Rationale and objectives

Any CLT or CLT-type program needs to first spell out what it wants to do, and why. There are a number of benefits to setting up and running a CLT:

1. CLTs are locally driven, controlled and democratically accountable. This is because CLTs focus on community participation in and ownership of the organisation. This requires and fosters capacity building in the community; many CLTs offer—if not require—orientation and training for their Board members, irrespective of their skills or history. This has been crucial to enabling good governance and clarity regarding the role of Directors.
2. CLTs can meet local housing need even in areas with very high house prices, although the amount of discounting or subsidisation will increase in high cost areas. The flexibility of CLTs means they can be used to develop and deliver a range of affordable housing options in

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<sup>26</sup> Organisations that want to undertake core CLT activities might not be able to use the word 'Trust' in their title under Australian law, as CLTs are not Trusts as understood under Australian law. See also 5.4.

different market scenarios. Local market conditions will determine what role the CLT is best placed to play. This can include providing rentals, price-restricted home ownership, cooperative housing, community facilities, commercial facilities and market-rate home ownership.

3. CLTs provide housing that is permanently affordable, benefitting many generations of residents and giving the community an asset for the future. By retaining an interest in each property, CLTs are able to ensure that affordable housing stays affordable and in a good state of repair. Some will share the responsibility for maintenance with the Resident to help maintain the condition of stock or agree to undertake cyclical replacements of certain items.
4. CLTs empower local communities, who are part of the vision and solution for their area. As communities usually have a substantial say in the activities and objectives of CLTs, CLTs act to develop and deliver community aspirations and objectives. So CLTs can be an effective mechanism for addressing issues of not only housing affordability, but also sustainability, employment and other issues of concern for a community. CLTs can be a great way of delivering community enterprise and development.

In light of these benefits, each CLT needs to decide upon its vision, target market and activities and develop a business case. Each CLT will need to develop a business case that explains its objectives, its core business, and the need for the proposed CLT and its activities. This needs to respond to local conditions and issues – why is a CLT needed? What will it do? Who will benefit? This needs to be based in an assessment of local housing market need and analysis, and in an argument as to how the CLT will use its assets to achieve its objectives. Aspects of these are discussed below. Many of these might not be worked out up front – that is, some of these might take time to work out as the CLT gets organised and starts thinking more thoroughly about how it best wants to meet its objectives.

*Every CLT needs a business case, explaining and justifying its aims, objectives and planned activities.*

### 3.1.1. Target market and activities

This will include deciding whether the CLT wants to focus on housing particular groups of people in its service area, such as very low income, low

income or moderate income, or a mixture, or include market-rate ownership. Including market rate ownership can diversify the CLT's housing stock and provide an income stream to help cover the costs of the CLT's affordable housing activities.

Similarly, the CLT will need to decide whether it will include community and/or commercial properties in its portfolio. Providing affordable spaces for community organisations can provide much-needed services in the CLT's area of operation. Providing commercial leases to businesses such as shops or industry can provide a further income stream in addition to selling market rate housing, although commercial leases might provide ongoing income, compared to the sporadic injections of cash from selling market-rate housing. Many CLTs in the US undertake both to provide a mix of income sources.

Each of these choices has implications. If the CLT focuses on lower-income housing, it might offer mainly rental, and be able to access tax concessions and National Rental Affordability Scheme (NRAS)<sup>27</sup> money if it can get charitable status and/or become registered as a social housing provider. However, if the CLT is a small start-up, this route might put it in direct competition with existing community housing providers. Focusing on a particular group within the community might mean the CLT can get access to philanthropic or sector funds for that part of the population.

Similarly, incorporating a high level of environmental concern into its activities might give the CLT access to programs or funds supporting best practice or innovation in this regard. As community-based and community-driven organisations, CLTs are often well placed to develop environmental programs and design. Providing leases for community and/or commercial spaces might be a good way to diversify the organisation's income stream and portfolio, and address local community aspiration. However, if the CLT does want to access funds as a not-for-profit, it will need to work out how to set itself up so it does not compromise its access to these. This is explored further in Chapter 6.

### **3.1.2. Development and householder training**

CLTs will have to decide whether they want to act as the housing developer as well as oversee training and resales; much of this will depend on what other organisations are operating in the area. Some CLTs in the US and UK

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<sup>27</sup> This is a government scheme providing incentives to organisations that develop housing to be rented at 20 per cent below market rent. As at 2012, the offset was \$7,486 per dwelling unit per annum for ten years from the Federal government as either a refundable tax offset or payment, plus a State or Territory incentive of \$2,495 as either direct or in-kind financial support.

act as developers and the larger ones of these in the US have been able to create an income stream by charging a developer fee which is paid by the buyer, while still keeping the housing affordable. Others have felt that the challenges of development are too great, so have partnered with non-profit housing developers that understand the needs of the sector.

Habitat for Humanity are playing an increasing role in this, as they specialise in preparing households for home ownership and building the residents' housing using a fixed amount of the residents' sweat equity, as well as the voluntary labour of Habitat for Humanity members and partners, and donated or discounted building materials provided by their supporting suppliers. In 2010 a national Memorandum of Understanding was signed between the US National CLT Network and Habitat for Humanity reflecting the synergies between the two. Habitat for Humanity International operates in Australia and might be a relevant partner for emerging CLTs. In Australia, acting as a developer might bring a CLT access to funds such as NRAS if rental housing is developed; however, this will mean the CLT is in direct funding competition with other community housing providers.

Most CLTs require their home owners to undertake financial counselling and training prior to buying a house. Consequently, some CLTs partner with specialist financial counsellors or trainers where these are available, rather than provide such training in-house. Again, this will depend on what the CLT sees as its core business and whether it has access to organisations that could perform this role appropriately.

### **3.1.3. Reversion or resale formula**

The CLT will have to decide upon a resale formula (or 'reversion formula') as a way of valuing the CLT and home owner's equity share at resale. To work this out, the CLT needs to decide what it aims to achieve through its formula. The most commonly used formulas are based on splitting the equity between the CLT and the home owner – 75/25 per cent respectively of the market valuation at time of transfer or sale is the most frequently cited split in the US sector. This has been described as best balancing affordability and mobility via equity gain, while also being easy to understand and administer.

However, there are other choices and other formulas that might come into play in determining the resale formula. For instance, the CLT will need to decide whether it is aiming to help people move out into the open market and free up the CLT stock for other households, or help stabilise communities and keep people in their housing for longer. In high capital gain areas, equity gain might need to be capped to ensure the home remains affordable for the next buyer. Chapter 9 discusses resale formula in depth.

More nuanced formulas can give proportionally more or less return to the home owner over time, so households can be financially encouraged to move on or remain in the house depending on what seems most appropriate for the local situation. CLTs that aim to keep people housed for longer tend to be expansionist to keep bringing affordable stock into the system and avoid the creation of a bottleneck in the market.

*Reversion formulas can be very fine-grained and are meant to be tailored to local conditions and aims. See chapter 9 for detail.*

Another option is to gear the reversion formula to indices such as the Consumer Price Index (CPI) or Area Median Income (AMI) – these formulas tend to keep housing very affordable but deliver minimal, if any, equity gain to the seller. It is also possible to design a formula that calculates devaluation and the value of any improvements, but in the US these have proved time-consuming, hard to administer and open to challenge.

#### **3.1.4. Repairs and improvements**

In addition, the CLT will also have to decide upon the level of repair and improvement it will require or allow Residents to make, and the equity return to be delivered on that basis. Each CLT will need to decide if it will take responsibility for any repairs, and if so, which ones. Some in the US will do major cyclical repairs such as roof and kitchen replacements, with the Resident responsible for smaller repairs and daily maintenance. Others will decide the Resident is responsible for all repairs and maintenance.

The decision will hinge upon and affect household incomes and the capacity of the CLT or its partners. That is, each CLT will need to decide whether it has the financial capacity, skills or access to reliable partners, such as tradespeople, to be able to undertake repairs on an ongoing basis, and if so, what level of repairs. It will also need to decide what level of repairs its Residents have the capacity to undertake by themselves without incurring unmanageable cost burdens.

Similarly, the CLT will also have to decide how often and how substantially they will perform household inspections. This can be a very sensitive issue in a home ownership situation, and care needs to be given to considering the privacy and autonomy of the Resident, while also ensuring the housing stock is being well looked after. Inspections might be seen as less onerous or less

invasive if the Resident is comfortable with the organisation and feels a sense of ownership in the organisation.

Similarly, each CLT will have to decide what level and nature of improvements they will allow Residents to make, from new taps to new rooms. In the US, some allow any additions within local legal parameters; others allow none; some allow additions on a case-by-case basis, while others have a pre-determined list of allowable additions. Again, this will depend on the condition of the housing stock and how affordable the stock needs to stay, which also affects the issue of how much equity gain to allow on the basis of any improvements or additions made.

*Each CLT will need to work out who does what repairs and maintenance, and how frequent and thorough inspections will be.*

Some CLTs give back dollar for dollar what the Resident spends on additions, others allow no reimbursement, while some will just roll the additions into the overall valuation of the property at resale. This is a balancing act between maintaining the condition of stock and allowing Residents to feel they have ownership on the one hand, and maintaining affordability for the next buyer on the other.

## 3.2 Getting organised

Once the CLT has its basic rationale worked out, it will need to get organised, which means recruit members and support, and start to become operational. Key aspects of this are discussed below; there are also many useful published and web-based guides to organising.

One of the first steps is membership and education, or publicity. As the membership base grows, refinement of the CLT's objectives might be necessary as further issues or better knowledge comes to light. Most US and UK CLTs have voting memberships that extend well beyond the target community or Residents, and include any individual or organisation that supports the CLT. Annual membership fees, drives and events are core ways of building the culture and capacity of the CLT, building support, creating an income and raising awareness. Further to the membership base, CLTs need to build awareness, familiarity and support amongst a wide range of organisations and communities. According to Davis:<sup>28</sup>

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<sup>28</sup> Davis (2007, p2).

“In the early days of a CLT’s start-up...five constituencies deserve special attention: (1) the community of individuals and institutions that call the CLT’s service area their home; (2) nonprofit organisations serving the same population as the CLT; (3) governmental agencies to whom the CLT must look for project funding, regulatory approvals, and equitable taxation; (4) private lenders and donors on whom the CLT must depend for mortgage financing and operating support; and (5) housing professionals on whom the CLT must depend for legal advice, accurate appraisals and development expertise.”

Davis suggests and discusses three possible ways for CLTs to organise: community organising; core group organising; and, resource organising. These are summarised in Table 3.1. Irrespective of which general pathway a CLT takes to get started, it will need to undertake similar core activities.

### **3.2.1. Publicity and awareness raising**

Any CLT needs members. One way of seeing if there is interest is to advertise a public forum. This can be done via advertisement and letterboxing or direct mail of the target area. However a CLT may want to target a certain demographic – for example, current renters. This may require doing research about which areas and households to target and what forms of media are the most appropriate.

A media release to local media outlets about the intention to form a CLT, what a CLT is, and where the meeting is to be held, is essential. A CLT could make reference to the housing affordability situation in the target area and back this up with some facts and figures.

### **3.2.2. Membership drives**

A CLT needs members – ideally, a minimum of five, and hopefully, more. A CLT could recruit via the methods described above, and sign interested persons up at street stalls, at public forums, via a website and via letterboxing or direct mail. Social media will also be vital.

Once again a CLT should remember who they are trying to recruit – who is the target audience? The CLT can do some research on the demographics of their target area by using Australian Bureau of Statistics information to ensure that the right people are being communicated with. For example – there may be little use in letterboxing an affluent suburb where home ownership is 95 per cent. A CLT may want to target an area where there are a high proportion of households renting, or on lower incomes.

Pathway	Pros	Cons
<p><u>Community organising:</u></p> <p>This is where supporters of the idea of a CLT run a big public campaign of awareness raising and then form a committee, structure, etc. and start their core activities.</p>	<p>Awareness and acceptance of model</p> <p>Wide and diverse recruitment</p> <p>Attracts future buyers/residents</p> <p>Possible access to funds via sympathetic organisations</p>	<p>Time-consuming, lot of voluntary effort needed, might not have required skills</p> <p>Might raise expectations</p> <p>Might be vulnerable to unsympathetic attacks or denouncements before organisation is clear of goals, structure, activities, etc.</p>
<p><u>Core group organising:</u></p> <p>This is a “quieter” form of organising – core individuals with the required skills are approached and recruited to an interim Board which fleshes out the details of the CLT’s vision and objectives.</p> <p>Public campaigning starts when structure and objectives are clear and possibly, housing activity is underway.</p>	<p>Faster development, not trying to convince people; core individuals might have more experience with running non-profits and/or housing</p> <p>Flying beneath the radar, not as vulnerable to opponents</p> <p>Builds credibility as the organisation is launched and able to deliver quickly</p> <p>Access to capacity of core individuals and possibly their organisations</p>	<p>Perceived elitism due to ‘closed’ nature of core group, which will need to be opened up as CLT is launched</p> <p>Individuals with existing skills and experience might bring organisational or political baggage with them</p> <p>Might create market risk if need for the model is untested and demand hasn’t been created through education and campaigning</p>
<p><u>Resource organising:</u></p> <p>This involves using public or private donations of land, housing and/or funds to raise awareness, hire staff and plan use of these resources either through community organising or core group organising</p>	<p>Can increase acceptability as CLT arrives with resources ready to go, rather than ‘cap in hand’</p> <p>Early staffing</p> <p>Ability to leverage or raise additional funds</p>	<p>Guilt by association if sponsor is unpopular</p> <p>Project might be built before there is community support</p> <p>Danger of ‘cataclysmic money’ – investment and activity that is focused and intense, which might erase existing diversity or resilience in sector.</p>

**Table 3.1. Pros and cons of three CLT development pathways.**

Source: adapted from Davis (2007).

### 3.2.3. Garnering local support

A CLT should get to know local organisations, media and NGOs, as well as local government representatives and MPs. All of these people could assist getting a CLT off the ground by lending support – and thus legitimacy. A CLT could contact and set up meetings with at least:

- The local MPs (state and federal)
- The local government Councillors
- Housing organisations
- Other NGOs
- The Chamber of Commerce
- Residents' groups
- Local media reporters

### 3.2.4. Identifying funding and other support

A CLT will need money, or land, or both, to get established. It may also need finance until the operation starts to break even. Unless members are wealthy, funding will need to be found from some source – probably via a grant or loan finance or a mixture of sources. As land is the most expensive item, acquiring land is the first priority.

A CLT should consider what land could be available in the target area. Is it affordable? Is it zoned for residential, or could it be zoned for residential? What density does the zoning allow? What housing is on the land, if any? Who owns the land – is it on the private market, or is it Government?

A CLT should also attempt to get support from local government and MPs. This can be vital to getting a project up and running – particularly if a CLT needs to acquire property assets. A CLT should also look at other sources of funding such as its membership. A CLT can charge membership fees. It can also undertake 'sweat equity' projects where much of the building work is undertaken by future housing occupants and/or other volunteers.

Another source is bequests and donations. If a CLT has tax-deductible status (see Chapter 6) then it may be able to accept donations of cash or in kind. Some CLTs have received donations of vacant land or land with housing already on it – or have received this at a discounted rate.

Remember, the most significant upfront costs of a CLT will be securing land. In most average areas, land value will be 50 per cent of the cost and house value will be the other 50 per cent. However in expensive areas, acquiring

land becomes even more important as land value may constitute a higher percentage of the overall cost. The actual building cost does not vary that much. The crucial element is land.

### **3.2.5. Pro bono and access to resources**

A CLT may be able to recruit professionals to assist pro bono (for free). A CLT could look for architects, engineers, builders, tradespersons and lawyers who may want to donate their time for free or for a reduced fee. A CLT may also seek individuals to help with other parts of its work such as media relations and its website.

A CLT may want to do some research on who could assist then approach that such individual with a letter or email, followed up by a phone call. It helps to have defined tasks and times, so the person who might volunteer their time does not feel swamped. A CLT adopting a tripartite Board structure may also want to include some useful professionals on the Board.

### **3.2.6. Developing a waiting list**

A CLT once established with a Constitution and eligibility criteria needs to establish a waiting list. Where there are more eligible applicants than CLT homes, a ballot or lottery might take place to determine allocation when housing becomes available. A CLT may also adopt a prioritisation system, if it wishes.

### **3.2.7. Staff and volunteers**

Once a CLT is well established and has secured funding, it should decide whether to employ staff or operate on a volunteer basis. Ideally employing staff would increase the work capacity of a CLT; however, unless a CLT has partnered with a funded organisation, the reality is that for the establishment phase, volunteers—that is, the CLT's membership and others—will need to do the work.

Once a CLT is established and has an income stream via regular ground rent payments and/or other activities, hiring more staff and expanding becomes easier. However, it will be some years before a CLT can start breaking even.

## **3.3 CLT service area and scale**

The CLT will need to determine the location and scale of its service area; that is, whether it wants to provide housing throughout a town, a region, or at a larger scale, or wants to acquire a single parcel of land and then build multiple homes. The CLT will need to determine how big it wants its

portfolio to be (that is, how many homes it wants to steward in its service area) and how long it wants to take to get to that size. The main issues relating to scale are income, membership and structure. The larger a CLT's portfolio, the greater its chances of mixing uses and household incomes, and cross-subsidising itself. Also, if a CLT includes urban and non-urban areas, higher charges from higher priced urban centres might cross-subsidise housing in lower priced areas.

Having a larger service area might increase the potential membership base and increase income to the CLT, but might also risk the organisation losing its community feel. Larger US CLTs have worked hard to avoid this by encouraging community membership on their Boards, running local events and having member sub-committees that are responsible for specific activities. This also impacts on structure – CLTs with very large service areas or portfolios might choose to establish formal sub-committees as part of their structure to help manage tasks and also maintain higher levels of community participation.

For CLTs that are large enough to cross state jurisdictions, or that happen to do so because of where their service area is, a structure will need to be chosen that works in both jurisdictions. The issue of structure is also discussed below in 3.4 and in Chapter 5. Table 3.2 summarises the pros and cons of large scale CLTs in the US as discussed by Davis<sup>29</sup>; not all of these might apply to the Australian situation, but are worth being mindful of when considering the scale of a proposed CLT.

### 3.4 CLT structure

The CLT will need to determine whether it wants to start up within an existing organisation such as an existing community housing provider or charity to take advantage of the skills, resources and capacities available, or establish itself independently to have greater autonomy. There is also the possibility that several smaller fledgling CLTs might be best served by a centralised service provider or umbrella organisation, as happens in some parts of the US and UK. Such an organisation could provide administrative, development and/or other support, services and guidance while the local shopfront or group recruits and works with members, Residents and local partners. Once the decision is made as to what form the CLT wants to take, the CLT then needs to work out which type of organisation suits its purpose best. The main choices as discussed in further detail in Chapter 5 are:

- Company limited by guarantee
- Incorporated Association

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<sup>29</sup> Davis (2007, pp. 28-30).

- Co-operative.

Pros of large scale CLTs	Cons of large scale CLTs
<p><u>Mobility</u></p> <p>More affordable housing stock and choices through a region means greater ability for households to move if and when they need to without becoming exposed to housing stress</p>	<p><u>Decreased accountability</u></p> <p>Hard to keep the CLT accountable when the community encompasses thousands of members, hundreds of homes and hundreds of leaseholders. Resident participation in the CLT might be hard to maintain.</p>
<p><u>Fair Share</u></p> <p>Can open up less affordable areas to broader section of the community</p>	<p><u>Management cost</u></p> <p>Scattered sites can mean difficult and expensive property and tenancy management</p>
<p><u>Development</u></p> <p>Wider service area might present more opportunities for development</p>	<p><u>CLT as landlord</u></p> <p>Large scale, multi-jurisdiction CLT might be seen as an absent landlord rather than a community-based development body</p>
<p><u>More applicants</u></p> <p>A wider service area might provide a deeper pool of eligible applicants for housing so make it easier and faster to sell homes</p>	<p><u>Competition</u></p> <p>Becoming large might put the CLT in competition with existing large scale community housing providers for funds, residents, sponsors, etc.</p>
<p><u>Constituency</u></p> <p>Larger service area allows access to larger and more diverse membership</p>	<p><u>NIMBYism<sup>30</sup></u></p> <p>The larger the CLT gets, the greater its chances of encountering NIMBYism and resistance to affordable housing. Community involvement is vital in addressing this, but can be undermined if the membership is spread over a large area and not drawn from the area where the NIMBYism is.</p>
<p><u>Collaboration</u></p> <p>Access to a larger area usually means greater opportunities to partner with other non-profits</p>	
<p><u>Fundraising</u></p> <p>Larger scale organisations might be preferred by funding agencies and other partners</p>	<p><u>Less community organising and development</u></p> <p>Larger CLTs might tend to focus more on housing provision or fundraising than community development</p>

**Table 3.2. Pros and cons of large scale CLTs.**

Source: adapted from Davis (2007).

The issue of governance is related to the issue of structure. The ‘classic’ model includes a significant degree of community and Resident participation in the governance of the organisation, and an extensive community membership base. The ‘classic’ three part Board is comprised of seats for CLT leaseholders, CLT members who are not Residents, and representatives of the broader public. Leaseholder CLT members directly elect one third of the Board, as do non-leaseholder CLT members. These two-thirds then

<sup>30</sup> Not In My Back Yard – refers to resistance to development.

nominate the remaining third of the Board, which is then ratified by the entire membership. Each CLT will need to consider its governance structures and processes in light of the core issues of: the nature of its voting membership; the interests to be represented in its Board; and, Board selection processes.

**Box 3.1 Key Issues for CLT Governance**

- What is the best way to ensure local accountability – and community support – for a CLT?
- Will Residents who are scattered across a large geographic area feel connected enough with one another to elect a slate of candidates who adequately represent their interests on the CLT’s board?
- Which public officials (if any) should be invited onto the CLT’s board?
- Which private funders (if any) should be invited onto the CLT’s board?
- At what point in the multi-year process of establishing the CLT should a non-profit sponsor or a government sponsor relinquish its preeminent role in governing and/or staffing the CLT?
- Will reserving seats for local governments create a conflict of interest, if the municipality is not only a funder and regulator of the CLT, but a member of its governing board as well?
- Should seats be reserved for a particular organization (e.g., “XYZ Community Organisation”) or for general organizational categories (e.g., “a representative of another non-profit organization developing housing or providing services for low-income people”)? Some CLTs do one; other CLTs do the other.

Source: adapted from Davis (2007, p. 69).

### 3.4.1. Membership

While most CLTs have only individuals as members, some have opted to include membership options for other organisations, so like-minded or supportive organisations can be CLT members. Some CLTs that operate as subsets of other community-based organisations might not have community representation on their Board as the CLT already answered to a community-driven entity. Some CLTs in the US operate without a membership base at all.

### 3.4.2. Composition

There are many variations on the classic Board structure. Within the assigned blocks of seats, some CLTs might reserve seats for particular categories of Residents, public representatives, financial sector representatives or others. Some CLTs vary the three-part structure, for example, splitting the Board 50/50 between members and institutions.

Irrespective of structure, CLTs have found that providing all prospective Board members with the same training and orientation is very useful in helping all Board members perform their role.

### 3.4.3. Selection processes

As outlined above, the most common way for Board members to be appointed is by CLT Resident members voting for one third of the seats, non-Resident CLT members voting for one-third and those elected members then nominating and voting for the last third, which are then endorsed by the membership. There are numerous variations to this, such as:

- the members electing the entire Board;
- reservation of individual seats for particular institutions or types of members (youth, various ethnic groups, etc.);
- appointment of a certain number of seats by an outside institution or by selection from within the CLT; and,
- the formation of transitional Boards as CLTs emerge from within another organisation, with increasing leaseholder representation and less parent organisation representation over time.<sup>31</sup>

## 3.5 Potential partners

Each CLT needs to determine which other organisations it wants to partner with to achieve its objectives. This will depend on access to organisations that understand and support the model, the organisation and its objectives. Existing community housing providers are an option here, particularly if the CLT intends to include rental housing in its portfolio. Local government might not wish to form formal partnerships, but can be a crucial avenue of support and guidance, or could be a source of land. There is also the potential for local government to consider CLTs in delivering affordable housing through access to airspace above local government stock. This possibility has already generated affordable rental housing stock in Australia (see also 10.10.1).

Other charities, social enterprises and local businesses might all be potential partners and/or Board members. Organisations that are working in similar fields, or whose objectives might be accommodated via a CLT, can form strong relationships with CLTs. An example of this is the Memorandum of Understanding recently signed at a national level in the US, between the US CLT Network and Habitat for Humanity. Such partnerships are worth exploration. CLTs have also partnered with community supported agriculture schemes, youth employment programs, refugee centres and

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<sup>31</sup> Davis (2007).

many other organisations to provide community services. Partnerships with organisations concerned with or working to help reverse rural decline might be particularly worth exploring in non-urban areas.

### 3.6 Launching your CLT

To form and launch, a CLT might want to follow these steps:

1. Hold a strategy and planning meeting of the 'core' group.
2. Adopt a Constitution, and form as a company, association or co-op, and appoint or elect office bearers
3. Decide who the target households are
4. Decide what the target area(s) are
5. Develop a membership recruitment strategy based on these two factors (3 and 4)
6. Publicise that the CLT is forming
7. Identify potential allies and make contact with them
8. Identify potential sources of funding and land and make contact with them
9. Carry out membership recruitment strategy
10. Publicise and hold public forums
11. Hold CLT meetings of members
12. Undertake detailed strategic planning – identify funding and land available, how to make best use of those assets, accessing loan finance, stock targets (including income mix, tenure types and any cross-subsidies) and a timeline for actions
13. Launch the CLT as a public event
14. Refine detailed operational procedures such as eligibility criteria, waiting lists, etc.
15. Begin housing people.

While this sounds easy, the reality is that for many CLTs this will be a hard slog and may take several years. However, most CLTs overseas have started out with a very small number of houses and grown from there.



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# Part III – Legal considerations



## 4 Legal Issues of Ownership

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### **Important information you should know before you read this section.**

The material in this Chapter 4 of the *Australian Community Land Trust Manual* is designed and intended to provide CLT proponents with general legal information that may be needed to establish a CLT. The information is current at the time of publication, for general informational purposes only. The material may not apply to all jurisdictions or to all needs of a particular CLT.

The material does not constitute legal advice, and is not intended to be a substitute for legal advice and should not be relied upon as such.

CLT proponents should seek legal or other professional advice before establishing a CLT.

The purpose of this chapter of this Manual is to provide not for profit organisations and other CLT proponents with an overview of land and property issues in relation to CLTs, review the legal mechanisms used by CLTs overseas, and highlight mechanisms that might be useful for the operation of CLT objectives in Australia. On some levels, the CLT model challenges popular concepts of what it means to "own" housing and provides new ways of thinking about delivering the core features of stable shelter options and enabling community-based development.

### 4.1 Concepts of ownership

All property is a social phenomenon. That is, 'property' as a concept only works because people act out the relationships that are written into property forms and laws—I am a property owner, you are a tenant, I have these rights, you have those rights, and so on—and are penalised if they do not. These relationships and the property laws that shape them are the result of the broader social, political and economic systems of a society. 'Ownership' as conceived in property law in the Western legal tradition focuses on enclosure and the right to exclude others. This is the result of very particular social and economic processes over the past few centuries that have favoured and relied on the privatisation of property to maximise

profit.<sup>32</sup> Models such as commons and community land trusts represent different understandings of property that focus more on the social dimensions of ownership than on profit maximisation. For example, commons represent forms of land access which aim to balance the access rights of individuals within a community in such a way that no members benefit to the detriment of others. Many commons have (often unwritten) rules that govern access in very nuanced ways that respond to local needs, objectives and conditions, and which have proven very resilient and equitable management systems.<sup>33</sup>

In a similar way, community land trusts aim to balance the rights and responsibilities of the many different entities that benefit from, are affected by, or frame, the occupancy and use of a particular space; in this case, usually residential real estate, although many CLTs also include non-residential uses. CLTs recognise that households usually want stability, mobility, security and autonomy in their housing; that is, people want to be able to stay put or move on their own terms as much as possible, and like to have control over and be able to make changes to the home environment.

This doesn't have to be based on particular forms of property, it's just that in some Western societies, including Australia, this has been tied up into largely speculative and usually debt-based individual home ownership and largely erased from other property forms such as private rental. Indeed, private rental housing has been severely impacted by the treatment of housing as an investment vehicle, to the extent that the occupants of private rental housing are almost an unfortunate by-product of an investment stream, rather than individuals entitled to housing rights, and residential tenancy legislation very much reflects this defensive and relatively powerless position of the tenant. In Australia, we are familiar with the drive to home ownership, which is one of the few tenure forms in Australia where people can gain control and security of tenure. Other tenure forms are seen as inferior and it is true that in many ways they are, due to weak legal protections for tenants in Australia resulting in little security of tenure and short-term leases, and the highly marginalised status of social housing.

Community land trusts can cut across both understandings of property—that is, either as speculative ownership or as tenuous rental—and focus primarily on issues of stability, autonomy and community by recognising that property is the result and articulation of ongoing relationships between members of a society. Twentieth-century Australian housing policy has increasingly favoured market-based ownership and the use of rental housing as an investment vehicle via tax concessions and mechanisms, over public

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<sup>32</sup> Blomley (2004).

<sup>33</sup> Ostrom (1990).

housing and other forms of socially-oriented housing which have been marginal since their inception and only recently received renewed interest and funding. These overall patterns have persisted under both Liberal and Labor governments, but do not reflect any innate desire for ownership over other tenure forms.<sup>34</sup> According to Richard Ronald,

Tenure patterns suggest that working-class home ownership was not especially popular before the war and only boomed during critical conditions where ownership was the most expedient means of finding housing.<sup>35</sup>

In this context, CLTs can sit alongside the ongoing provision and expansion of social housing and the residential tenancies legislation to create a more equitable and diversified housing tenure system in Australia. CLTs represent hybrid housing models that seek to combine individual and social aspects of housing and to counter the more deleterious effects of free market-based housing models. By identifying the aspects of housing that people like and attempting to provide these without relying on speculation, CLTs can provide stability and dignity in housing and ideally keep this affordable across generations in a variety of tenures. As seen overseas, CLTs also serve a pivotal role as community-based agencies that can significantly affect the terms and directions of development and which can act in favour of intergenerational stability and stewardship.

*CLTs aim to provide stability, dignity and choice in housing, without unduly exposing the organisation or the household to risk.*

CLTs draw on notions of shared ownership, stewardship and sharing benefits across generations by holding a stock of property and maintaining affordability. Much traditional Indigenous culture emphasises that the land does not 'belong' to any particular person but rather, that the people are 'of' the land or 'custodians' of the land. In CLT ownership models, while Residents do have exclusive use of their own home, ownership rights are shared legally, via a lease or shared equity agreement (these are discussed in detail in Chapters 7 and 8 respectively). So while the Western legal tradition defines property as something belonging to the owner, CLTs give rights to property to the Resident, but also maintain rights in the property to ensure it remains affordable and that householder and community objectives are carried into the future.

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<sup>34</sup> Ronald (2008).

<sup>35</sup> Ronald (2008, p156).

## 4.2 Economic value

Enclosing property and deciding its value reflect and confer particular allocations of economic investment and return. Building on the stewardship role mentioned above, CLTs recognise land as a common resource and legacy rather than a readily tradeable commodity and aim to separate the use value of land from its exchange value. That is, CLTs draw on several traditions, including the work of Henry George, who argued that individuals should not reap the benefit of increases in land value, as these increases were felt to usually be the result of wider social and/or environmental forces and phenomena, such as investment in transport infrastructure, proximity to desirable amenities and so forth.<sup>36</sup> The original proponents of CLTs drew on Georgist and other traditions to propose that land is a common legacy and that individual households should be entitled to some form of return on their efforts such as building a house or making improvements.<sup>37</sup> Again, this reflects an understanding of the individual and broader societal forces that are tied up in property systems and an attempt to balance and allocate the rights and responsibilities of the household with those of broader society. The evolution and diversification of the CLT sector since its origin reflects the articulation of these core concerns in different economic, political and legal contexts.

Currently Australia's property tax system encourages home ownership as a wealth creation vehicle and provides vast subsidisation to this form of property.<sup>38</sup> This encourages speculation on property value and particularly land value, as in Australia's populated centres it is overwhelmingly the land value that inflates. Suggestions to reform the speculative nature of housing investment and the tax incentives supporting this include tax reform proposals such as those contained in the Henry review of Australia's taxation system and housing models that attempt to sever the investment and shelter roles of housing.<sup>39</sup> CLTs can offer community-driven development strategies and can foster models that can supplant speculative housing forms.

## 4.3 CLTs in Australia – a review of the options

The potential advantages of a CLT scheme have been explored in Chapter 2 and above. This section explores what legal instruments best give effect to the effective operation of a CLT in Australia.

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<sup>36</sup> Davis (2010a).

<sup>37</sup> Davis (2010a).

<sup>38</sup> Yates (2009), Ronald (2008).

<sup>39</sup> For an example of the latter, see Stone (2009).

There has been a good deal of conjecture within the CLT community in Australia<sup>40</sup> on the question whether fixtures can be separated from the land to enable the CLT Classic model. In a sense this conjecture is a distraction.<sup>41</sup> What is important is ensuring a Resident has sufficient rights, including a right to be paid for improvements they make irrespective of the legal consideration that the fixtures form part of the land.

In *Milirrpum v Nabalco Pty Ltd*<sup>42</sup> Justice Blackburn gave a helpful list of rights to land that is consistent with the idea of ownership, namely:

- Right to use and enjoy
- Right to exclude others
- Right to alienate (i.e. pass to others by sale or under a will).

Justice Blackburn's decision in *Milirrpum v Nabalco Pty Ltd* was to *not* recognise claims of Indigenous persons to land and led eventually to the High Court recognising native title in *Mabo*. However, Justice Blackburn's analysis of what it means to have ownership in relation to land is still useful when we test concepts of 'ownership' in relation to CLTs.

In the US, CLT proponents see the CLT model as providing home owners who live on CLT land with:

- **Security** – that is a private place to call a home that has continuity;
- **Equity** – meaning whatever value a person has put into their homes through cash or labour is retained; and,
- **A reasonable legacy** – meaning that the property from which one derives security and has created value through equity can be passed from one generation to another.<sup>43</sup>

The CLT criteria seem broadly similar to the analysis of Justice Blackburn. The idea that 'security' is a 'private place' implies that a Resident has a right to exclude others and 'equity' seems consistent with a Resident's right to use and enjoy, especially where such right comes about from their own personal efforts. The 'legacy' seems consistent with the right to alienate, albeit the right to alienate is restricted.

In Australian property law, there are two main types of property rights: freehold and leasehold. Freehold is that right associated with having

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<sup>40</sup> See DF Mortimer and Associates (2011).

<sup>41</sup> In the same context as observed by Justice Harper in relation to "ownership" *State of Victoria v Tymbok Pty Ltd*, [2007] VSC 140 (9 May 2007), [55].

<sup>42</sup> [1971] 17 FLR 141 (at 270-273).

<sup>43</sup> Institute for Community Economics (1982, p232)

purchased the title to a defined piece of land and all the buildings and other things on it, whether natural or constructed. Leasehold is where a right is granted to exclusive use of the land for a certain time. The landlord (or lessor) is the owner, but the lessee (leaseholder or tenant) has rights to use of the land and the house or fixtures erected on the land. The owner and the leaseholder (unless the lease is three years or less) have rights to the land which can be registered. CLTs in Australia have to work within the existing legal framework, but can also inform the evolution and direction of property law.

CLTs that provide home ownership aim to limit the sale price of housing to allow continuing access to housing for those who would not otherwise gain entry to the property market. To perform this housing function, the essential elements of a CLT which need to be given effect to in legal instruments are the following:

- Grant of lease or sale of equity
- Limitations on alterations, building requirements
- Responsibilities for the home, its repair and upkeep
- Restrictions on buy-back price
- Rent
- Mortgage default

This section will discuss the models utilised by CLTs overseas and consider which appear most appropriate in the Australian context. The mechanisms that look most appropriate to CLT objectives under current Australian law are: long-term (99-year) leasehold to the entire premises (house and land) where this is legally permissible; and, a modified form of shared equity in the jurisdictions where such long-term leaseholds cannot escape residential tenancies legislation, or contain clauses that would be deemed unlawful under residential tenancies legislation. An overview of the possible mechanisms for delivering home ownership-type models via CLTs is provided in Table 4.1.

#### **4.3.1. The US approach – the CLT Classic Model**

Under the classic CLT model in the US, the CLT as a not for profit organisation holds the fee simple title to land. It leases the premises (usually for 99 years) and implements by way of lease terms, price restrictions on the transfer the lease.<sup>44</sup> In some US jurisdictions, the house only is conveyed to

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<sup>44</sup> The classic CLT model as developed in the USA and defined in 1992 in Section 233 of the Cranston-Gonzales National Affordable Housing Act (42 U.S.C 12773) is distinct from the broader definition of CLTs as an "English body" found in the UK *Housing and Regeneration Act 2008* s79. The latter Act does not define a CLT as an entity that leases land with resale restrictions. See discussion in Appendix 4.

the Resident by a 'deed of warranty' so that the Resident 'owns' the house but not the land, which is leased from the CLT. There are two legal instruments: first, a lease of the land to the Resident (termed a 'ground lease'); and secondly, the separate transfer of the house and fixtures under a deed of warranty to the Resident.

Criteria	Long term lease land, own house (CLT classic)	Long term lease of both land and home (RTA exempt)	Modified shared equity
Access to finance	?	✓	✓
Land stewardship and perpetual affordability	✓	✓	✓
Regulation of entry	✓	✓	✓
Registrable interest in land	Lease OK Deed of Warranty not registrable	✓	✓
Legislation exists	?	✓	✓
Documents	Lease Conveyance of dwelling and other improvements via Deed of Warranty Agreement on resale	Lease	Transfer of land Contract of sale Mortgage with conditions
Ease of comprehension	✓	✓	✓
Replicable?	No way to register Deed of Warranty	✓	✓
Inheritability	✓	✓	✓
Marketability	Has appeal but not legally possible	Maybe – a lease might not be seen as being as 'strong' as ownership	✓
Verdict	✗ Not currently possible	✓ Possible in some States	✓ Possible in all States and Territories

**Table 4.1. Overview of potential CLT mechanisms in Australia.**

Source: CLT legal roundtable, November 2011

The lease and deed of warranty is registered at a land records deed registry. These warranty deeds list all improvements that are to be conveyed to the Resident, distinct from the land to which the improvements are affixed. The warranty deed is a conveyance of title to the fixtures, free of restrictions on the price that may be obtained for sale of that title and free of the restrictions as to who may purchase the fixtures. CLTs in the US give effect

to the price resale restrictions and requirements that fixtures be transferred to income qualified persons in the lease. The leaseholder is therefore also the title holder of the fixtures. The lease may also contain an obligation on the part of the Resident to give the CLT rights of first refusal to purchase the fixtures.<sup>45</sup>

*The CLT Classic in the USA involves a Deed of Warranty to convey the registrable ownership of the fixtures to the resident, and a long-term lease for the underlying land.*

In summary, in the CLT classic, the home owner leases the land from the CLT and under a separate warranty deed the house and fixtures are conveyed absolutely to the home owner free of sale restrictions. Covenants in their lease then prevent the home owner from selling those fixtures on the open market or selling to persons not income qualified or eligible under the CLT scheme. In those jurisdictions in the US that may not permit a conveyance of the house and fixtures by a deed of warrant, the practice for CLTs is to dispense with the deed of warrant entirely and provide for ownership of fixtures in the lease document.<sup>46</sup>

In Australia, there is no straightforward method of achieving the separation of ownership of the home from the underlying land without the creation of specific legislation.<sup>47</sup> The US approach in using a deed of warranty to transfer the home to the CLT resident will not be a useful model to adopt, as under the Australian Torrens system of title by registration, there is no provision for the registration of fixtures separately from the land itself.<sup>48</sup>

*The CLT Classic might require legislative change in order to be possible in Australia, as fixtures cannot readily be separated from land title.*

<sup>45</sup> See National Community Land Trust Network (2011a).

<sup>46</sup> National Community Land Trust Network (2011a, p4).

<sup>47</sup> CLT legal roundtables, November 2011 and March 2012.

<sup>48</sup> Strata title legislation might provide a model if there were a defined area which could be subject to a scheme. The usual position is that strata title owners (e.g. of an apartment or unit) also have an interest in the common property, land and superstructure owned by the owners corporation.

A leasehold differs in that it grants limited rights to the land as well a home or other fixtures on the land. As will be mentioned below, a long term lease in some Australian jurisdictions can provide the Resident with a level of security and proprietary interest in the house and land and in some states will enable the effective implementation of a CLT scheme.

#### 4.3.1.1. Australian case law examples of relevance to consideration of the CLT classic

In the absence of a clear mechanism through which title to fixtures can be separated from title to land in Australia, case law shows some of the problems that can arise when attempting to allocate land and fixtures to different parties. In the absence of clear and enforceable agreements, it is interesting to see how this separation has been treated at law.

##### **Box 4.1. Termination of Lease Problems: *May v Ceedive Pty Ltd***

This case<sup>49</sup> concerned an action by Ceedive to evict Mr May as a tenant of Ceedive's land. At issue was whether notices by Ceedive to Mr May to terminate the lease were subject to the process for serving notices under landlord and tenant legislation. This legislation applied to residential leases of 'premises'.

It was common ground between the parties that Mr May "owned" the house. This house was a substantial brick structure and was "bought" by Mr May from a local real estate agent many years prior to the case. Ceedive said accordingly, that its lease with Mr May must be a lease of "bare land" rather than a lease of 'premises'.

The Court found that the house was a fixture and fell under the definition of "premises" in the relevant landlord and tenant legislation. Accordingly Mr May was entitled to proper notice required under that legislation for termination of his tenancy.

The Court considered that the presumptions of Mr May and the real estate agent from whom Mr May purchased the house could not prevail over the position at law as to whether the house was necessarily leased with the land on which it stands. The Court found that there was no evidence of an agreement that the house could be dealt with separately from the underlease. Nor did it matter that Mr May had acquired the house for value.

In the case *May v Ceedive* above neither party denied that Mr May was the owner of the house. What was in issue were the circumstances in which Mr May as lessee was to terminate his lease. The case highlights the

<sup>49</sup> [2006] NSWCA 369.

dependency upon the terms of the lease of a claim to ownership of the fixtures. It also shows that normally 'premises' includes land and buildings. Finally, the case also illustrates how landlord and tenancy legislation can impact upon an arrangement where at least one party asserts the lease is a ground lease of bare land only.

**Box 4.2. A residential tenancy regardless: *Australian Maritime Safety Authority v Quirk***

Mrs Quirk occupied a lighthouse keeper's cottage on Barranjoey Head in New South Wales under a deed and then a lease<sup>50</sup>. The registered proprietor was the Commonwealth Government or a statutory authority. These documents permitted Mrs Quirk to occupy the premises for her lifetime and make improvements to the cottage. The deed required Mrs Quirk to maintain and repair the cottage without cost to the Government body. Mrs Quirk was required to pay a 'ground lease' for use of the land. The documents also provided that Mrs Quirk could not assign or transfer the lease. However it provided that Mrs Quirk's son effectively had an 'option' to acquire the lease after the death of his mother.

Much of the litigation involved discussion on determination of the ground rent. The documents did not provide for valuation of the ground rent over time. His Honour Justice Bryson expressed apparent frustration by stating "I have not been presented with any cogent valuation logic based on principle..."

His Honour held that the documents 'do not take affect according to their terms'. His Honour held that the documents were in nature of a residential tenancy agreement under the RTA 1987 (NSW) and pointed out that the landlord under section 25 is obliged to provide and maintain the residential premises. Accordingly his Honour held that the lessee's obligation to repair was void and that the prohibition against assignment was also void.

His Honour observed that the "terms of the [RTA] show no sign that those who drafted it adverted to problems and injustices which can result from its application to a building lease for residential premises". ('A building lease' recognises that the lessee builds the improvements and is responsible for maintaining those improvements). His Honour made orders that the terms of the documents are subject to the RTA 1987, in addition to orders for the terms of payment of ground rent.

<sup>50</sup> *Australian Maritime Safety Authority v Quirk* (1998) NSW ConvR 55-858; [1998] NSW SC 147 (30 April 1998).

Based on the case summaries above and broad definition of residential tenancy agreement, a CLT lease will fall under the requirements of residential tenancies legislation unless specific exemptions are utilised. This legislation is found in each Australian jurisdiction<sup>51</sup> and appears to not be appropriate for core CLT objectives and activities unless rental housing is being provided.

**Box 4.3. Judicial Consideration on “Ownership”: *State of Victoria v Tymbook Pty Ltd***

This case<sup>52</sup> concerns the Palais Theatre at St. Kilda beach, Melbourne. The land upon which the Theatre stood was held by the Crown. The land was let to successive theatre operators initially under an ‘occupancy agreement’ in 1926, and later in 1956, under a lease. Rent was calculated with reference to the unimproved value of the land.

The occupancy agreement permitted the Theatre operator to hold an auction prior to expiration of the agreement in order for the operator to sell the Theatre building to the next operator.

The lease did not have the ‘auction clause’ of the occupancy agreement. Instead and partly consistent with the *Landlord and Tenant Act 1958*, the lease permitted the operator during its tenancy or whilst in possession, to remove from the land such fixtures as were its property (including fixtures erected during the term of the occupancy agreement). That is, under the lease the Theatre operator had a right to remove the Theatre building.<sup>53</sup>

The rights to auction or to remove fixtures respectively his Honour Justice Harper observed, were ‘in recognition’ that the Theatre building was built and paid for by successive Theatre operators.

In 2006 in anticipation of the expiry of the lease, the State of Victoria as landlord sought access to the Theatre to prepare a condition report. It asserted that it owned the Theatre building, in addition to owning the land. The Theatre operator refused the request for access and counterclaimed that it owned the Theatre.

<sup>51</sup> *Residential Tenancies Act 1997* (ACT); *Residential Tenancies Act 2010* (NSW); *Residential Tenancies Act 1999* (NT); *Residential Tenancies Act 1994* (Qld); *Residential Tenancies Act 1995* (SA); *Residential Tenancy Act 1997* (Tas); *Residential Tenancies Act 1997* (Vic); *Residential Tenancies Act 1987* (WA).

<sup>52</sup> [2007] VSC 140 (9 May 2007).

<sup>53</sup> It seems the Theatre operators were content not to have an auction clause as the lease was of sufficient duration to allow them to amortise (i.e. write off) the Theatre building costs: *State of Victoria v Tymbook Pty Ltd (Palais Theatre)*(Retail Tenancies) [2006] VCAT 2298,[123].

The case was enlivened due to a heritage order over the Theatre. The heritage order prevented the Theatre operator from exercising its rights under the lease to remove the Theatre.

In coming to his conclusion, His Honour relied on the terms of the lease at [37], rather than the understandings of the parties subsequent to execution of the lease.

His Honour stated at [51] “it does not concern me that [the Theatre operator] referred to itself as the owner of the Palais Theatre...The epithet was appropriate. The [Theatre operator] *was* the owner of the Theatre, although the rights attached to that ownership were restricted”.

His Honour<sup>54</sup> observed that while both parties had engaged in a search for the “true owner of the Palais Theatre” the search was “essentially a distraction”. His Honour then added “the entire controversy [regarding who owns the Palais Theatre] is pointless.” The real question in His Honour’s opinion was the substance of the Theatre operator’s rights to the Theatre and whether those rights extended beyond the expiration of the lease.

His Honour found that the Theatre operator’s rights in the Theatre did not extend beyond the end of its leasehold. Whatever ownerships rights it had in the Theatre building were extinguished at the expiration of the lease. The State was entitled to possession of the Theatre.

As can be seen from the *State of Victoria v Tymbook* case summary, His Honour discussed the idea that ownership may be absolute or may be restricted. In the case of the Palais Theatre, his Honour found that ownership was restricted by the fact that the land owner was not the entity which operated and owned the Theatre.

This case is important to illustrate how irrelevant the concepts of ownership can be in relation to questions of entitlements, rights and obligations. The better legal question is: what are the legal consequences of that ownership? Nonetheless his Honour seems to accept that it is not unreasonable for a lessee to describe their relationship to the improvements as being one of ownership (albeit qualified) particularly where they have incurred expenditure.

The outcome in the case above may have been different if the lease agreement had similar terms to that of the former permissive occupancy agreement. That is, if the agreement between the state government and

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<sup>54</sup> At [55].

Tymbook permitted the lessee to recoup the value of the improvements from the subsequent purchaser of the lease or alternatively, from the State Government where the leasehold would merge with the fee simple, i.e. where the state government took the land without being subject to any further leases.

### 4.3.2. United Kingdom

In the UK, CLTs are recognised in legislation, which gives a broad definition of what a CLT is and its purpose being determined by the community.

The present CLT sector in the UK is made up of 35 per cent of homes for rent, 59 per cent homes for part sale (shared equity) and six per cent are for outright sale.<sup>55</sup> Apart from offering housing, CLTs also focus on actually building the housing (often via self-build) and running other community enterprises such as workshops, community gardens and even a pub.

In the case of shared-equity homes, CLTs fix the resale value as a percentage of open market value. In the UK<sup>56</sup> these include the transfer of part of registered title to the householder with an agreement to resell back to the CLT at an agreed percentage of market value written into a Deed.<sup>57</sup>

*In the UK, CLTs use shared equity or resale covenants – there is no universal approach, and the CLT Classic is not possible. This is why the Classic is not possible in Australia – our legal system evolved from English law.*

Another method is freehold sale with a resale covenant.<sup>58</sup> For example, St Minver CLT sold serviced plots to self builders freehold with a resale covenant which ensures that the disposal requirements cannot be breached, plus the added assurance of a pre-emption agreement which gives the CLT a 'first refusal' to reacquire or nominate a purchaser for a dwelling when it is sold. The resale covenant fixes all resales as a percentage of open market

<sup>55</sup> Paterson and Dayson (2011).

<sup>56</sup> See UK National CLT Network (n.d.a.)

<sup>57</sup> For example, as used by Cornwall CLT Limited.

<sup>58</sup> Described by the UK CLT Network 'jargon buster' as 're-sale price covenants' (UK National CLT Network, n.d.b.); but see definition of 'restrictive covenant' and 'part-equity ownership' in UK National CLT Network (n.d.c.).

value (OMV) and at St Minver, following independent valuation of the first phase, this percentage was fixed at 31.3 per cent.<sup>59</sup>

CLTs in the UK use covenants in the following way.<sup>60</sup> The CLT acquires the fee simple title and by means of a covenant, restricts the sale price of the fee simple title. The CLT then transfers that fee simple title to the resident. The covenant is said to prevent that resident from selling the fee simple title at a later time for a price greater than that specified in the covenant. Notably, the CLT no longer retains title to the land but may retain rights to enforce the covenant as a matter of contract law.

Under Australian law, covenants are typically used by property developers to regulate the appearance of fee simple lots in a development subdivision. Covenants may also restrict use of land. These common law covenants are generally expressed in the negative (i.e. a covenant that the fee simple owner 'must not' do something). Positive obligations on common law covenants are generally unenforceable against subsequent purchasers of the lots.<sup>61</sup>

At common law covenants are enforceable against subsequent purchasers if the covenants are negative and improve the amenity or value of land retained by the vendor. Special statutory provisions in some states allow the Crown or its instrumentalities to impose positive covenants on land which bind all purchasers without the need for the Crown or the instrumentality to retain land which will benefit from the covenant. In Victoria, one such special exception exists in relation to covenants protecting the environment. Trust for Nature (Vic) registers statutory covenants on title<sup>62</sup> to oblige the occupier to use that land with regard to its environmental benefits. The covenants are entered into voluntarily by the initial holder of the fee simple title. They are binding against subsequent purchasers. The covenants need not be negative; i.e., the covenants can positively oblige a land occupier to care for the environmental quality of the land.<sup>63</sup>

A problem with covenant mechanisms is that they may be difficult to enforce against subsequent purchasers of the fee simple title. Once the covenant is removed, the fee simple title to the land effectively can be sold on the open market. A prudent approach is to ensure that CLTs always have a stake in the property and limit how much return the Resident receives at the end of their time as a CLT owner, thus achieving the twin objectives of

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<sup>59</sup> Paterson and Dayson (2011, p21).

<sup>60</sup> See UK National CLT Network (n.d.a.).

<sup>61</sup> Victorian Law Reform Commission (2010) [12.33]; *Austerberry v Corporation of Oldham* (1885) 29 Ch D 750.

<sup>62</sup> Under the *Victorian Conservation Trust Act 1972*, (Vic) s3A.

<sup>63</sup> *Victorian Conservation Trust Act 1972*, (Vic) s3A (11).

providing access to the housing market, providing affordable housing and giving the Resident a stake in the home and some benefit from increasing land value. In light of the above difficulties, the UK CLTs primarily do this via shared equity agreements or agreements on re-sale and often value CLT homes as a percentage of market value.

### 4.3.3. Australian option 1: Modified Shared Equity

Shared equity is where different parties share the ownership of the property and any house erected on the land. There are several State-sponsored and administered shared equity schemes currently operating in Australia.<sup>64</sup> Throughout this manual we refer to the property as the ‘premises’ which means the land and house and anything else attached to the land. Co-owners of real property are known as ‘tenants in common’. This does not imply they are literally tenants of the landlord, rather than they hold the property in common (‘tenant’ comes from *tenir* – to hold – in Latin). A couple who buy a house together may purchase as ‘tenants in common’ when both of their names appear on a title.<sup>65</sup> Business partners can be shared equity partners; for example, two or more people might own an investment property or a commercial property as tenants in common.

*Shared equity is based on a contract between two parties – here, the resident and the partner organisation (CLT).*

In the case of a shared equity offered by a CLT, one co-owner is the CLT and the other co-owner is the Resident. The CLT might sell a specified portion of the value of the property to the Resident for an agreed price; for example, a CLT may sell 50 per cent of the equity and keep 50 per cent. Or the Resident’s proportion could be higher, or lower. Each co-owner has the right to dispose of their interest by sale; however, an agreement can restrict terms of the sale so that the CLT has first option to buy, and the extent of capital gain on this. The potential of a modified shared equity model for enabling CLTs in Australia is discussed in detail in Chapter 8.

<sup>64</sup> See Pinnegar et al (2009).

<sup>65</sup> This allows each of the co-owners to separately leave their share by will or to sell their share. This contrasts with joint tenancy where the longest survivor is entitled to all the property.

#### 4.3.4. Australian option 2: Long-term Leasehold

Where a long term lease (usually 99 years<sup>66</sup>) is used for a CLT, the CLT is registered owner of the premises (house and land) and grants a long term lease to an eligible Resident who will become the CLT lessee. The Resident pays a Premium (lump sum) for the grant of the lease and is the owner of the lease which gives the Resident rights to use the land and house and any fixtures on the land for a specified period of time – the term of the lease. The long term lease would be registered under the land titles legislation in the state or territory (see 4.3.5). Lease registration requirements are not the same in all jurisdictions. For example in the Australian Capital Territory, Northern Territory and Queensland the relevant legislation does not specify a minimum term required for registration. In South Australia a fixed-term lease for a period exceeding one year must be registered.<sup>67</sup> In Tasmania registration of leases for less than three years is not permitted. Common practice in Victoria is not to register leases of three years or less.<sup>68</sup>

Long-term leasehold can act like CLT ownership so long as the lease sits outside of Residential Tenancies legislation.

Short-term leases (leases not exceeding three years) are not generally required to be registered under Torrens title but usually the registered owner of the land will be bound by that short-term lease.<sup>69</sup> But since long-term leases are being considered as one of the mechanisms for delivery of CLT housing options, this exception is not likely to be important. A long-term

<sup>66</sup> This is the usual term in the USA and is intended to mimic perpetuity – leases re-start with a new resident when the resident chooses to sell or the property is bequeathed to an inheritor. This also gives the CLT a window to dispose of the property when a resident sells, if a majority decision determines that the property no longer serves the core objectives of the CLT. Shorter-term leases can be used but might not confer the same sense of perpetual ‘ownership’ to residents. In NSW, the use of a 99-year lease also serves to make the lease exempt from Residential Tenancies legislation where this is desired. Shorter leases – for example, 40 or 50 years— could be used in Victoria and Tasmania but this might undermine the sense of ‘perpetuity’. Lease duration and RTA exemptions are discussed in 4.3.6 and Appendix 8.

<sup>67</sup> *Land Titles Act 1925* (ACT) s82(1); *Real Property Act 1900* (NSW) s53(1); *Land Title Act 2000* (NT) s65; *Land Title Act 1994* (Qld) s64; *Real Property Act 1886* (SA) s16; *Land Titles Act 1980* (Tas) s64(1); *Transfer of Land Act 1958* (Vic) s66(1); *Transfer of Land Act 1893* (WA) s91. 43

<sup>68</sup> See 66, *Transfer of Land Act 1958* (Vic)

<sup>69</sup> Torrens title legislation usually provides that the registered owner is bound by an unregistered short term lease. See, for example, *Real Property Act 1900* (NSW) s.42(1)(d).

lease can provide a viable mechanism for CLT housing in some Australian jurisdictions. This is because it:

- (a) allows the imposition of such duties as duties to repair, pay rates, etc. (positive covenants);
- (b) binds subsequent owners of the freehold and subsequent tenants under the lease (covenants run with the land);
- (c) retains the housing stock within the CLT whilst providing affordable housing;
- (d) provides the Resident with a sense of ownership, with the ability to improve the property;
- (e) can compensate the Resident for improvements at the end of the lease or on its earlier surrender;
- (f) can impose conditions relating to eligibility, resale, transmission to beneficiaries;
- (g) allows removal (or payment of value) for fixtures erected or improved by the Resident;
- (h) makes provision for surrender and re-grant where the Resident wishes to leave the unexpired portion of the lease to family under a will; and,
- (i) sets out provisions relating to subleasing or transfer of the remaining period under a lease.

The 99-year CLT lease is discussed in detail in Chapter 7 and a model 99-Year Lease appears in Appendix 5.

#### 4.3.5. The Torrens system of title by registration<sup>70</sup>

In Australia the Torrens system applies to real property. The Torrens System is a system of 'title by registration'. That is, until an interest (such as that of the Resident) is registered, legal title is not established. There are exceptions to this general rule<sup>71</sup> but overall the objective is to provide a central register whereby a prospective purchaser with an interest in land may conveniently see those other interests that may affect their purchase.<sup>72</sup>

Once registered and subject to exceptions such as where fraud or mistake is involved, the registered proprietor of the interest gains an 'indefeasible

<sup>70</sup> The Torrens system of title registration is currently state based. The Law Council of Australia supports a draft Uniform Torrens Title Act prepared by Professor Peter Butt (The New Lawyer, 2012).

<sup>71</sup> For example the effect of s42(2)(e) of the *Transfer of Land Act (Vic)* is that a tenant *in possession* has an indefeasible interest or NSW in relation to a short term lease, *Real Property Act 190 (NSW)* s.42(1)(d).

<sup>72</sup> See Butt (2010) at [2002] – [2003] and [2012].

title'. That is, their title is paramount and overrides any other person's claim to their interest.

Without registration on title a person may only have what is called an 'equitable interest' in land. For example, an equitable interest may arise by signing a contract for the sale of land, or by having an unregistered lease, or by reliance on promises made by the landowner to another, amongst other things. This presents difficulties with enforcing that interest against other persons who may also have an unregistered interest. In cases where a person seeks to enforce an equitable interest over land, courts may award a remedy of damages, rather than specific performance of the contract or promise from which the equitable interest arises.

For the purposes of giving the Resident security of tenure we need to give them more than an 'equitable interest'. Instead, we need to provide legally recognised indefeasible title to rights over the land to the Resident. Legal recognition of a Resident's rights must be through the title registration system.

Presently there is no explicit means to separately register fixtures through the title registration system.<sup>73</sup> However the land registry offices in each jurisdiction will register fee simple, leases, mortgages and covenants on a central registry.

As outlined in 4.3.4 above, lease registration requirements vary between jurisdictions. The effect of registration is to give 'indefeasible title' to the Resident as their leasehold is effectively established beyond most disputes.

#### **4.3.6. Effect of residential tenancies legislation**

A CLT model based on a long-term lease to a Resident needs to be considered in the light of residential tenancies legislation in the various states and territories.<sup>74</sup> The authors do not feel that a residential tenancies lease is an appropriate lease for use by a CLT if the CLT aims to offer core features of home ownership.

Residential tenancy legislation protects the rights of tenants and ensures an appropriate allocation of responsibility between the tenant and landlord. It forms part of broader consumer protection schemes. It provides basic

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<sup>73</sup> In Australia it is technically possible through the subdivision process to convey a separate title to fixtures. A lease is still required to give the title holder to the fixtures access to the land: notes from meeting with Peter Butt, 21 January 2012.

<sup>74</sup> Residential tenancies legislation is subtly different in the various States and Territories but is broadly similar in many ways. This is explored in more detail in Chapter 7.

protection for tenants with little bargaining power to ensure fair treatment. The key features of residential tenancies legislation usually include the following:

1. Restrictions on the payment of premiums for grant of the lease
  - The residential tenancies legislation limits upfront charges to bond and rent (usually imposing a limit on how much rent can be charged in advance). This limitation is inconsistent with the operation of a CLT. It is unlawful to demand or receive a premium for the grant of a lease. This means that the normal upfront payment under a CLT scheme cannot lawfully be demanded.
  - This effectively prevents a CLT scheme where residential tenancies legislation applies.
2. Provisions relating to the termination of leases
  - Under residential tenancies legislation after the expiry of the fixed term of a lease, the landlord may, on appropriate notice, terminate the lease for no reason. There is no provision for reimbursement of the resident for an amount they have paid such as exist under a standard CLT scheme.
3. Imposing responsibilities for such matters as maintenance, repairs, rates, etc.
  - Residential tenancies legislation imposes responsibilities for maintenance, repairs, rates and taxes on the landlord. Under the CLT scheme the Resident may be responsible for all or most of these costs.
  - As it is unlawful under the legislation to impose these charges on the tenant, this effectively prevents a CLT scheme operating where the Residential Tenancies legislation applies.
4. Imposition of standard terms for residential leases
  - Residential Tenancies legislation frequently sets out standard terms. This would not permit special terms that are needed for a CLT to operate.

These restrictions make it impossible under Residential Tenancies legislation for the Resident to: take responsibility for repairs, rates etc; to pay up front for a proportion of the value of the home and land; and, to be compensated for the value of improvements on termination of the lease and a proportion of the increase in value. Attempting to enforce or enact such activities under

Residential Tenancies legislation might leave CLTs vulnerable to fines and criminal penalty.

In some states, there are exemptions from the legislation based on the term of the lease (in NSW, Tasmania and Victoria). In other states (ACT, NT, Qld, and SA) exemptions can be made via regulation. In WA, there does not appear to be any existing exemption that a CLT could utilise, so legislative change may be required. But there is no uniform rule. In some jurisdictions, a long-term lease is not a useful model for CLT housing at the current time. This is discussed in more detail in Chapter 7.

#### 4.4 Summary – possible CLT models in Australia

In summary, it appears that at the moment there are two models that are most readily applicable for CLT-type programs and objectives in Australia. The first is a long-term leasehold that is exempt from residential tenancies legislation in jurisdictions where such exemptions can be utilised or granted. This is discussed in Chapter 7 and a model lease provided in Appendix 3. The second is a modified shared equity scheme, based on existing shared equity schemes with modifications that articulate core CLT objectives such as eligibility, inheritance and resale restrictions. This is discussed in Chapter 8 and a model shared equity contract provided in Appendix 6.

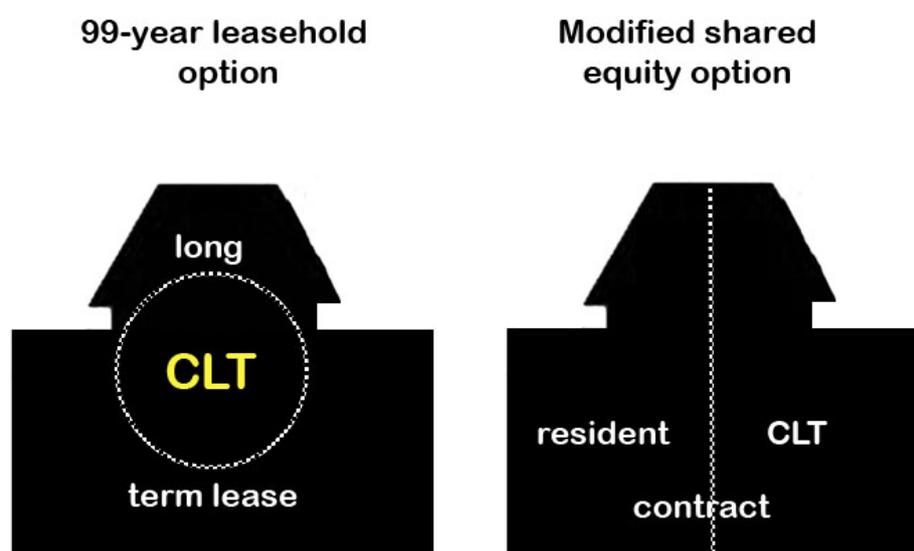


Figure 4.1. Possible CLT mechanisms in Australia.

Source: author.

## 5 Community Land Trust Structures<sup>75</sup>

Derek Mortimer<sup>76</sup>

### Important information you should know before you read this section.

The material in this Chapter 5 of the *Australian Community Land Trust Manual* is designed and intended to provide CLT proponents with general legal information that may be needed to establish a CLT. The information is current at the time of publication, for general informational purposes only. The material may not apply to all jurisdictions or to all needs of a particular CLT.

The material does not constitute legal advice, and is not intended to be a substitute for legal advice and should not be relied upon as such.

CLT proponents should seek legal or other professional advice before establishing a CLT.

The purpose of this Chapter is to describe and review the legal requirements for structures that may be useful for Community Land Trusts (CLTs) in Australia. These structures are:

- Company limited by guarantee
- Incorporated association
- Non trading co-operative.

Before we discuss each of these structures and their usefulness to CLTs, it may be worthwhile to first consider the several matters below:

- Purpose of a CLT
- Location of activities
- Sources of CLT revenue and impact of taxing statute
- Structuring – subsidiary entities

It is important for CLT proponents to thoroughly discuss the proposed purpose of their CLT before incorporation (see Chapter 3). CLT proponents may want the CLT to own a particular piece of land<sup>77</sup> or acquire land in a particular region. The persons who are likely to be assisted by the CLT may

<sup>75</sup> This material is abridged from Sharma et al (2013).

<sup>76</sup> “We” refers to DF Mortimer and Associates.

<sup>77</sup> See the story of Troy Gardens and Madison Area CLT in Rosenberg (2010).

need to be considered, especially if CLT proponents want to obtain Public Benevolent Institution (PBI) status from the Australian Tax Office (ATO).

It is likely many CLTs would want to be income tax exempt so as to avoid liability for income tax on lease fees and other income sources. Some CLTs may also want to obtain deductible gift recipient (DGR) endorsement to attract tax-deductible donations of cash and land. These tax privileges impose obligations on the CLT. Taxation of CLTs is discussed further in Chapter 6.

The location of CLT activities may affect the type of legal structure chosen. If promoters wish their CLT to be Australia wide, then an association incorporated under state jurisdiction may be too restrictive.

There may be a need to have several CLT structures, comprising parent and subsidiary entities. For example a CLT conglomerate may include:

- a not-for-profit CLT parent entity to hold property and enter into Agreements with Residents
- a subsidiary for-profit entity as property developer or real estate agent (with surplus directed back to its 'parent' CLT)
- a CLT 'necessitous circumstances fund' with DGR endorsement to operate as a revolving loan fund, where the CLT parent acts as trustee of the fund.

## 5.1 Companies limited by guarantee

### 5.1.1. Definition and characteristics

A 'company limited by guarantee' means a company formed on the principle of having the liability of its members limited to the amount that the members undertake to contribute if the company limited by guarantee is wound up.<sup>78</sup> The amount of the guarantee is typically very small (e.g. \$50). The amount must be specified in registration with ASIC.

Companies limited by guarantee are regulated by federal legislation<sup>79</sup> and do not have share capital.<sup>80</sup>

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<sup>78</sup> *Corporations Act 2001* (Cth) s9.

<sup>79</sup> *Corporations Act 2001*(Cth); *Corporations (Review Fees) Regulations 2003*; ASIC Class Orders *CO 02/184* and *CO 04/1569* (in relation to exemptions for CLGs from fundraising provisions under the Act).

<sup>80</sup> *Corporations Act 2001* (Cth) s124.

An example of a company limited by guarantee with a community land trust mission is the Castlemaine Victoria based entity, Mount Alexander Community Land Ltd.

### 5.1.2. Directors and secretary

A company limited by guarantee must have at least three directors and one secretary.

The duties of directors are extensive; conscientiousness on the part of a director is not sufficient to avoid prosecution.<sup>81</sup> CLT proponents should inform themselves of the director duties.

The secretary must ensure the company complies with certain obligations including the maintenance of a registered office, keeping the registered office open to the public, and corresponding with ASIC.<sup>82</sup>

CLT proponents should note the typical board structure for a CLT comprises between nine and 12 persons. In addition there are several classes of directors; namely, Resident directors, general directors and public directors. See the further discussion on the precedent constitution commentary in Appendix 7 under the heading “Appointment and Removal of Directors”.

Given that a CLT may comprise persons with little experience managing companies, we recommend CLT proponents arrange appropriate board training courses. The Public Interest Clearing House and the Australian Institute of Company Directors both offer not-for-profit board training courses; there may also be other providers to choose from.

### 5.1.3. Members

A company limited by guarantee must have at least one member. Members must state the amount of the guarantee that they agree to in writing before registration.<sup>83</sup>

A person is deemed to be a company limited by guarantee member when their name is entered on the register of members. Hence a person is not entitled to membership rights, such as voting rights, until their name is entered on the register.<sup>84</sup>

A CLT typically has several categories of members namely:

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<sup>81</sup> *Australian Securities and Investments Commission v Healey* [2011] FCA 717.

<sup>82</sup> *Corporations Act 2001* (Cth) s188.

<sup>83</sup> *Corporations Act 2001* (Cth) ss114-121.

<sup>84</sup> *Corporations Act 2001* (Cth), ss169 and 231.

- Current Residents
- Prospective Residents
- Persons or organisations from the general public.

We discuss this further in the commentary below on the CLT constitution, under 5.2.3 Membership.

#### **5.1.4. Auditor**

A registered company auditor must be appointed for all companies limited by guarantee, including “small companies limited by guarantee” within one month of company registration. Hence a “small company limited by guarantee” must appoint an auditor on the one hand, but on the other hand, may not be required to produce audited financial reports.<sup>85</sup>

#### **5.1.5. Registered office**

As a public company, a company limited by guarantee must have a registered office. The registered office must be open to the public for least three hours each business day.

#### **5.1.6. Registration of company limited by guarantee – deletion of word “Limited” in company name**

A company limited by guarantee may be registered without the word “Limited” in its name. Some CLTs may wish to do this to say, avoid a perception that their company limited by guarantee is “commercial”.

Deleting the word “Limited” from a company limited by guarantee’s name is only possible if its constitution:

- requires it to pursue charitable purposes only and apply its income to promoting those purposes;
- prohibits it from making distributions to its members and paying fees to its directors; and
- requires the directors to approve all other payments made to directors.<sup>86</sup>

The precedent CLT constitution found in Appendix 7 contains the requisite clauses.

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<sup>85</sup> *Corporations Act 2001 (Cth)*, s327A.

<sup>86</sup> *Corporations Act 2001 (Cth)*, s150.

### 5.1.7. Advantages and disadvantages of a company limited by guarantee

#### Company limited by guarantee pros

- Federal legislation, regulated by ASIC

#### Company limited by guarantee cons

- Establishment and reporting might be complex and/or expensive for small groups

#### 5.1.7.1. Advantages

Because a company limited by guarantee cannot distribute dividends or assets to members by law, a company limited by guarantee is an ideal structure for a CLT.

For CLT proponents the major advantage of a company limited by guarantee is that it may operate in all Australian jurisdictions. This does not mean that a CLT must operate in more than one jurisdiction, only that it may. This advantage may be illusory for many CLTs that choose to operate in a particular geographical location such as a town or suburb. Certainly the experience in the US is that CLTs generally do not operate over many jurisdictions.

#### 5.1.7.2. Disadvantages

Relative to small incorporated associations, financial reporting requirements and governance for a company limited by guarantee may be more complex.

## 5.2 Incorporated associations

### 5.2.1. Definition and characteristics

Associations are incorporated under state jurisdiction.<sup>87</sup> A statutory feature of incorporated associations is that they must be not-for-profit.<sup>88</sup> These

<sup>87</sup> *Associations Incorporation Act 1981* (Vic) and the *Associations Incorporation Regulations 2009* (Vic); *Associations Incorporation Act 2009* (NSW) and *Associations Incorporation Regulation 2010* (NSW); *Associations Incorporation Act 1981* (Qld) and *Associations Incorporation Regulation 1999* (Qld); *Associations Incorporation Act 1985* (SA) and *Associations Incorporation Regulations 2008* (SA); *Associations Incorporation Act 1964* (Tas) and *Associations Incorporation Regulations 2007* (Tas); *Associations Incorporation Act 1987* (WA) and *Associations Incorporation Regulations 1988* (Tas); *Associations Incorporation Act 1991* (ACT) and *Associations*

factors suggest incorporated associations may be suitable for CLTs that operate in a single jurisdiction.

Incorporated associations can have relatively large gross receipts and current assets. For example, under the NSW Act, “tier 1” associations have gross receipts in excess of \$250,000 or current assets in excess of \$500,000. These associations are required to submit audited financial statements each year to members.

What was once a wide gap between the regulatory requirements for incorporated associations and companies limited by guarantee is narrowing. For example, amendments to the Victorian Act set out a range of duties for committee members that mirror the duties of directors under the Corporations Act.

CLT proponents should be aware that some jurisdictions only permit associations to be formed for certain purposes, purposes such as churches, schools and benevolent societies. The relevant legislation with specific requirements are those of South Australia, Tasmania, Western Australia and the Northern Territory.<sup>89</sup>

Accordingly CLT proponents may find that the purpose of their CLT is not an acceptable purpose for an association in those jurisdictions. In this case, it may well be better for CLT proponents to consider using a company limited by guarantee or co-operative.

Other jurisdictions permit any group of persons to incorporate as an association, providing that the association is not for the purpose of making pecuniary profit to be distributed to members. The jurisdictions are those of New South Wales, Queensland, Victoria and the Australian Capital Territory.<sup>90</sup>

Accordingly CLT proponents that wish to use an incorporated association for their CLT should fit in with the “purpose” of these jurisdictions.

Note that if a state-based CLT as an association is “carrying on a business” in states other than its own jurisdiction, the CLT may need to obtain an

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*Incorporation Regulations 1991 (ACT); Associations Act 2003 (NT) and Associations Regulations 2004 (NT).*

<sup>88</sup> See for example the *Associations Incorporation Act 1981 (Vic)* at s51(4).

<sup>89</sup> *Associations Incorporation Act 1985 (SA)*s18(1); *Associations Incorporation Act 1964 (Tas)* s2(1); *WA Associations Incorporation Act 1987 (WA)* s4(1); *Associations Act 2003 (NT)* s4(1).

<sup>90</sup> *Associations Incorporation Act 2009 (NSW)* s6; *Associations Incorporation Act 1981 (Qld)* s5(1); *Associations Incorporation Act 1981 (Vic)* s3(1); *Associations Incorporation Act 1991 (ACT)* s14(1).

Australian registered body number (ARBN).<sup>91</sup> A body with an ARBN becomes subject to parts of the *Corporations Act 2011*. It is likely the activities of a CLT would be regarded as the “carrying on of a business”. This is because the CLT effectively engages in a business of providing leases or co-ownership deeds for residential purposes.

### 5.2.2. Management Committee and secretary

As described for the boards of companies limited by guarantee, note that CLT boards for an association may need to specify different classes of committee members. That is, the committee members of the association should be Residents, general members and members of the public if the classic CLT model of board governance is used.

The common law duties for committee members of incorporated associations have been uncertain. It is likely that they emulate the duties required of company directors. It is important that CLT proponents understand the correct processes to follow regarding decisions on CLT land use as the case below illustrates.

#### **Box 5.1. Use of assets and the need to follow process: *Lai v Tiao (No 2)***

The second defendant in this case<sup>92</sup> was a religious and charitable organisation which owned land on which it had constructed a temple paid for from monies contributed by association members. The association purported to enter into a contract to develop and sell part of the association’s land. However only certain members of the committee of management were aware of this and general members were not advised of this decision. The association in fact was found by the court not to have conducted annual general meetings.

His Honour Justice Johnson stated at [84] that “it is probable that committee members owe in the same measure, the common law and equitable duties which law and equity have imposed on company directors”.

His Honour found that certain individual directors had conducted the association “as a personal fiefdom” apparently in wilful disregard of the obligations of committee and statutory requirements of the association. His Honour made orders entitling the plaintiff member access to the association’s land and restraining the defendants from changing the locks to the land and from permitting persons other than members of the association to access the land.

<sup>91</sup> *Corporations Act 2001* section 5B.2.

<sup>92</sup> *Lai v Tiao (No 2)* [2009] WASC 22.

The common law duties of management committees are gradually being replaced by statutory requirements.<sup>93</sup> We recommend CLT proponents inform themselves of the duties of committee members of incorporated associations.

Committee members must disclose any pecuniary interest they may have in contracts with the association to the committee.<sup>94</sup> Obviously enough, a prospective Resident who also sits on the CLT committee would need to disclose that interest prior to any discussion to grant that member a lease.

Whether a committee member may remain and participate in deliberations on a contract in which they have an interest by the committee varies from jurisdiction to jurisdiction. NSW and Western Australia prohibit participation and voting by a committee member in these circumstances.<sup>95</sup>

The role of the secretary is sometimes conflated with the role of the “public officer”. Most jurisdictions specify that the contact person between the association, the government and the community is the public officer.<sup>96</sup>

### 5.2.3. Members

An incorporated association must have a minimum number of members. In NSW, Victoria and the ACT and the Northern Territory the Acts require a minimum of five members. The Queensland Act requires seven members and in Western Australia the minimum membership is six.<sup>97</sup>

Despite the minimum number of members required under the legislation, CLT proponents may wish to increase membership to gain a representation of current Residents, prospective Residents and members comprising persons from the general public.

### 5.2.4. Auditor

<sup>93</sup> See for example *Associations Incorporation Act 1981* (Vic) s29A.

<sup>94</sup> See for example *Associations Incorporation Act 2009* (NSW) s31 and *Associations Incorporation Act 1981* (Vic) s29B.

<sup>95</sup> *Associations Incorporation Act 2009* (NSW) s31(5) (6); *Associations Incorporation Act 1987* (WA) ss21 and 22.

<sup>96</sup> *Associations Incorporation Act 2009* (NSW) ss34 – 36; *Associations Incorporation Act 1981* (Qld) ss65 – 69A; *Associations Incorporation Act 1985* (SA) s56; *Associations Incorporation Act 1964* (Tas)ss14 – 15; *Associations Incorporation Act 1981* (Vic) ss24 – 28; *Associations Incorporation Act 1991* (ACT) ss57 – 9; *Associations Incorporation Act 2003* (NT)ss27 – 28.

<sup>97</sup> *Associations Incorporation Act 2009* (NSW) s6(1); *Associations Incorporation Act 1981* (Qld) s5(1)(a); *Associations Incorporation Act 1981* (Vic) s3(1); *Associations Incorporation Act 1987* (WA) s4(1); *Associations Incorporation Act 1991* (ACT) s14(1)(a); *Associations Incorporation Act 2003* (NT) s26.

An auditor only needs to be appointed when financial reporting thresholds are reached by the association. CLT proponents should check the association legislation in their own jurisdiction as regards to financial reporting threshold. This is because a CLT may own land and a financial reporting threshold may be dependent on the gross value of the association assets.

### **5.2.5. Registration of an incorporated association**

The steps to incorporate an association throughout the jurisdictions generally follow these steps:

1. Five or more individuals appoint a management committee and a public officer, and adopt a constitution;
2. The management committee authorise an application for incorporation/registration that includes:
  - a) a statement of the association's objects
  - b) a copy of the association's proposed constitution;
  - c) the name of the public officer as the contact person; and
  - d) the official address for the association in the relevant jurisdiction.
3. Apply for incorporation by lodging an Application for registration, with the prescribed fee and documents at the relevant incorporated association's regulator in a jurisdiction.

There is an association regulator of each jurisdiction.<sup>98</sup>

### **5.2.6. Advantages and disadvantages of an incorporated association**

#### **5.2.6.1. Advantages**

Because an association cannot distribute dividends to members by law, they are an ideal structure for a CLT. Removal of the statutory trading restriction means associations may engage in trade, similar to companies limited by guarantee.

Incorporated associations also have “purpose built” State and Territory-based statute. This statute should be easier to navigate than say, the Corporations Act. Establishment of an association is often easier and less costly than setting up a company limited by guarantee.

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<sup>98</sup> Queensland Office of Fair Trading; NSW Office of Fair Trading; Consumer Affairs Victoria; Consumer Protection, WA; Department of Commerce Office of Consumer and Business Affairs, South Australia; Consumer Affairs and Fair Trading, Tasmania; ACT Office of Regulatory Services; Business Affairs, Northern Territory Department of Justice.

### 5.2.6.2. Disadvantages

CLT proponents should check that the purposes of their proposed CLT are purposes permitted by the association's legislation in their particular jurisdiction.

A major disadvantage is the (not insurmountable) difficulty of an association operating in all Australian jurisdictions. Depending on the circumstances, the fact an association must have no less than five (or more) members can also be a disadvantage.

If the CLT wishes to operate in several jurisdictions it will need to obtain an ARBN. A company limited by guarantee under the Corporations Act 2011 may be the better choice in these circumstances.

#### Association pros

- Relatively easy and low-cost to set up

#### Association cons

- Legislation is State- or Territory-based; might have trouble operating in more than one State/Territory

## 5.3 Non-trading co-operatives

### 5.3.1. Definition and characteristics

Non-trading co-operatives are regulated by state legislation and regulations.<sup>99</sup>

Despite a perception that co-operatives are for the benefit of their members only, they can also be used to provide public benefits and community service functions. Non-trading co-operatives have been endorsed by the ATO as public benevolent institutions and as charitable institutions.

Somewhat confusingly, a non-trading co-operative is a co-operative that may trade although it need not engage in trade. We understand that the

<sup>99</sup> (no regulation)(WA); *Co-operatives Regulation 2003* (ACT); *Co-operatives Regulation 2005* (NSW); *Co-operatives Regulation* (no date) (NT); *Co-operatives Regulation 1997* (Qld) and *Co-operatives Exemption Notice 1999* (Qld); *Co-operatives Regulation 1997*(SA); *Co-operatives Regulation 2000* (Tas); *Co-operatives Regulation 1997* (Vic).

term “non-trading co-operative” is to be replaced under the Co-operatives National Law with the term “non-distributing co-operative”.<sup>100</sup>

Non-trading co-operatives could be particularly useful in the CLT sector because of the ability under the legislation to raise capital by:

- issuing shares to co-operative members;
- issuing debentures to co-operative members;
- taking out commercial loans; and
- issuing “Co-operative Capital Units”.

Co-operative capital units (“CCUs”) can be issued by a co-operative under some co-operatives legislation, to members and non-members.<sup>101</sup> A CCU transfers an interest in the capital (but not share capital) of the co-operative to the holder of the CCU.

It appears that CCUs have not been widely adopted by co-operatives in Australia. Given that finance to acquire property and potentially build or renovate dwellings may be needed for CLTs, it is worthwhile in our opinion that CLT proponents consider CCUs as a capital raising device.

How a CCU may work in practice is worth further discussion. For the moment though it may be that a CLT could acquire capital by issuing CCUs and upon payment of the Premium by incoming Residents, the CCU holder could be paid out.

Depending on the terms of the CCU, a difficulty is that a debt owed to a person who holds the CCU has priority ranking for payment of that debt.<sup>102</sup> This could mean that the CLT and Resident may be at risk if the CCU terms and payment are not met.

### 5.3.2. Primary activity

Under the co-operative legislation a “primary activity” is a purpose for which a co-operative exists. A primary activity must amongst other things, be an

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<sup>100</sup> the Consumer Affairs Forum comprising Ministers from each State and Territory approved the draft Co-operatives National Law on 19 January 2012. The legislation must first be passed by the New South Wales Parliament and then each other jurisdiction will either adopt the legislation or pass consistent legislation. See NSW Office of Fair Trading (2013).

<sup>101</sup> One statutory definition is found at *Co-operatives Act 1996* (Vic) s268A(1): “A co-operative capital unit (CCU) is an interest issued by a co-operative conferring an interest in the capital (but not the share capital) of the co-operative.”

<sup>102</sup> See *Co-operatives Act 1996* (Vic) s268B.

activity that makes a “significant contribution” to the business of the co-operative.<sup>103</sup>

For CLTs this primary activity may be “the provision of affordable housing”. We imagine CLT proponents will want to discuss the nature of their primary activity in detail.

### 5.3.3. Winding up

Remaining assets of a non-trading co-operative (after discharging all liabilities including repayment of shares if any) must be transferred to an organisation with similar purposes. Members of the co-operative can determine by special resolution, which organisation should receive the remaining assets.

If a non-trading co-operative does have share capital, the co-operative legislation prohibits the co-operative from distributing any surplus to members on winding up, except the nominal amount of each member’s shares.

### 5.3.4. Directors and secretary

The board of directors is normally responsible for the business of managing the co-operative.<sup>104</sup> A director must be a co-operative member, or representative of a member or a co-operative employee.<sup>105</sup>

CLT proponents should note that the same “tripartite” classes of directors for companies limited by guarantee may also apply for co-operative boards.

That is, the co-operative board may comprise Resident members, prospective Resident members and members of the public in equal proportion on the board.

Directors and other officers of the co-operative (the term “officers” includes the secretary and a person who takes part in the management of the co-operative) are subject to statutory standards of care and diligence, honesty and must not make improper use of information.<sup>106</sup> CLT proponents should take steps to inform themselves of the duties of directors and officers of the co-operative.

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<sup>103</sup> See for example, *Co-operatives Act 1996* (Vic) s124.

<sup>104</sup> See for example, *Co-operatives Act 1996* (Vic) s211.

<sup>105</sup> See for example, *Co-operatives Act 1996* (Vic) ss211 - 219.

<sup>106</sup> See for example, *Co-operatives Act 1996* (Vic) ss220 - 223.

### 5.3.5. “Active” Members

A co-operative must have at least five members.

A person is not entitled to co-operative membership unless they remain “active members”. The co-operative legislation provides that the requirement for “active membership” of a non-trading co-operative need be no more than a requirement in the rules for members to make payment of a regular subscription.<sup>107</sup>

Hence a CLT could attract members of the public to membership without disturbing the “active membership” test.

### 5.3.6. Auditor

The co-operative legislation provides for a co-operative to keep financial records and have those financial records audited.<sup>108</sup>

### 5.3.7. Transfer of share on death of member

Shares are the personal property of a member. Accordingly, when the member dies that share is transferred to the legal personal representative or subject to directions in the member’s will. The board is entitled to consider whether the eventual recipient of the deceased member’s share is likely to be an active member of the co-operative.

In the case of a CLT, it is likely that transfer of the share in the co-operative will be given to the same person that the deceased member wishes to acquire a new Agreement. That is, the deceased member’s share is transferred to a relative of the deceased member who under the terms of the Agreement becomes a Resident.

### 5.3.8. Registration of a co-operative

Generally the steps to incorporate an non-trading co-operatives throughout the jurisdictions and timeline are as follows:

1. Draft co-operative rules and discuss with prospective members;
2. Apply to the regulator to approve the draft rules;
3. The regulator has 28 days to respond;
4. The next step depends on whether the regulator does or does not approve the draft documents:

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<sup>107</sup> See for example, *Co-operatives Act 1996 (Vic)* s126.

<sup>108</sup> See for example, *Co-operatives Act 1996 (Vic)* s238.

- a. If the regulator does not approve the draft documents then start again at point 1 above, (particularly if the regulator has requested amendments to the draft documents before it will approve them); or
  - b. If the regulator does approve the draft documents, then hold a formation meeting of prospective members to adopt the approved rules; and
5. Apply to the regulator to register the co-operative within two months of the formation meeting.

There are different government regulators in each state.<sup>109</sup> There are also support organisations for co-operatives in each state, under a national group called “Co-operatives Australia”.

### 5.3.9. Registered office

Co-operatives must have a registered office. Unlike a company limited by guarantee, the co-operatives legislation does not require a registered office to be open for a certain period during business hours.<sup>110</sup>

### 5.3.10. Advantages and disadvantages

#### 5.3.10.1. Advantages

Shares (if used), cooperative capital units, debentures and loans from members can be issued to raise capital. For CLT proponents these capital raising facilities are worth considering.

A member need not use the co-operative’s services but instead may remain effectively as a “supporter” by paying annual membership subscription.

#### 5.3.10.2. Disadvantages

Co-operatives have a deal of complexity not found in companies limited by guarantee and associations. Some of this complexity arises due to the “active member” requirements and the issuing of shares. As co-operatives are not popular compared with companies limited by guarantee and associations, they may be less familiar to CLT proponents than the other

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<sup>109</sup> Registrar of Co-operatives, Office of Fair Trading Queensland; Registrar of Co-operatives, Office of Fair Trading NSW; Registrar of Co-operatives, Consumer Affairs Victoria; Registrar of Co-operatives, Department of Commerce WA; Registrar of Co-operatives, Office of Consumer and Business Affairs, Adelaide; Registrar of Co-operatives, Business Affairs Office Tasmania; Registrar of Co-operatives, Business Industry and Development, Office of the Chief Minister ACT; Registrar of Co-operatives, Business Affairs, Northern Territory Department of Justice.

<sup>110</sup> See for example *Co-operatives Act 1997* (Qld) s249.

structures. A non trading cooperative with shares prevents its members from receiving a dividend or rebate on services. Hence the shares effectively do not offer an investment return. For a non-trading cooperative without shares, the cooperative will need to find other means to raise capital.

*Cooperative pros*

- *Can use shares to raise capital*

*Cooperative cons*

- *Can be complex to administer*

## 6 Tax treatment for CLTs

Derek Mortimer<sup>111</sup>

### **Important information you should know before you read this section.**

The material in this Chapter 6 of the *Australian Community Land Trust Manual* is designed and intended to provide CLT proponents with general legal information that may be needed to establish a CLT. The information is current at the time of publication, for general informational purposes only. The material may not apply to all jurisdictions or to all needs of a particular CLT.

The material does not constitute legal advice, and is not intended to be a substitute for legal advice and should not be relied upon as such.

CLT proponents should seek legal or other professional advice before establishing a CLT.

### 6.1 CLTs and tax: overview

The purpose of this Chapter is to review the federal and state taxation statute in relation to CLTs. Taxation statute can have an impact on the final shape of a CLT including:

- The “purpose” of the CLT (i.e. the CLT’s reason for existence)
- Activities that the CLT may undertake
- Potential beneficiaries of the CLT, including whether those beneficiaries may be outside of Australia
- Whether the CLT can receive bequests of land and other property without the will maker’s estate being liable for capital gains tax
- Whether passive investments will entitle the CLT to franking credits on dividends
- Whether CLT employees may be able to salary sacrifice using the fringe benefits tax rebates and exemptions
- Whether under state duties legislation a CLT will be liable for duty on transfers of and
- Exemptions from payment of local government rates.

<sup>111</sup> “We” refers to DF Mortimer and Associates

We will briefly review law and then discuss tax structures that may be useful for CLTs, with particular attention applied to Public Benevolent Institutions (PBIs).

We will also briefly discuss admission of CLTs to the Register of Environmental Organisations (REO) and how a CLT may use a ‘necessitous circumstances fund’. All of the tax structures are entitled to Deductible Gift Recipient (DGR) endorsement. DGR endorsement will entitle a CLT to receive tax deductible donations of cash and land.

However, it is worthwhile for CLT proponents to consider whether DGR endorsement is necessary. For example, a CLT’s revenue sources may not come from tax deductible donations but instead may come from government grants or sponsorship. It is at least possible for a CLT to be self funded by setting lease fees at a rate sufficiently high to pay off any mortgages. Without a need for DGR endorsement a CLT need not try to fit within the constraints of PBIs or REOs.

We have assumed that most CLTs will wish to obtain endorsement as a DGR. Most importantly it is worth discussing in detail the bequest of land to CLTs as this may be a likely means for a CLT to obtain land. Where land is transferred (as distinct from liquidated and cash transferred) to a CLT under a will this is known as an ‘in-specie bequest’.

Keep in mind that different regulatory bodies—e.g. Australian Tax Office (ATO), State Revenue Office, Local Council—may interpret law and taxation exemptions differently. However, the establishment of the Australian Charities and Not for Profit Commission (ACNC) as a central register of charities and other not for profit organisations may lead to a uniform interpretation of charity law.<sup>112</sup>

The taxation concessions generally are available to any of the structures discussed in Chapter 5 such as companies limited by guarantee, incorporated associations and non-trading co-operatives, providing the constituent documents of these organisations have the requisite ‘non-profit’ and ‘non-distribution’ clauses and they comply with other specific requirements.

The ATO and it is to be expected the ACNC, have many helpful publications on taxation of not for profit organisations. We recommend CLT proponents peruse these publications.

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<sup>112</sup> The ACNC commenced on 3 December 2012; see other resources at the website of Australian Charities and Not for Profit Commission (n.d.).

## 6.2 Taxation statute

Particular Commonwealth taxation statute that may need to be taken into account when considering CLTs include:

- *Income Tax Assessment Act 1997* (Cth) (“ITAA 97”)
- *Income Tax Assessment Act 1936* (Cth)
- *Fringe Benefit Tax Assessment Act 1986* (Cth)
- *GST Act A new tax system (goods and services tax) Act 1999* (Cth).

The ITAA97 has specific requirements for DGR endorsed organisations under division 30 and income tax exempt entities under division 50. Some entities can be a DGR endorsed and income tax exempt; the categories are not mutually exclusive.

State taxation statute that may need to be taken into account when considering CLTs include:

- State Duties Acts
- State Payroll Tax Acts
- associated tax and revenue rulings relevant to an Act
- Local Government Acts.

Duties Acts are relevant to CLTs as they may offer exemption from duty for transfers of land to CLTs. Local government acts may offer CLTs an exemption from local rates and charges. CLT proponents should consult with legal advisors in their local jurisdictions for specific advice.

## 6.3 Public Benevolent Institutions

### 6.3.1. Relevance of PBIs to CLTs

In theory, CLTs need not be created purely to provide perpetually affordable housing for persons of low income. CLTs can be an effective means to reduce the purchase price of land for persons generally.<sup>113</sup>

In practice however CLTs are recognised as being organisations established to provide affordable housing for persons of low income. It is for this reason most CLTs in the US<sup>114</sup> are eligible for tax concessions and gift deductibility under section 501(c)(3) of the Internal Revenue Code.<sup>115</sup> The effect of

<sup>113</sup> See comments of CLT pioneer Robert Swann in White (1992).

<sup>114</sup> See National Community Land Trust Network (2011b, p1).

<sup>115</sup> Section 501(c)(3) IRC exempts from payment of income tax and permits tax deductibility of donations to entities organised for “charitable” purposes (amongst

section 501(c)(3) IRC is that a CLT can provide land and housing for the relief of the poor.

Broadly speaking the class of persons who may be assisted by entities under section 501(c)(3) IRC are similar to the class of persons who may be assisted by PBIs under Australian law. As we will shortly see however, PBIs are not so much concerned with the “relief of the poor” as they are concerned with the relief of “benevolent need”. This latter term is both wider and narrower than the “relief of poverty”.

Given that the Australian interest in CLTs is to provide affordable housing for persons of low to moderate income it is appropriate we focus our discussion of tax treatment on PBIs (as distinct from other types of tax concession structures).

PBIs are entitled to receive tax deductible donations and are exempt from income tax. PBIs are also exempt from fringe benefits tax (up to a capped amount). There are also some GST concessions. We have noticed that providers of affordable housing have obtained PBI status from the ATO.

Our approach in this chapter is to describe several cases in Australian courts that considered PBI status of organisations, (particularly those involved in provision of housing) and draw some broad opinions from those cases relevant to CLTs.

We have chosen this way as we believe it will be of interest to readers and because it is difficult to foresee the circumstances in which CLT proponents may seek PBI status.

For a useful if generic overview of PBIs including a list of what the ATO considers to be organisations eligible for PBI status, see the ATO publication *GiftPack*.<sup>116</sup>

We will begin with a brief review of law and a definition of PBIs and conclude with the PBI application process to the ATO.

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other purposes). The term “charitable” in section 501(c)(3) IRC is relevantly defined in *Income Tax Regulation* section 1.501(c)(3)-1(d)(2) thus: “The term *charitable* is used in section 501(c)(3) in its generally accepted legal sense...Such term includes: Relief of the poor and distressed or of the underprivileged...and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency.

<sup>116</sup> PBIs are discussed at Australian Taxation Office (2011a, pp. 33-38).

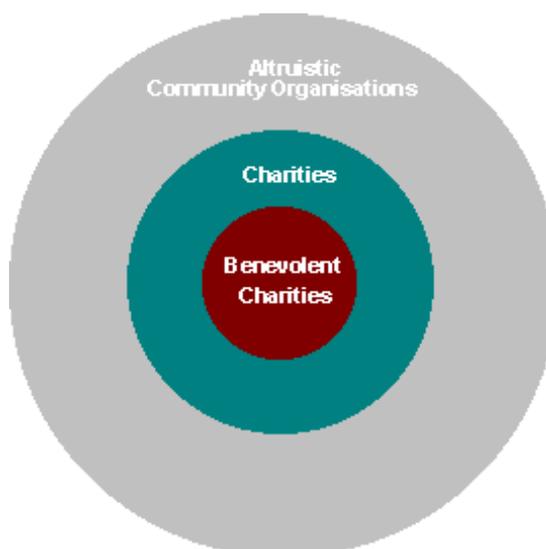
### 6.3.2. Definition of a PBI

The Commonwealth tax concession and deduction requirements for PBIs are found at:

- Item 4.1.1, section 30-45 ITAA 97 (relating to DGR endorsement of PBIs)
- Subdivision 50-B ITAA97 (relating to endorsement of income tax exempt charities)
- Section 57A *Fringe Benefits Tax Assessment Act 1986* (relating to a PBI's exemption from payment of fringe benefits tax up to a capped amount for fringe benefits given to its employees).

References to PBIs can also be found in state and local government statute, in relation to exemptions from state and local government charges.

Conceptually, PBIs are a subset of “charitable institutions” as the chart below illustrates:



**Figure 6.1. Altruistic Community Organisations, Charities and Benevolent Charities.**<sup>117</sup>

Source: Commonwealth of Australia (2001, p4)

The *definition* for PBI is found in:

- case law; and

<sup>117</sup> PBIs form part of the category of “Benevolent Charities” in the diagram.

- the ATO’s interpretation of that case law in Tax Ruling 2003/5 *Income tax and fringe benefits tax: public benevolent institutions* (TR 2003/5).

Whilst PBIs are mentioned in statute, they are not defined in statute; instead they rely on a body of Australian case law developed since the early 1930s.<sup>118</sup> Under case law, a PBI must have as its paramount purpose, the “direct relief” of suffering of persons in (what we call) ‘benevolent need’.

Persons in benevolent need are persons to whom the community would generally have compassion. Persons suffering sickness, disability, substance abuse or being in a high state of emotional helplessness would be regarded as in benevolent need.

#### 6.3.2.1. Judicial Authority for PBIs: *The Perpetual Trustees Case*<sup>119</sup>

In the *Perpetual Trustees Case* the High Court had to consider whether a house in central Sydney was a PBI. This house provided petty officers and lower ratings of the Royal Navy with accommodation whilst ashore.

Justice Dixon stated that PBIs are organisations established to promote “the relief of poverty, suffering, distress or misfortune”<sup>120</sup>. Justice Evatt stated:

“[PBIs] have one thing in common: they give relief freely to those who are in need of it and who are unable to care for themselves. Those who receive aid or comfort in this way are the poor, the sick, the aged and the young. Their disability or distress arouses pity, and the institutions are designed to give them protection”.<sup>121</sup>

The High Court held that the house was not a PBI as the house did not assist persons in distress.<sup>122</sup>

It is tempting to conclude from the *Perpetual Trustees Case* that a PBI is one that relieves poverty. However the ATO has an important qualifier:

“not all degrees of...poverty would necessarily have the effect of arousing pity or compassion in the community”.<sup>123</sup>

<sup>118</sup> For discussion on the genesis of PBIs see Dal Pont (2010) and Commonwealth of Australia (2001).

<sup>119</sup> *Perpetual Trustee Co Ltd v FC of T* (1931) 45 CLR 224.

<sup>120</sup> *Ibid* per Dixon J, 233 – 234.

<sup>121</sup> *Ibid* per Evatt J, 235 – 236.

<sup>122</sup> Justice Evatt opined that the house was “... in truth a cheap and convenient club house for those in ... navy service... and for no-one else.”: *ibid*, 236.

A way of explaining the ATOs position is that a person may be in a relative state of poverty but has the means to help themselves such as the navy personnel described in the Perpetual Trustees Case extract above.

A PBI may be summed up as being “to relieve disadvantage or misfortune, rather than benefit a worthy community objective.”<sup>124</sup>

The emphasis is less on an objective state of poverty (such as a means test) but rather on the impoverished person’s distress or inability to help themselves out of that poverty.<sup>125</sup> Ultimately whether a person’s financial impoverishment is sufficient to arouse compassion in the community is a question of fact, to be determined on the circumstances.<sup>126</sup>

Hence for the purposes of a CLT, a Resident may be in benevolent need where their poverty is sufficient to arouse compassion in the wider community. Arguably this test of poverty for PBIs is a narrower test than is applied to CLTs in the US under section 501(3) (c) IRC.

It is also worth stating that Residents under a lease agreement with a CLT that has PBI status may not appreciate being type cast as persons suffering misfortune. For example in the *Northern Land Council Case*<sup>127</sup> there was discussion about the “patronising and possibly offensive” effect of charities and PBIs:

“Members of the Aboriginal community might greet the statement that their Land Council was ‘a benevolent institution’ with amazement, perhaps with indignation”.

The possibly patronising effect of PBIs is also noted by the Charities Definition Inquiry.<sup>128</sup> It is also worth briefly noting the concept of “social inclusion” which aims to encourage participation and belonging in society.<sup>129</sup> PBIs sometimes struggle with this concept.

<sup>123</sup> Tax Ruling 2003/5 at [10]; See also *Marriage Guidance Council of Victoria v The Commissioner of Payroll Tax* (Vic) 90 ACT 4770, 4775.

<sup>124</sup> *Trustees for the Indigenous Barristers’ Trust v Commissioner of Taxation* (Cth) (2002) 127 FCR 63, Gyles J,[19] (the “Mum Shirl Case”).

<sup>125</sup> see *Lemm v Federal Commissioner of Taxation* (1942) 66 CLR 399 (26 November 1942) where Williams J at 411 described “financial distress” as being benevolent.

<sup>126</sup> *Toomelah Co-operative Ltd v Moree Plains Shire Council* (1996) 90 LGERA 48.

<sup>127</sup> *Northern Land Council v Commissioner of Taxes* [2001] NTSC 115 (21 December 2001) [50] (in respondent’s submission quoted verbatim). Note this case was appealed: *Northern Land Council v Commissioner of Taxes* [2002] NTCA 11.

<sup>128</sup> Commonwealth of Australia (2001, p254) states “The current approach to the concept of PBI has negative and distasteful connotations for some.”

<sup>129</sup> See further Department of Employment and Workplace Relations (2009).

Arguably, CLT proponents seeking PBI status may need to consider the possibility that Residents may be stigmatised.

### 6.3.3. PBI cases that may be relevant to CLTs

There are two relevant questions for CLT proponents to ask relevant to PBI status:<sup>130</sup>

1. Who is the CLT trying to assist? – to ensure these persons are persons in benevolent need; and
2. How is the CLT trying to assist? – to ensure the CLTs activities actually relieve the suffering of persons in benevolent need.

Rather than attempt to answer these questions exhaustively, we will give case examples that may stimulate discussion on these questions. The cases are:

- The *Aged Womens Homes Case*<sup>131</sup> (concerning accommodation for aged women in financial need)
- The *Boys Brigade Case*<sup>132</sup> (concerning facilities for boys from a depressed area of Sydney)
- The *Toomelah Co-operative Case*<sup>133</sup> (concerning the “purpose” of an Aboriginal Housing Co-operative and the use of its land).

#### 6.3.3.1. Housing for Women in Financial Need: *The Aged Women’s Homes Case*<sup>134</sup>

A residential home, four shops and money were left under a will to an institution controlled by a church property trust. Under the will, the home was to provide accommodation for 26 aged women in “financially straightened circumstances”. The women were required to pay £1 per week (a relatively substantial sum at the time) towards upkeep of the home. Income from the shops and the invested money was to help with maintenance of the home.

At issue was whether the estate was liable for estate duty under the (now repealed) *Estate Duties Assessment Act* (NSW). Under the Act, an estate was

<sup>130</sup> Other questions relating to PBI status, such as whether the organisation is a “not for profit”, or is based “in Australia”, or is an “institution” are not considered to be in issue for present purposes.

<sup>131</sup> *Lemm v Federal Commissioner of Taxation* (1942) 66 CLR 399 (26 November 1942).

<sup>132</sup> *Maugham v Federal Commissioner of Taxation* (1942) 66 CLR 388.

<sup>133</sup> *Toomelah Co-operative Ltd v Moree Plains Shire Council* (1996) 90 LGERA 48.

<sup>134</sup> *Lemm v Federal Commissioner of Taxation* (1942) 66 CLR 399 (26 November 1942)

not liable for duty where it is transferred to a PBI or to a fund established to assist a PBI.

Justice Williams considered whether the home was a public benevolent institution. His Honour held it was a public benevolent institution and stated:

“The benefits of the institution are available to members of the class of aged women in straitened circumstances irrespective of their religion. A home for such women, even if they are able to pay one pound per week, is an institution organized for the relief of poverty. Poverty is a relative term. There are degrees of poverty less acute than abject poverty or destitution, but poverty nevertheless.”

His Honour then directly added “The purpose of the home is to confer benevolence upon an appreciable needy class in the community...”

The shops and money were held in a public charitable fund for the purpose of assisting with maintenance of the home.

#### The Aged Women’s Homes Case Discussion points

CLT proponents should note poverty is not an essential requirement for persons assisted by PBIs. For example, in the *Cairnmillar Case*.<sup>135</sup> Justice Gobbo said upon finding that the Cairnmillar Institute was a PBI: “the levying of a charge for services does not remove necessarily the element of benevolence”. His Honour also said by way of example: “it is no less benevolent to assist an AIDS sufferer because that person can afford to pay, for the issue here is not the relief of poverty but the relief of distress”.

See also the *Launceston Legacy Case*<sup>136</sup> where Launceston Legacy was held to be a PBI despite the fact that it provided relief to dependants of deceased ex-service persons, without regard to the dependants’ financial circumstances.

The fact that the women were required to pay fees of £1 per week was not in itself fatal to the institution in the *Aged Women’s* case from being classified as a PBI.

The essential determinant in the *Aged Women’s* case seems to be whether the women were an “appreciably needy class” of persons.

<sup>135</sup> *Commissioner of Payroll Tax (Vic) v The Cairnmillar Institute* [1992] 2 VR 706, 712.

<sup>136</sup> *Federal Commissioner of Taxation v Launceston Legacy* (1987) 15 FCR 527.

It is important to contrast the “benevolent needs” of persons with the needs of persons encountered in ordinary human experience. For example Marriage Guidance and “Parent without Partners” types of organisations have been found not to be PBIs.<sup>137</sup> The anxieties experienced by persons undergoing marital separation or loss have been considered not to be benevolent needs.

In the *Aged Women’s Case* a fund was established to provide home maintenance. Note that tax deductible “funds” for PBIs existed prior to 23 October 1963. Nowadays the PBI does not need a separate “fund” for assets maintenance. The important point here is that the willmaker set aside provision for maintaining the home.

#### 6.3.3.2. A PBI defined by area: *The Boys Brigade Case*<sup>138</sup>

This case concerned boys from the Surry Hills and Pyrmont area in Sydney, an area notorious at the time for being a slum. An Association provided buildings in the area for the boys to use its facilities free of charge. It did not provide accommodation. It seems that the facilities were recreational in nature to provide for the “intelligent occupation for [the boys] their leisure hours”. Persons described as “well-disposed citizens” could apply to be subscribers and members of this Association and sit on its board of management.

Justice McTiernan spent little time in concluding that the Association was organised for the relief of poverty stating “...it is I think hardly open on the facts of the case to draw any other inference”. His Honour found that the dominant object of the Association was to “elevate boys adversely affected by poverty”.

The Court also found that whilst the idea of “public” regarding a PBI applies to the persons that it is the object of a PBI to benefit, some form of public control of a PBI is a factor to be taken into account. The fact that members of the public could subscribe, be members and indeed sit on the board of the Association was relevant.

#### *The Boys Brigade Case Discussion points*

It appears from this case that a PBI need not be directed at providing the necessities of life; i.e., a PBI may also provide some recreational facility – the ATO accepts<sup>139</sup> that a person’s misfortune or distress need not be

<sup>137</sup> TR 2003/5, [32].

<sup>138</sup> *Maugham v Federal Commissioner of Taxation* (1942) 66 CLR 388.

<sup>139</sup> TR 2003/5, [35].

susceptible to relief by way of material things. It accepts that the effects of poverty might be addressed in terms of social and cultural conditions, citing the *Boys Brigade* case as an example.

In the *Boys Brigade* case the court appears to accept that persons from a defined geographical area (being a “slum”) are a class of persons in benevolent need.

#### 6.3.3.3. Recognition that an ethnic group needs protection: *Toomelah Co-operative Case*<sup>140</sup>

Toomelah Co-operative (“Toomelah”) was liable for Council rates unless it was exempt under the Local Government Act as a PBI. Toomelah was incorporated under the then *Co-operation Act 1923 (NSW)*.

Toomelah’s “objects” as set out in its rules included the “acquisition of land” and to “provide and maintain buildings”. An additional object was to strengthen “Aboriginal and Islander identity and culture”. There was dispute regarding which of these objects was the primary object of Toomelah.

Toomelah owned 11 houses and rented to Aboriginal families in the Toomelah and Boggabilla area. The houses were allocated on a needs basis. One of the residents had income and there was dispute that this resident was in need.

Justice Stein concluded that Toomelah’s primary object in its rules was the relief of poverty by provision of housing. His Honour considered that the objects were all directed at benefiting the Aboriginal community and noted wide community recognition that the Aboriginal community presently needs “protection”. He regarded the “identity and culture” clause in the rules as being in support of the primary objective, rather than a separate, competing objective.

His Honour also noted that “poverty” need not be destitution. His Honour considered that whether a person is in need is a question of fact. The fact that a person earns an income does not mean land on which they reside is not being used for PBI purposes.

#### *The Toomelah Co-operative Case Discussion points*

The point sometimes forgotten is that co-operative can be structured as not for profit organisation. With appropriate clauses their constitution can also meet the requirements for PBI status.

<sup>140</sup> *Toomelah Co-operative Ltd v Moree Plains Shire Council* (1996) 90 LGERA 48.

A series of court cases accept that the needs of Aboriginal persons generally mean that Aboriginal persons are a class of persons in benevolent need.<sup>141</sup>

It is important for a CLT constitution to clearly articulate its “purpose” to avoid possible dispute as to which of its “objects” is a priority. Courts may accept that the PBI can assist in promotion of cultural values.<sup>142</sup> But this is likely where such an object exists in promotion or support of a class of persons in need of protection or assistance. Hence a “promotion of culture” clause such as found in the *Toomelah Co-operative case* needs to be a supporting rather than primary object.

The income level of a PBI beneficiary is not relevant where the income earner remains within a class of appreciably needy people.<sup>143</sup>

CLT proponents should be aware that whether an organisation is a PBI according to the ATO is a matter of “fact and degree”.<sup>144</sup> This means a CLT’s constitution and actual activities may be relevant. We recommend CLT proponents consult with legal advisors on their specific circumstances. Factors that may be relevant would include:

- services provided
- how Residents are selected
- promotional activities (including website and annual reports).

The term “directly” refers to there being a causal link between the activities the PBI undertakes and the actual relief of suffering for those in benevolent need.

CLT proponents will need to show that the CLTs programs do actually relieve the suffering of persons in benevolent need.

A PBI can have “incidental” purposes such as “fundraising” providing such a purpose is minor or will lead to the relief of benevolent needs.

We think that where a CLT plans to assist with provision of housing for persons who by ethnic identity, age, geographic location or disease are

<sup>141</sup> See comments in Dal Pont (2010) [2.34] and the cases cited therein.

<sup>142</sup> *Tangentyere Council Inc. v Commission of Taxes* (1990) 21ATR 239 at 248 where Justice Angel said “helping those who cannot help themselves to retain and observe their customary values, traditions and culture, Western or not, is benevolent, at least in the sense that it is for their social and spiritual welfare and the welfare of society as a whole”.

<sup>143</sup> Per comments of Justice Gobbo in *Commissioner of Payroll Tax (Vic) v The Cairnmillar Institute* [1992] 2 VR 706, 712.

<sup>144</sup> TR 2003/5.

experiencing anxiety that the CLT should consider seeking PBI status. However CLT proponents should take care:

- Lease or administration fee – a fee is possible but it should not be so high as to exclude persons in benevolent need
- Residents – eligibility should be assessed using PBI criteria i.e. a Resident should be a person in benevolent need.

#### **6.3.4. Applying for PBI Status**

An application to the ATO for a CLT to apply for PBI status will require at a minimum, the following forms and documents:

- ATO form *Application for endorsement as a tax concession charity or tax fund* (“the TCC form”)
- The ATO form *Application for DGR endorsement* (“the DGR form”)
- The ATO form *Public Benevolent Institution schedule*
- Certified copy of the CLTs constitution.

The ATO provides guidelines for completion of the TCC form and the DGR form.

The TCC form deals with conferring PBI status and income tax exemption. The DGR form deals with tax deductibility of donations to the PBI.

At question 5 of the TCC form CLT proponents will need to tick the box marked “public benevolent institution”. At question 7 proponents will need to insert the relevant PBI item number which is “4.1.1” and at question 9 proponents will need to provide an estimation of income and expenditure for the first year of operation (if the CLT is commencing operation as a PBI).

The PBI schedule will require at question 3 a brief statement of the CLT’s activities. Proponents will need to clearly show how the activities relieve persons in benevolent need. Question 7 will require proponents to demonstrate a selection criteria; i.e., how the CLT plan to select persons in benevolent need. This section may require some care bearing in mind that the persons must be in benevolent need.

The DGR form is straightforward.

A certified copy of the CLTs constitution must contain clauses relevant to the “purpose” of the CLT, clauses preventing the distribution of profits and assets to members and instead, requiring surplus assets to be distributed to another PBI if the CLT is ever wound up.

Before applying to the ATO, the CLT must obtain an ABN. This may be achieved on line through the Australian Business Register. We recommend CLT proponents obtain professional or at least experienced advice before a CLT submits applications for PBI status to the ATO. The ATO process takes around 30 days.

Be aware that from December 2012 the ACNC registers new entities seeking tax concession and DGR endorsement. The ATO will retain a role but will accept the ACNC's registration of charitable status for an entity.<sup>145</sup>

## 6.4 Registered Environmental Organisations

### 6.4.1. Overview

We are aware that CLT proponents are interested in the possibility of CLTs seeking admission to the Register of Environmental Organisations (REO) operated by the Department of Environment Heritage and the Arts. Admission to the REO will enable a CLT to solicit tax deductible donations.

Relevant law and associated materials to consider are:

- The ITAA 97;
- Australian Tax Office Tax Ruling TR 2005/21 (TR 2005/21) in relation to charitable institutions;
- The common law of charities; and
- Requirements in the *Guidelines for Registration as an Environmental Organisation* ("the Guidelines") published by the Department of Environment, Water, Heritage and the Arts.

CLT proponents should be aware that the precedent constitution in Appendix 7 to this Manual is not sufficient for a CLT to gain admission to the REO.

### 6.4.2. Admission to the REO

Admission to the REO is the first step for an environmental organisation to gain DGR endorsement. An entity with DGR endorsement is entitled to receive tax deductible donations.

An entity admitted to the REO must be established for the sole purpose of protecting the "natural environment" or providing education on means to

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<sup>145</sup> The ACNC commenced on 3 December 2012; see other resources at the website of Australian Charities and Not for Profit Commission (n.d.).

protect the natural environment. Some care is required to demonstrate that an entity meets the various criteria.

Under the Guidelines the term “natural environment” includes “promotion of ecologically sustainable development principles”. For example a CLT with an object such as “promoting and developing renewable sources of energy” may be consistent with the ITAA 97 and the Guidelines.

A REO is focused on protecting and enhancing the natural environment or educating persons about the natural environment. The sole purpose of a REO accordingly does not naturally fit with a CLT established for the principal purpose of encouraging perpetually affordable housing for persons of lower income.

Some REOs that own land particularly in rural areas however do permit persons to reside on the land in a caretaker role. That is, the purpose of the caretaker is to help with the protection and enhancement of the natural environment. Similarly, it may be a CLT lease could be drafted to include positive and negative obligations on the Resident to protect and enhance the land on which they reside.

A useful guide may be that found in the deed of conservation covenant used by Trust for Nature (Vic) discussed briefly in Chapter 4 of this Manual. This concept may be worth further exploration as it is not required for Residents to be in a state of benevolent need.

Keep in mind that an environmental organisation must also satisfy the “not-for-profit” requirements of the ATO before DGR endorsement is granted.

In accord with the ATO “public fund” requirements, a majority of persons who serve on the managing board of a REO must be what the ATO calls “Responsible Persons”.

Responsible Persons are persons who are admitted to a profession or calling (such as members of the clergy, lawyers and accountants) or have a public profile (such as persons with Queens Birthday honours or local “citizens of the year”).

## **6.5 Necessitous circumstances funds**

### **6.5.1. Overview**

We will briefly discuss necessitous circumstances funds in the context of them being a sub-entity of a CLT rather than being a CLT in themselves. As a necessitous circumstances fund may give to any persons who are in financial

need, it does not have the constraint of the need for those persons to be “arousing compassion” in the community like a PBI.

A necessitous circumstances fund may be useful to a CLT as a form of revolving loan fund to assist Residents with purchase of white goods and repairs and maintenance to their homes. Revolving loan funds have proved a popular adjunct to CLTs in the US.

### 6.5.2. Purpose of necessitous circumstances fund

The sole purpose of a necessitous circumstances fund is to provide money or goods to persons in financial need. While necessitous circumstances involve financial necessity, the necessity need not be to the extent of abject poverty or destitution. In *Ballarat Trustees*<sup>146</sup> Kitto J said:

“The expression “necessitous circumstances” is not defined by the Act...I should say that a person is in necessitous circumstances if his financial resources are insufficient to enable him to obtain all that is necessary, not only for a bare existence, but for a modest standard of living in the Australian community.”

The ATO also accepts<sup>147</sup> that “financial need” is the inability to obtain a “modest” standard of living. In our opinion, a requirement say, that CLT Residents seeking a loan from a necessitous circumstances fund must hold a healthcare card would be consistent with that person being in financial need. However being a recipient of a healthcare card is not determinative of eligibility to receive assistance from a necessitous circumstances fund.

Generally speaking, the provision of loans by a necessitous circumstances fund is not inconsistent with that entity being a charity under common law. The ATO also suggests (by example) that the provision of money to persons in financial need may be made by way of loan, rather than by grant.

A necessitous circumstances fund may be established by way of deed of trust and must be managed by a trustee. A trustee may be a body corporate such as a CLT. In accord with the ATO “public fund” requirements, a majority of the trustee must be “Responsible Persons”.<sup>148</sup>

A necessitous circumstances fund is entitled to endorsement by the ATO as a DGR. The trustee will also be entitled to exemption by the ATO from

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<sup>146</sup> *Ballarat Trustees Executors and Agency Co Ltd* (1950) 80 CLR 350.

<sup>147</sup> TR 2000/9.

<sup>148</sup> see comments on the REO above.

payment of income tax as a “charitable fund”. A necessitous circumstances fund is a type of charitable fund.

## 6.6 Bequests of land to a CLT – Capital Gains Tax implications and family provision legislation

Generally speaking the estate of a deceased person is not liable for Capital Gains Tax (CGT) for capital gains on CGT assets owned by the deceased immediately before their death. A “CGT asset” is an asset acquired after 20 September 1985. This date was the date when CGT laws generally became operative. CGT assets include land, beneficial interest in shares, paintings and other “collectibles”. These assets may be transferred “in specie” to a beneficiary; i.e., the asset need not be realised in to cash before being transferred.

The ITAA97 sets out certain exceptions to the general rule that the estate of a deceased person is not liable for CGT on transfer of CGT assets.<sup>149</sup> One exception is where the CGT asset passes to a beneficiary of the deceased’s estate that is “an exempt entity”. An exempt entity is an entity that is exempt from payment of income tax. This circumstance is described as “CGT event K3”.

Exempt entities include not-for-profit organisations that are exempt from payment of income tax but which are not DGR endorsed. Accordingly an estate that transfers a CGT asset to an income tax exempt but not DGR endorsed CLT will be liable for any capital gains (if any) for that asset immediately prior to the will maker’s death.

However, CGT event K5 does not occur where the beneficiary is a DGR. The ITAA97 states<sup>150</sup> that a capital gain is to be disregarded from a testamentary gift of property that would have been deductible under section 30-15 if it had not been a testamentary gift. An estate that intends to gift CGT assets to a CLT that is not DGR endorsed will be exposed to CGT liability.

A willmaker can avoid this liability by gifting the CGT asset directly to a CLT that is DGR endorsed. Alternatively a willmaker could either ensure the asset is not a CGT asset (i.e. the asset was acquired prior to 20 September 1985) or the willmaker could ensure their estate has provision for any CGT liability that may arise as a consequence of the transfer of a CGT asset to a CLT.

The willmaker may also need to consider the impact of any CGT liability on distributions to other beneficiaries under their will.

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<sup>149</sup> Section 104-215.

<sup>150</sup> Section 118-60.

CLT proponents should also be aware on the impact on potential distribution under an estate that may be subject to family provision legislation. This legislation is beyond the scope of this Manual but generally speaking provides certain entitlements to family members of the deceased to claims on the estate.

## 6.7 Charitable Institutions<sup>151</sup>

### 6.7.1. Overview

Charitable institutions are institutions established for purposes under one of the traditional “head of charity” namely:

- Relief of poverty
- Furtherance of education
- Furtherance of religion
- Furtherance of other purposes beneficial to the community.

The benefit of charitable institution endorsement for CLTs is they will be exempt from payment of income tax. In our experience PBIs and REOs will also be classified by the ATO as charitable institutions.<sup>152</sup> A necessitous circumstances fund however is likely to be classified by the ATO as a “charitable fund”. A charitable fund is also income tax exempt and has other rules for its governance.

Some CLT proponents may also want their CLT to serve as some form of demonstration project or engage in educating the public about CLTs. This purpose may fit the charitable head of “advancement of education”. Importantly however, “advancement of education” must be education that is provided to the public.

### 6.7.2. Requirements for Tax Concession Charity endorsement

Endorsement by the ATO as an income tax exempt charity means that a charitable institution CLT will not pay income tax on “income” it receives.

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<sup>151</sup> We have disregarded discussion on “community service organisations” which are income tax exempt but not DGR endorsed entities established for community service purposes but which are not charitable institutions. Typical community service organisations include service clubs such as Rotary and Apex. Community service organisations must not be established for the benefit of their members—the purpose of the organisation must be to provide a benefit to the public: see Australian Taxation Office (2007, p14).

<sup>152</sup> The ATO regards PBIs as being a type of charitable institution: *ATO TR 2003/5* [127]. Entities admitted to the REO may be classified as charitable institutions on the basis of the entity providing education on environmental matters.

Importantly income would include administration fees and any other fees it may charge Residents for services. Income would not include government grants or gifts. Hence without TCC endorsement, a CLT would be liable for tax on the rental return from Residents.

A PBI, registered environmental organisation and necessitous circumstances may all be entitled to exemption from payment of income tax as a TCC. There are other minor tax concessions available to charitable institutions such as concessions relating to fringe benefits tax and GST.

It is worth briefly noting the impact of commercial activities on charitable institutions because of CLTs leasing activities. Importantly, a charitable institution must have a charitable “purpose” but may undertake commercial activities that support that purpose; however, an institution with a “commercial” purpose is not charitable.

#### 6.7.2.1. CLTs and commercial activities: *The Word Case*<sup>153</sup>

In 2008 the High Court of Australia examined charities and their incidental commercial activities in the *Word Case*. Word Investments Limited (“Word”) operated effectively as its only activity, a commercial funeral business. Surplus from this business was distributed to an entity linked to Word called Wycliffe Bible Translators Australia (“Wycliffe”). Wycliffe used the surplus for a charitable purpose, namely the translation and distribution of Bibles.

At issue was whether Word was entitled to endorsement as a charitable institution. This was because the ATO had previously refused Word’s application for endorsement. The judgment records that the ATO’s letter of refusal said:

“Commercial enterprise entities are not considered to be charities. This is the case irrespective of whether charitable consequences flow from the entity’s activities”.

The Court directly disagreed with the second sentence of the ATO’s letter. The High Court held that charitable activities of an entity can be found in “...the natural and probable consequence of its immediate activities.”

The Court found that Word’s funeral business would “naturally and probably” lead to charitable consequences because of the distribution of surplus to Wycliffe.

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<sup>153</sup> *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited* (2008) 236 CLR 204.

In our opinion a CLT that conducted leasing or co-ownership for the purpose of providing homes to persons in a state of poverty or benevolent is likely to meet the High Court’s test as laid down in the *Word Case*; i.e., the natural and probable consequence of a CLT’s housing activity will help to relieve the Residents’ state of poverty.

However we recommend that CLT proponents take care with housing and other commercial activities their CLT may undertake. Specialist legal advice may be needed.

Note also the current Government is considering ways to respond to the effect of the High Court’s decision with an “unrelated business income tax”. The Australian Government consultation paper states<sup>154</sup> that the intent of the unrelated business income tax is to encourage altruistic entities to direct their profits from commercial activities towards their altruistic purpose.

CLT proponents should be aware that any charitable entity must also provide a “public benefit”. We think there is little question a CLT will provide benefits to the public because of the consequences of providing affordable housing. However for abundant caution CLT proponents should consider the following paragraphs abridged from an ATO publication<sup>155</sup> in relation to “public benefit”.

“...an institution set up to advance the interests of its members in their capacity as members cannot be charitable as it cannot satisfy the public benefit requirement. The Members...do not, as Members, constitute a section of the public in the relevant sense, and the benefits derived by the Members are, as a result private in nature... However, an institution that benefits its members can still be charitable if...the member benefits are simply incidental...to the purpose of benefiting the community.”<sup>156</sup>

In our opinion, CLT proponents should take care to ensure that their CLT is not constituted purely for the purpose of providing benefits to Resident Members. It is important that the CLT provide benefits available to the public.<sup>157</sup> CLT proponents may wish to consider taking specialist legal advice on this issue.

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<sup>154</sup> Commonwealth of Australia (2011, p7).

<sup>155</sup> *TR 2011/4* [49], and [50].

<sup>156</sup> For an explanation see *TR 2011/4* [180] and following.

<sup>157</sup> *TR 2011 /4* [15]; *Downing v Federal Commissioner of Taxation* (1971) 125 CLR 185

## 6.8 Duty exemption<sup>158</sup>

### 6.8.1. Duty on transfer of lease

State governments raise revenue from duty on transfers of interests in land.<sup>159</sup> This may impact on CLTs that acquire land and may also impact upon the granting of leases. We recommend CLT proponents seek legal advice on the effect of duty in their particular jurisdiction. However, to illustrate the potential difficulties with duty we will briefly describe the effect of the *Duties Act 2000* (Vic) on the imposition of duties in Victoria.

Until July 2009, the State Government did not levy stamp duty on leases. As part of new anti-avoidance measures, the *Duties Act 2000* subjects all leases to the same rate of duty as would apply for a transfer of the fee simple interest in the land except where the only consideration is “rent reserved.” The lease provisions of the *Duties Act 2000* (Vic) are said<sup>160</sup> to apply to arrangements by which a lease is used to transfer rights in the underlying land, similar to a sale of land transaction to ensure that leases are not used as a mechanism for avoiding duty.

Accordingly there is a risk that CLT leases for which a capital sum is paid as the Premium may be taxed on the full market value of the fee simple title of the land. Surrenders of a lease or options to renew may also be subject to the same maximum rates of duty.

Under such leasing arrangements, the rights and benefits obtained by the lessee are viewed as being equivalent to the rights and benefits obtained by a person who acquires the land directly. Essentially, the lessee acquires rights over the land equivalent to ownership. The consideration paid, or agreed to be paid, is for the acquisition of these valuable rights and is in contrast to the rent payable under the lease, which is often minimal.

The term “land” is defined to include “buildings and other structures permanently affixed to land, land covered with water, and any estate, interest, easement, servitude, privilege or right in or over land”.<sup>161</sup>

CLT proponents should note the following statement in Victoria:

<sup>158</sup> This section acknowledges advice provided to Mount Alexander Community Land Limited by George Ryan Solicitors 5 April 2010.

<sup>159</sup> *Duties Act 2000* (Vic); *Duties Act 2008* (WA); *Duties Act 2001* (Tas); *Stamp Duties Act 1923* (SA); *Duties Act 2001* (Qld); *Stamp Duties Act 1978* (NT); *Duties Act 1997* (NSW); *Duties Act 1999* (ACT).

<sup>160</sup> State Revenue Office Victoria (2012).

<sup>161</sup> *Interpretation of Legislation Act 1984* (Vic) s38.

“In considering [whether an upfront payment is “rent”], the duration of the lease will often be relevant because, for example, it would not be usual for a lessee to pay “rent” in advance on a long term lease such as a lease for 99 years. An upfront payment for the grant of a long term lease is more likely to be capital in nature and based on the freehold value of the underlying land rather than the net present value of the leasehold.”<sup>162</sup>

We recommend CLT proponents consider means to exempt from duty provisions such as:

- A change in the duty legislation to exempt CLTs (for example, the Victorian legislation specifically exempts the grant or surrender of a lease creating residency rights in a retirement village within the meaning of the *Retirement Villages Act 1986 (Vic)*);<sup>163</sup>
- A private ruling from the relevant Revenue Commissioner

### 6.8.2. Exemptions from duty

CLT proponents should note that duties legislation can provide exemptions from duty. These exemptions are generally available to charitable entities. These include exemptions from duty for a transfer of dutiable property such as land.<sup>164</sup> This is relevant where the CLT itself acquires property.

CLT proponents should note that the exemptions apply to charitable entities. Unless the lessee or co-owner was itself a charitable entity, it could not gain an exemption from duty on grant of the lease.

## 6.9 Local government exemptions

CLTs may be able to obtain exemptions under local government legislation from payment of council rates and other charges.<sup>165</sup> Exemptions are generally available for charitable institutions. We recommend CLT proponents seek legal advice from practitioners in their own jurisdiction for the requirements of local government legislation.

<sup>162</sup> <http://www.sro.vic.gov.au/SRO/> - State Revenue Office Victoria (2012) website accessed 13 March 2012.

<sup>163</sup> *Duties Act 2000 (Vic)* s7(3AAA).

<sup>164</sup> E.g. *Duties Act 2000 (Vic)* s45.

<sup>165</sup> *Local Government Act 1995 (WA)* s6.33(1)(b); *Local Government Act 1989 (Vic)* s154 (2)(c); *Local Government Act 1993 (Tas)* s87(d); *Local Government Act 1999 (SA)* s161; *Local Government Act 2009 (Qld)* s96; *Local Government Act 2008 (NT)* s144(1)(f); *Local Government Act 1993 (NSW)* s556(1)(h).

We are aware that CLTs in the US have sometimes perceived the exemptions from local rates and charges to be a difficult issue. On the one hand CLTs want to minimise as much expenditure and outgoings as possible. On the other hand CLTs want also to contribute to the local community.

Perhaps Australian CLT proponents will need to discuss these issues before making a decision to apply for exemptions from local government charges.

## 7 Long-term Leaseholds

Hazel Blunden  
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### **Important information you should know before you read this section.**

The material in this Chapter 7 of the *Australian Community Land Trust Manual* is designed and intended to provide CLT proponents with general legal information that may be needed to establish a CLT. The information is current at the time of publication, for general informational purposes only. The material may not apply to all jurisdictions or to all needs of a particular CLT.

The material does not constitute legal advice, and is not intended to be a substitute for legal advice and should not be relied upon as such.

CLT proponents should seek legal or other professional advice before establishing a CLT.

As Chapter 4 outlined, a CLT in Australia has two potential ways of offering home ownership, with the assumption being that ownership is in some ways 'shared' with the CLT as partner. These are leasehold and shared equity freehold. This chapter discusses using long-term leases, typically of 99 years, in order to give the occupant certainty, security and equity in the home. Long-term leases not subject to residential tenancies legislation can be entered into in NSW, Victoria and Tasmania. In other jurisdictions, a regulatory or legislative change would be necessary before a long-term leasehold could be used.

Strictly speaking, the use of a lease means that technically the occupant is a tenant and the CLT is a landlord. A normal residential lease is subject to residential tenancies legislation in each jurisdiction. However, as will be seen, there are good reasons why a CLT should sit outside residential tenancies legislation and in some jurisdictions this is easily achieved. As noted earlier, a 99-year lease is exempted from residential tenancies legislation in some jurisdictions. If the term of the lease is very long, this gives much of the benefits of ownership – almost as if the occupant owned the freehold, as in mainstream home ownership. Typically the term of the lease is longer than the person's natural life, providing long-term security of tenure. Many of the desired aspects of home ownership, like the ability to

modify the home or leave it to inheritors, are readily achieved under a long-term lease. A leasehold can be granted to the CLT home occupant (the Resident). If the lease is surrendered or terminated, the lease can be transferred back to the CLT, for an agreed Reversion Price based on the original lease premium. In addition the Resident may be paid an additional amount, such as a fixed amount based on CPI or capital gain.<sup>166</sup> The CLT can then enter into a new lease with the next eligible household.

Long-term leases not subject to residential tenancies legislation can be entered into in NSW, Victoria and Tasmania. Some jurisdictions cannot currently implement long-term leaseholds without legislative or regulation change to tenancies legislation (ACT, NT, QLD, SA, and WA). So a CLT may choose to use shared equity rather than leasehold in those jurisdictions until such time as the necessary changes have been made (see Chapter 8).

A long-term leasehold can be set up outside of residential tenancies legislation in NSW, Tasmania and Victoria. Other jurisdictions will need Ministerial exemption or legislative change.

## 7.1 What is a lease?

A lease is a written document<sup>167</sup> granting a party (the lessee who will be the Resident) 'exclusive possession' of the premises. Legislation in all Australian jurisdictions requires a conveyance to be in writing. Technically, short-term oral leases are possible; however, even if an agreement is oral, it is still subject to the relevant laws.<sup>168</sup> The lessee has control of the premises and can decide who can come on to the property, and can exclude others. There are some exceptions – usually the lessor (e.g., the CLT) has a limited right to inspect the premises, and certain other rights in the case of emergency. A

<sup>166</sup> 'Capital gain' refers to an increase in the home's real market value at the later valuation (compared to the valuation when the resident moved in). Although we have witnessed the escalation of house prices in Australia, capital gain is not a uniform thing and varies. It is also possible to make a capital loss – that is, the home's value decreases (this is referred to as 'negative equity').

<sup>167</sup> This is because to help circumvent fraud, all conveyances of interests in land effectively since the *Statute of Frauds 1677* are required to be in writing.

<sup>168</sup> *Civil Law Property Act 2006* (ACT), s204; *Conveyancing Act 1919* (NSW), s54A; *Law of Property Act 2000* (NT), s62; *Property Law Act 1974* (Qld), s59; *Law of Property Act 1936* (SA), s26; *Conveyancing and Law of Property Act 1884* (Tas), s36; *Instruments Act 1958* (Vic), s126; *Law Reform (Statute of Frauds) Act 1962* (WA), s2.

lease will normally allocate responsibility for such matters as repairs, rates and other charges.

The property which is the subject of the lease is described as the 'premises'. The 'premises' means the house *and* land as defined by the deposited plan or certificate of title that corresponds with the address. The lease will specify a fixed term. In the case of a CLT, the fixed term may typically be 99 years. This may be brought to an end by surrender on the part of the Resident (lessee) or other circumstances as set out in the lease.

Under a CLT, the incoming Resident does not have to buy 100 per cent of the market value of a home, but can by purchasing a lease instead, enter the leasehold on a lower income and with a lower level of savings, as the deposit will also be smaller. For example, if a CLT-owned home was valued at \$500,000, the CLT could lease the home for a long-term such as 99 years for a lease premium based on an appropriate equity ratio such as 50 per cent of the equity, for \$250,000. Thus the CLT's lessee—the Resident—could enter into the 99-year lease at approximately half the price than if they had purchased on the open market in the same area. At the time of sale, the Resident recoups their equity subject to a reversion formula, less whatever is owing on a mortgage. The CLT will specify that the lease has to be sold back to the CLT or its nominee at an agreed price determined by a formula set out in the lease. Reversion formulas are discussed in Chapter 9.

A lease is concurrently a 'proprietary interest' in land, and a contractual relationship between the tenant (Resident) and the owner of the freehold (the CLT). As a proprietary interest in land, the Resident can enforce and protect their leasehold against third parties, may qualify for compensation on compulsory acquisition of land, and with the CLT's consent, may assign their lease or sub-let the premises.

The usual requirements for formation of a contract must be met to create a lease. For example, there will not be a lease unless both CLT and Resident intend to enter into a legal relationship, there has been a genuine offer and consequent acceptance of that offer and consideration passes.<sup>169</sup>

The contractual nature of the relationship means that there can be some flexibility in drafting the CLT lease agreement. Some contractual remedies such as found under the *Consumer and Competition Act 2010*<sup>170</sup> and

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<sup>169</sup> *Progressive Mailing House v Tabali Pty Ltd* (1985) 157 CLR 17.

<sup>170</sup> Schd 1 *Australian Consumer Law* (such as misleading and deceptive conduct and unfair contracts).

damages for breach of contract can apply to leases.<sup>171</sup> CLT proponents need to ensure that prospective Residents are fully aware and agree to their obligations under the lease.

CLT proponents should note in particular the unfair contract provisions of the *Consumer and Competition Act 2010*.<sup>172</sup> These provisions can apply to contracts for the sale or grant of an interest in land to an individual whose acquisition of the interest is wholly or predominantly for personal, domestic or household.<sup>173</sup> The unfair contract provisions can result in a term of such a contract being void if the term is unfair and the contract is a standard form contract.<sup>174</sup> The standard lease for CLTs would most likely be a standard form contract, as CLTs are likely to provide leases to Residents in some standardised form rather than individually negotiate and draft a lease for each Resident. Accordingly, CLT proponents need to be aware of the risk of the unfair contract provisions applying to the standard lease.

## 7.2 Residential Tenancy Leases

Residential leases in Australia normally come under residential tenancies legislation (the Residential Tenancies Acts in the various States and Territories). Long-term leases such as a 99 year lease that a CLT might use are exempt from the operations of the Residential Tenancies legislation in some States and Territories. Section 7.3 below and Appendix 8 cover the exemptions possible under residential tenancies legislation in each Australian jurisdiction. This section highlights the differences between the likely objectives of a CLT leasehold and residential leases as enacted under residential tenancies legislation.

### 7.2.1. Lease term

Typically a lease term under residential tenancies legislation is six or 12 months; however, it can be for longer. The proposed CLT lease is for a term of 99 years and is renewable, so is very different to a residential tenancy.

### 7.2.2. Exclusive possession

A tenant under a residential tenancy lease has exclusive possession of the premises (control over it). This is subject to the landlord's defined rights under the legislation – to inspect, etc. Similarly under the proposed CLT in

<sup>171</sup> *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17- damages were awarded on the basis that an unregistered 5 year lease operated as a contract to which ordinary principles of contract law applied.

<sup>172</sup> Part 2-3, Schd 1 *Australian Consumer Law*.

<sup>173</sup> Section 23(3), Schd 1 *Australian Consumer Law*.

<sup>174</sup> Section 23(1), Schd 1 *Australian Consumer Law*.

relation to a long-term lease, the lessee (Resident) has rights to exclusive possession subject to any rights that the lessor (the CLT) may have to inspect, etc.

### **7.2.3. Maintenance and repairs**

Under residential tenancies legislation, the landlord is responsible for repairs and maintenance and often subsidiary matters such as compliance with energy saving devices. Each CLT will want to determine the allocation of responsibility for repairs and maintenance between the Resident and the CLT, with some provision relating to the state of premises at the commencement of the long-term lease.

Some may want the Resident to be responsible for all repairs and maintenance, while some might want to play a role in this to ensure the condition of the housing stock and reduce the cost burden to their Residents. As discussed in Chapter 2, there are cost implications to be weighed up in making this decision.

### **7.2.4. Rates and other charges**

Under residential tenancies legislation, the landlord is responsible for payment of rates and other charges. Insurance of the premises (but not tenant's belongings or fixtures) is the landlord's responsibility. Under the proposed CLT long-term lease, the Resident will be responsible for these rates and other charges.

CLTs might want to negotiate reduced rates with their local government if there is a risk this cost would be too high for their Residents. Insurance over the buildings (rather than contents) can remain the responsibility of the CLT as long-term owner and to ensure the CLT's interest is protected in the case of destruction.

### **7.2.5. Rent and bonds**

Under residential tenancies legislation, the tenant pays rent and a bond which normally cannot exceed four weeks' rent.<sup>175</sup> No additional payments

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<sup>175</sup> RTA 1997 (ACT) s28 prohibits payment of more than 1 month's rent in advance. RTA 2010 (NSW) s33 prohibits payment of more than 2 weeks rent; however, the prohibition is not mandatory. RTA (NT) s39 prohibits payment of more than "one rental payment period's rent". RTA 1995(SA) s54 prohibits payment of more than 2 weeks rent. RTA 1994(Qld) s49 prohibits payment of more than 1 month's rent in advance. RTA 1997 (Tas) s17 prohibits payment other than "rent in advance for the relevant payment period"; under s19 a "payment period" is 4 weeks.

such as a premium—that is, effectively a lease purchase price—can be charged.<sup>176</sup> In relation to a residential tenancy, the tenant has no investment or stake in the property so that at the end of the tenancy, the tenant will not get anything back except the bond. The tenant does not have any equity (money invested which could be partially or wholly recovered) in the premises. This is in contrast to the proposed CLT long-term leasehold.

Under the proposed CLT long-term lease, the Resident will pay an upfront sum (the lease Premium) related to the value of the home and fixtures. When the lease is surrendered or terminated, the Resident is reimbursed according to a formula that reflects the value of the home and the Resident's investment in it.

### **7.2.6. Expiry of the lease**

Under residential tenancies legislation once the fixed term of the lease has expired (the initial term of the lease) it continues on as a periodical tenancy. The landlord can then bring the lease to an end without giving reasons. Subject to providing sufficient notice, the landlord can give the tenant notice to leave the premises and the tenant has to move out.

Under the long-term lease option for the CLT, quite specific provision has to be made in relation to surrender of the lease, and the termination of the lease, such as: the grounds upon which it might be terminated; the responsibilities and compensation payable on termination; and, the transmission to others by sale, sublet or inheritance. As the fixed term would be for a long period, unlike in a continuing agreement under residential tenancies legislation, the landlord would not be able to bring the lease to an end for no reason – only for specified reasons, such as a serious or persistent breach of the terms and conditions in the lease.

### **7.2.7. Summary**

Unless the lease is exempt from the operation of residential tenancies legislation, a CLT cannot pass on responsibility for repairs, maintenance and rates to the Resident and it cannot charge a lease Premium. Thus a CLT under residential tenancies legislation cannot 'sell' a lease and buy it back – it can only accept rental payments. In addition the CLT is liable for costs such as rates and charges. This has the negative effect that the Resident would

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RTA 1997(Vic) s40 prohibits payment of rent more than 1 month in advance, unless the amount of weekly rent exceeds \$350.

RTA 1987(WA) s28 prohibits payment of more than 2 weeks rent.

<sup>176</sup> For example, a prohibited charge under the RTA 1997(Vic) s51 is a 'premium', 'bonus', 'commission', or 'key money'. Similar provisions exist in other jurisdictions, although different terminology is used.

not have much responsibility and all of the Resident's costs would be non-recoverable money ('dead rent' in common parlance).

Inserting lease clauses into a standard residential tenancy agreement to attempt to charge an upfront Premium or pass on responsibility for rates and repairs to Residents would render a CLT vulnerable to legal challenge and criminal penalty, unless the term of the lease is such that it is exempt from the operations of residential tenancies legislation. Of course, any CLT that wishes to include affordable rental housing in its portfolio could offer leases that would be subject to residential tenancies legislation and that operate as typical residential tenancy leases; however, the tenant would not gain access to the benefits of ownership or security via lease purchase.

State/Territory	Exemption	Notes
ACT	The Crown can issue 99 year leases Exemption from residential tenancies act via regulation	The ACT is 100 per cent owned by the Crown (government) so all land is leasehold in the ACT.
NSW	Leases of 99 years +	Allowed
NT	Exemption from residential tenancies act via regulation and legislative change	Classes of tenancies can be exempted via regulation
Queensland	Exemption from residential tenancies act via regulation change	Classes of tenancies, premises and entities can be exempted via regulation
South Australia	Exemption from residential tenancies act via regulation change	Classes of tenancies, premises can be exempted via regulation
Tasmania	Leases of 3+ years	Allowed
Victoria	Leases of 5+ years	Allowed
WA	Exemption from residential tenancies act via regulation and legislative change	Prescribed tenancies of a prescribed class can be exempted by legislative and regulation change

**Table 7.1. Summary of residential tenancies exemptions in Australia.**

Residential tenancies legislation is not considered useful for CLT forms of housing, as it is too restrictive and does not provide for the Resident to accrue equity or provide enough security of tenure. In some states, the strictures of the residential tenancies legislation can be avoided by a CLT offering a long-term lease. If the term of the lease is long enough (this varies between three, five and 99 years depending on jurisdiction) the lease can

contain other terms of conditions not found in residential tenancies legislation.

For example, if the term of lease is more than three years (Tas), five (Vic) or 99 years or more (NSW) the lessor (the CLT) can pass on almost all the responsibilities of landlord to the lessee (Resident). In addition, the Resident then cannot be thrown out within that fixed term as the lease cannot be terminated except under certain circumstances. The lease can only be terminated if there has been a serious breach of the terms and conditions within the lease by either party, or for certain other reasons like the Resident defaults on the mortgage or the house is destroyed and can't be rebuilt or becomes uninhabitable.

### 7.3 Long-term leases

In Australia's most populous states, NSW and Victoria, long-term leases are allowable and do not come under the ordinary residential tenancies legislation. The same is true in Tasmania. In these states, the legislation specifically exempts certain leases if they are for terms of more than a certain number of years.<sup>177</sup>

This means if a CLT offered a sufficiently long lease, it would not have to comply with residential tenancies legislation. It could write its own lease and also charge the occupant a 'lease fee' or Premium equal to the agreed valuation for the premises as set by the CLT.

In return the lessee (Resident) would receive absolute security of a 99-year fixed term, meaning that short of the home being destroyed in a natural disaster<sup>178</sup> or breach on their part (such as failing to pay a mortgage loan) they could remain in the same home until their death or the 99 years expired (their death would in all probability occur sooner). At expiry, leases can then be renewed for another 99 years.

In other jurisdictions, long-term leases will be 'caught' by residential tenancies legislation unless an exemption is made, either by legislative change or via regulation. Legislative change requires an amendment to go through Parliament, changing a law, whilst regulation change is more straightforward, requiring publishing of the change in the Government Gazette, and alteration of the regulation.

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<sup>177</sup> Tasmania if the lease is registered under Torrens title, *Land Titles Act 1980* (Tas).

<sup>178</sup> Even then, a CLT and lessee could agree that the house be rebuilt if the lessee wanted to continue living in the same place. The home insurance would cover the rebuilding cost.

The Minister can exempt certain leases from this legislation or create a class of tenancies that are exempt. In WA, no exemptions currently exist (which means WA CLTs cannot offer long-term leases). Appendix 8 has a full analysis of legislative exemptions for each State and Territory.

## 7.4 Long-term lease provisions

The lease operates both as a contract between the parties and the grant of an interest in land. The CLT is the owner subject to an interest in land in favour of the long-term lessee (the Resident). The Resident as a lessee-owner<sup>179</sup> has an interest in land and a financial ‘stake’ in the premises.

### 7.4.1. Description of the Land

The lease shall describe the land (such as the address and official lot/section/block number as is registered with the Land Titles Office or Land Registry), and may describe what is on the land (e.g. a house, carport, etc). Any special considerations pertaining to the land (such as easements) should be included in the lease.

### 7.4.2. Parties to the lease

The parties to the lease shall be named – so, the name of the CLT (lessor) and those who intend to be the Resident (lessee), which can be one or more persons.

### 7.4.3. Lease Premium

In order to remain financial, and in consideration of the long-term nature of the agreement, the CLT can charge an up-front lease Premium. The lease shall specify what this Premium is and how it has been calculated, if a formula is being used.

Typically the Premium amount may relate to a percentage of the open market value of the premises, or may be related to the value of the actual premises. Or it may be related to what the CLT has deemed affordable for its Residents, given their incomes.

The term “premium” has been discussed in case law.<sup>180</sup> *In Gillett v Burke* His Honour Justice Ormiston said<sup>181</sup> the word ‘premium’ depends on its particular context:

<sup>179</sup> The ACT Government uses this term to address ACT homeowners who are all on 99-year leasehold land.

<sup>180</sup> *Gillett v Burke* [1997] 1 VR 81; *Frazier v Commissioner of Stamp Duties* (NSW) [1986] 17 ATR 64.

<sup>181</sup> [1997] 1 VR 81 at [91].

[B]ut a consideration of all of the contexts will show the width of [the term ‘premium’] as comprehending almost all conceivable payments in cash or kind to obtain leasehold interests in land.

**Box 7.1. Upfront payment for a lease: *Matthews v Timothy*<sup>182</sup>**

Mr Matthews entered into a lease that required him to pay an up-front “capital sum” of \$16,000 to the landlord “in consideration for” the leasehold. The lease agreement did not require Mr Matthews to pay a periodical sum by way of rent. The Commissioner of Stamp Duties sought to charge duty on the \$16,000 payment because the Commissioner considered the payment to be a “premium” rather than “rent”. The relevant duty statute made duty payable on premiums.

Mr Matthews submitted that his \$16,000 payment, although described as a capital sum, was rental payment in advance.

His Honour Justice Wright noted he had no evidence to explain how the landlord had calculated the \$16,000 payment. Accordingly His Honour was not satisfied that that sum represented a weekly or monthly payment, or rent discounted in consideration of payment in advance.

His Honour then considered whether the payment was a “premium”. His Honour stated:

“‘premium’...means a cash payment made to the lessor, and representing or supposed to represent, the capital value of the difference between the actual rent and the best rent that might otherwise be obtained...It is in fact the purchase money which the tenant pays for the benefit which he gets under the lease.”<sup>183</sup>

His Honour accordingly held that the Commissioner’s characterisation of the sum as a premium to be correct and duty was payable.

In summary, a premium is a payment to obtain a lease.<sup>184</sup>

#### 7.4.4. Mortgage

<sup>182</sup> [1987] TASSC 33 (5 May 1987).

<sup>183</sup> *Matthews v Timothy* [1987] TASSC 33, [9].

<sup>184</sup> Peter Butt *Land Law* (6<sup>th</sup> edition) 2010 at [15 49] and comment that “fine” in modern parlance is called a “premium”.

A lease may specify what type of mortgage the Resident can obtain – this is referred to as an ‘approved mortgage’ and is to make sure the Resident can pay the mortgage and has less chance of defaulting.

#### 7.4.5. Exclusive possession

A Resident would be given exclusive possession of the premises (control over it). This subject to the CLT's defined rights in the lease – to inspect at an agreed frequency, enter in the case of emergency, etc.

#### 7.4.6. Maintenance and repairs

The Resident will be responsible for repairs and maintenance with some provision relating to the state of premises at the commencement of the lease. Typically, the Resident will be responsible for:

- Payment of rates and any other charges imposed by local government
- Repairs and maintenance
- All utility costs (water, gas, electricity, etc.)
- Complying with safety requirements (smoke alarms)
- Looking after the premises.

Typically, the CLT will be responsible for:

- Making sure the premises is fit for habitation and complies with relevant safety laws at start of the lease
- Inspecting once or more times a year
- Paying any taxes associated with being a multiple property owner (e.g. land tax)
- Buying the lease from the Resident at an agreed price when the agreement ends.

Sometimes, a CLT as ultimate owner may agree to take on certain repairs and maintenance (cyclical repairs) such as replacing big-ticket items like roofs, etc., every 10-20 years. However, generally the Resident has the day to day responsibility for the home.

The lease might specify terms of agreement on many other things such as:

- Administration fee
- Subletting
- Pets
- Swimming pools
- Changes or renovations of the premises
- Water saving devices
- Valuation of improvements made at the time of reversion.

#### **7.4.7. Lease fee to cover administration costs**

The lease will also specify what lease fee (or administration fee) is payable to the CLT and how often it needs to be paid. A CLT uses this payment to cover its administrative costs so the cost will be low. The lease fee component can be set as a flat fee based on the CLT's running costs, with reference to a percentage of land value, of premises value, or by some other method. If the term 'lease fee' is unpalatable, this can be termed an 'administration fee'.

The rest of the lease agreement concerns all the other matters to do with the dwelling and the allocation of responsibilities in relation to the premises.

#### **7.4.8. Insurance**

A CLT may specify that it will pay for the house insurance while the Resident can pay for contents insurance (if they so choose). Thus if the house is destroyed, it can be replaced by the CLT. The Resident is responsible for protecting their own personal possessions.

#### **7.4.9. Surrender of lease**

A Resident might decide to end the lease before the 99 years is up, such as when deciding to sell their leasehold interest in the home. In this case the lease will require they give the CLT notice of this. The lease will also require them to grant (sell) the lease back to the CLT, according to the reversion formula set out in the lease.

The CLT would have the first option on purchasing the Resident's lease if the Resident was to surrender the lease or otherwise exit the arrangement. A term of the lease would require that if the Resident wished to surrender the lease, that they must give written notice to the CLT (some UK CLTs require notice of six weeks) offering to surrender the lease back to the CLT.

The CLT can then pay the Resident the equivalent of the lease premium plus any extra amount as specified in terms of the lease (for example, for any improvements made). This would require that the CLT have a capital reserve with which to buy back leases.

Alternatively, the CLT might help the seller find a new buyer and oversee the sale to that buyer and the start of a new lease. Many CLTs maintain waiting lists of eligible buyers who have undertaken relevant training and/or financial counselling to ensure there is a pool of potential buyers. Either way, the lease would prevent the Resident from unilaterally selling the lease

to just anyone, for any price. This is to prevent a windfall gain going to the Resident in a housing market that may have gone up.

The price for the lease will already be known as this will be specified in the lease and is based on a formula or rule. The price might be related to the market value of the premises (or a percentage thereof), the value of the improvements (the buildings), or by another formula. Depending on the formula used, the Resident might be entitled to a percentage of the market value of the premises (if it has gone up).

Typically US CLTs give 25 per cent of the capital gain to the lessee. Other CLTs limit payments to increase in the CPI (inflation rate) to make sure the outgoing lessee-owner gets closer to the 'full value' of what they put in at the beginning. Reversion formulas are discussed in Chapter 9.

We envisage the process for surrender of a long-term lease where the tenant wishes to leave the leased premises would be as follows:

1. The Resident notifies CLT and Resident's mortgagee that it seeks to surrender the lease by agreement.
2. The Resident (or the CLT) identifies new potential CLT Resident.<sup>185</sup>
3. CLT prepares new lease for new Resident.
4. The exiting Resident's mortgagee agrees to termination of mortgage and payout amount.
5. CLT receives deposit for the Premium from the new Resident.
6. CLT prepares surrender of lease documentation to remove lease from title and sends to Resident for checking and signature. At settlement, mortgagee provides CLT with discharge of mortgage, the outgoing Resident provides CLT with fully executed surrender of lease and CLT provides the outgoing Resident and mortgagee with settlement cheques.
7. CLT arranges for discharge of mortgage and removal of lease from title with the relevant titles office.
8. Incoming Resident pays the CLT the Premium and signs the new lease.
9. CLT registers the new lease on title
10. The land titles office issues a certificate of title for the lease to the Resident.

The process is similar to that for the conveyance of fee simple title.

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<sup>185</sup> The extent to which the present Resident *must* be involved in locating a new Resident needs to be considered in the light of law relating to unfair contracts.

#### **7.4.10. Ending the lease**

Apart from the Resident giving notice that they wish to surrender the lease, or the expiry of the 99 years, there is no specific end point for a 99 year lease. The lease will continue unless:

- It expires and is not renewed;
- It is ended early via surrender;
- It is terminated because of breach;
- It is terminated because of some other reason (natural disaster, government acquisition); or,
- The lender (bank) sells the premises because of a mortgage default that could not be remedied.

There are instances in which a CLT might need to end a lease, but the CLT would not be able to terminate the lease for no reason. The lease would need to set out how the lease could be terminated and under what circumstances – usually only when a serious breach of the terms of the lease has occurred (for example, the Resident is not paying their mortgage or persistently fails to meet their responsibility for repairs and maintenance).

Under the terms of the lease, quite specific provision has to be made in relation to the termination of the lease: the grounds upon which the CLT may be able to enforce a buyout; the responsibilities and compensation payable on buyout; and, the transmission to others by grant, sublet or inheritance. The lease could only be ended by the CLT for specified reasons.

#### **7.4.11. Strata and long-term leasehold**

In a high-rise or other strata situation, the lease (or shared equity agreement as per Chapter 8) would require clauses that required the Resident comply with strata by-laws and pay strata fees. Alternatively in a long-term leasehold strata situation, the CLT could build the cost of strata fees into the lease fee.

#### **7.4.12. Legal arrangement: the typical CLT 99-year lease**

A lease involves a contract between the lessor (the CLT) and lessee (Resident). The CLT would remain as sole owner of the premises on the title. If the Resident has taken out a mortgage of the Resident's leasehold interest, they would be the sole mortgagor. The terms of a typical CLT lease are set out in the form of a Model 99-Year Lease in Appendix 5. The terms of the lease are in essence identical to those in the shared equity agreement contract (see Chapter 8). The difference is that the nature of the interest

held by the Resident is leasehold, rather than freehold. In both models, the Resident has a 'share' in the property and a partner (the CLT).

## 7.5 Pros and cons of long-term leasehold

One advantage of long-term leasehold is it preserves fee simple ownership in the hands of the CLT. The CLT remains the owner of the CLT home over the long term. However, the Resident has rights of security and tenure close to that of a freehold home owner. It is true their rights (for example, to any capital gain) are restricted slightly, but on the other hand they receive benefits such as security of tenure and being able to afford a home they otherwise could not afford. This reflects the sharing of equity and responsibility between the CLT and Resident, and the retention of the housing as affordable for subsequent occupants in line with the objectives of CLTs as developed overseas.

For example, some CLTs could offer a home that usually cost \$500,000 for around 50 per cent of that cost. In return for this discount, the Resident agrees to forgo some of the benefits associated with unfettered freehold, such as to access to full capital gains<sup>186</sup> upon sale, in return for the significant benefit of living in an affordable and secure home for the long-term.

The flexibility of the long-term lease is another advantage, as the upfront Premium can be adjusted according to local capacity to pay. Some CLTs might decide to utilise long-term leaseholds in a way more like ongoing rentals, with a minimal upfront Premium and income-gearred rents. The advantage of such an arrangement is that this might provide a more stable and appealing alternative to market rentals due to the extended term of the lease, the ability of the tenant to make repairs, and the indexation of rents. Further, CLTs might also be able to structure their operations and terms such that tenants in a more rental-like situation do not lose their tenancy if their income rises beyond affordable housing thresholds, in contrast to the current situation in affordable rental housing.<sup>187</sup>

One con of using long-term leasehold for ownership-like arrangements is that the Resident is still a lessee—that is, a tenant—albeit a tenant with home ownership-like rights. Their name does not appear on the title as the owner of the home; however, they can be issued a certificate of title to the lease. However, CLTs are conceived of as involving a partnership and shared

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<sup>186</sup> Assuming there is a capital gain (increase in value). It may be that the value of the home has reduced. Where this is the case, the loss is also shared.

<sup>187</sup> As affordable rental housing has income limits, typically 120 per cent of local median income, households are often given notification that they need to vacate the housing within 12 months if their income rises above this threshold.

ownership. The other option, shared equity, still includes the CLT's name on the title – so even though a shared-equity owner-occupier is on the title, they too have co-ownership with the CLT. Whether leaseholders or freeholders, Residents have registrable interests in the premises and this is recorded at the Land Titles office. A Resident has additional rights in relation to the premises that a tenant under residential tenancies legislation does not and cannot ever have.

Another con is that a bank may have more difficulty lending on leasehold than a freehold; however, this difficulty is not insurmountable, as seen in the ACT Land Rent Scheme (see Appendix 2). A CLT would need an agreement with a lender or lenders that the lender could offer a mortgage over leasehold, and that the CLT's housing is subject to the usual mortgagee action in the case of a default. The CLT then has the obligation to thoroughly vet applicants, to make sure they can service a mortgage and may proscribe what types or terms in mortgage are acceptable, in order to reduce risk.

## 7.6 Conclusion

While some states' and territories' residential tenancies legislation restrict the use of long-term leaseholds to establish CLT schemes, in NSW, Tasmania and Victoria, long-term leaseholds can be used currently by any CLT and will be exempt from Residential Tenancies legislation. In other states and territories, regulation and/or legislative change is necessary. In those jurisdictions, a shared equity model may be more useful in the short term, until the necessary changes to law are secured.

Leaseholds have the advantage of being straightforward and can include almost any term – that is, the lease can be amended to allow many different conditions so can allow CLTs to be very flexible as regards repairs, inspections, reversion formulas and so forth. This type of flexibility has been a key strength of the model and sector in the US as each CLT can tweak the lease according to its aims and local factors. The drawback is the occupant might still see this as inferior to freehold, even though in reality 99-year leasehold provides security of tenure and investment with many of the attributes of freehold ownership.

## 8 Shared equity

Hazel Blunden  
Peter Phibbs  
Louise Crabtree

### **Important information you should know before you read this section.**

The material in this Chapter 8 of the *Australian Community Land Trust Manual* is designed and intended to provide CLT proponents with general legal information that may be needed to establish a CLT. The information is current at the time of publication, for general informational purposes only. The material may not apply to all jurisdictions or to all needs of a particular CLT.

The material does not constitute legal advice, and is not intended to be a substitute for legal advice and should not be relied upon as such.

CLT proponents should seek legal or other professional advice before establishing a CLT.

As Chapter 4 outlined, a CLT in Australia currently has two potential ways of offering home ownership, with the assumption being that ownership is in some ways ‘shared’ with the CLT as partner. These are long term leasehold and shared equity freehold. This chapter discusses using shared equity arrangements to give the Resident certainty, security and equity in the home. Compared to conventional mortgage arrangements, shared equity can enhance affordability for homebuyers by reducing both deposit requirements and ongoing housing costs.<sup>188</sup> Shared equity arrangements can happen in any jurisdiction in Australia.

In the case of shared equity, the Resident would share ownership of the Premises (that is, the entire land and home package) with the CLT. Compared to the classic CLT, this represents a split ‘down the middle’ of the entire package, rather than a split ‘across’ the package, between the land and the home. This would be accompanied by an Agreement (a deed) outlining which party is responsible for what, and what happens when the Resident wants to leave and sell their share.

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<sup>188</sup> Pinnegar et al (2009).

Shared equity arrangements are already used to facilitate home ownership for those households who may have difficulty purchasing a home through the open market.<sup>189</sup> Sharing the equity reduces the cost for the Resident of moving into home ownership. Many state governments in Australia have some form of shared equity home ownership program. Some are more extensive than others. All are means tested and targeted at people who may not be able to afford home ownership otherwise. A CLT would be able to offer a similar path into home ownership by using shared equity arrangements which would be modified to include ongoing affordability conditions, which existing shared equity programs do not do.

As with a 99-year leasehold or the CLT classic, a shared equity arrangement is a partnership between the Resident and the CLT. The Resident is able to recoup what they have put in if they decide move out. At the end of the arrangement the Resident's share in the premises can be sold back to the CLT. In addition the Resident may be paid another amount (such as a fixed amount based on CPI or capital gain).<sup>190</sup>

One advantage to using a modified form of shared equity is that shared equity can be implemented in any Australian jurisdiction. Some jurisdictions cannot currently implement long-term leaseholds without legislative or regulation change (ACT, NT, QLD, SA, and WA). So a CLT may choose to use shared equity rather than leasehold in those jurisdictions until such time as the necessary changes have been made.

The other advantage of shared equity is that it is associated with owning, rather than leasing (even though long term leasehold is in many ways similar to owning) and thus may be more psychologically desirable for the CLT and potential home owner.

## 8.1 What is shared equity?

Shared equity arrangements cover the range of products, schemes and initiatives which 'enable the division of the value of a dwelling between more than one legal entity'.<sup>191</sup> The purchaser enters into an agreement with a partner to share the cost of purchasing a property.

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<sup>189</sup> Pinnegar et al (2010).

<sup>190</sup> 'Capital gain' refers to an increase in the home's real market value at the later valuation (compared to the valuation when the resident moved in). Although we have witnessed the escalation of house prices in Australia, capital gain is not uniform and is subject to variation. It is also possible to make a capital loss – that is, the home's value decreases to below the initial purchase price (this is referred to as 'negative equity').

<sup>191</sup> Whitehead and Yates (2007, p. 16) cited in Pinnegar et al (2009, p2).

Shared equity is exactly as it sounds – the ‘equity’<sup>192</sup> (or ‘net value’) of the home is shared between more than one party – in this case, the Resident and the CLT. Neither owns 100 per cent of the property. The title deed and mortgage records both parties’ names. These are used by some CLTs in the US in those states where the separation of buildings from land is not possible, and by some in the UK, as that separation is not legally possible in the UK.

By not having to buy 100 per cent of the market value of a home, the incoming Resident can enter home ownership on a lower income and with a lower level of savings, as the deposit will also be smaller. For example, if a CLT-owned home was valued at \$500,000, a CLT could sell 50 per cent of the equity for \$250,000. Such a CLT’s potential equity partner, the Resident, could buy into home ownership at approximately half the price than if they had purchased on the open market in the same area. At the time of sale, the partner would recoup their share of equity (less what is owed on a mortgage). The CLT would specify that the share has to be sold back to the CLT or its nominee according to an agreed formula.

## 8.2 Subsidy retention

As with those using leaseholds, a CLT utilising a modified shared equity approach would write a term into the deed which limits the equity gain to the Resident upon exiting the scheme. This is referred to as a subsidy retention model because the subsidy has been made available to the purchaser and needs to be made available to future purchasers. In order to reduce ‘subsidy leak’ the price of the home has to stay affordable into the future – which means that the price needs to be controlled rather than opened up to market forces and house price inflation.

If a CLT does not limit how much is paid out on sale, then the property could steadily become more and more unaffordable and the price could increase beyond the capacity of a similar future buyer to pay, thus jeopardising the ability of the CLT to provide affordable housing into the future.<sup>193</sup> However, in such schemes, the Resident will always get their equity back (less borrowing costs such as interest) and most CLTs would also offer a modest gain. This is a balancing act, which has to consider local income and housing costs to aim to return enough equity to allow an exit for the seller, while not pricing out the next buyer.

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<sup>192</sup> “The net value of real property, determined by subtracting the amount of unpaid debts secured by (against) the property from the appraised value of the property” (Law.com n.d.).

<sup>193</sup> See Jacobus and Lubell (2007) on this phenomenon.

For example, let's take that three-bedroom home from Chapter 2 valued on the open market for \$500,000 in a middle ring suburb of any of Australia's major capital cities. That hypothetical CLT sells 50 per cent of the equity for \$250,000 to an eligible person. If the Resident bought 50 per cent and stays for ten years, one of three things can happen – the house price can go down, up, or stay more or less the same. Let us assume that house price inflation will continue in Australia because of the imbalance between supply and demand.

Given the recent downturn in the Australian property market associated with the global financial crisis, it is difficult to forecast future changes in house prices. However, for the purposes of the current exercise let us assume that house prices rise at three per cent per annum over the next ten years.<sup>194</sup> This means that in ten years, the owner's share of the property will be valued not as \$250,000 but as \$336,000. A capital gains formula that is not capped in some way will cause subsidy loss over time (see scenario 1 in Appendix 1). This will not be a problem if incomes have risen by at least the same percentage. However, if house prices increase faster than incomes, the cost of entry to the CLT would increase over time if the capital gains were set to market values.

For example, if that hypothetical CLT's rules and contract stated that the Resident would receive capital gain in equal proportion to their equity stake – in this case, fifty per cent – that would mean a payout of equity of \$250,000 plus \$86,000 in nominal capital gain to the Resident, minus any outstanding mortgage amount. While the Resident would no doubt celebrate their good fortune, this represents unearned income<sup>195</sup> especially if they did not improve the dwelling during the ten years.

If income growth had not kept pace with house price inflation, this would result in the house being relatively more expensive for the subsequent buyer. This can be measured by the ratio of the price to the income of the purchasing household. Appendix 1 shows how this ratio increases in scenarios where house price growth exceeds income growth.

For example, if house price growth is five per cent and income growth is three per cent, this ratio rises over 20 years from 3.85 to 5.65, even with the CLT using 50 per cent of their share of capital gains to help reduce the entry price. The only way that the CLT can maintain the original ratio is to find some more subsidy to assist the purchasing household. If this is not available

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<sup>194</sup> Recent annual price increases have been very subdued in Australian capital cities. For example, the ABS Price Index for established houses fell 2.1% from June 2011 to June 2012. Only two cities, Perth and Darwin experienced price increases (Australian Bureau of Statistics 2012).

<sup>195</sup> See Chapter 4 on the work of Henry George.

the CLT would either have to accept that housing would become more unaffordable over time or reduce the size of their CLT to maintain affordability.

This is why CLTs often limit payment for capital gain to below the open market, or not use market valuation at all as the basis of the payment. Some CLTs use Consumer Price Index for this purpose, or the nominal increase in incomes to maintain affordability for subsequent purchases. This ensures the Resident does not lose money due to inflation, and the CLT maintains affordability for the next buyer, but deliver no equity gain to Residents. The exact formula will often depend on the nature of the housing market in which the CLT operates and the individual CLT's stated objectives.

Some state-based housing authorities (in South Australia, the Northern Territory and West Australia) already offer shared equity home ownership to low- to moderate-income households. Similarly to a CLT, WA's program, SharedStart loans, offers finance for 'fixed' properties where WA Housing retains a share in perpetuity (up to 30 per cent).<sup>196</sup> The program restricts sale of equity: the Government gets the first offer on any sale, so the Government retains the housing in the long term. WA Housing gives the resident owner the full proportion of any capital gain (increase in value) on the home at the time of sale.

However, as discussed above, this may cause 'subsidy loss' over time in areas where housing prices are appreciating faster than incomes – the government would need to increase the subsidy to subsequent buyers in order to provide them with the same affordability benefits. The WA Government would be able to use the increase in the value of its own equity share and any margin it makes on its lending operations to its shared equity clients. However, even with these levers to improve affordability, subsidy loss could occur if property values increased substantially faster than household incomes.

The ACT Government offers a form of discounted ownership via the ACT Land Rent Scheme in new urban areas, where the land value can be excluded from the sale price and the resident pays rent on the land value (see Appendix 2). This reduces the cost significantly for the buyer as they only have to pay for the value of the dwelling plus an annual rent amount based on either two per cent or four per cent of the land value.<sup>197</sup> The buyer

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<sup>196</sup> Government of Western Australia (2012a).

<sup>197</sup> While this sounds like the CLT classic and the ACT's land system is the result of implementation of the ideas of Henry George, the ACT scheme operates via a leasehold system rather than the conveyance of title to the house. Until 1970, rent was payable to the Government, and under the land rent scheme, this has been

forgoes access to any capital gain, as most value gains come from increase in land value rather than from improvements to the actual buildings on the land. The scheme has been very popular since it started and applicants must enter a ballot as there are more applicants than new release blocks for sale.

These schemes are all examples of shared equity or leasehold arrangements and all have the same purpose – to reduce the upfront costs of getting into home ownership. Some are structured to allow subsidy leakage; some for subsidy recapture. A CLT shared equity scheme would probably contain rules to ensure greater subsidy recapture, especially in areas where house prices are going up rapidly. However, in order to ensure the marketability of such schemes, the CLT would most likely need to benchmark their shared equity offering against existing shared equity schemes operating in their housing market, although there would also be households that sign up for ideological reasons.

### 8.3 Finance

As CLTs offer housing to moderate income households, most households will not be able to buy their equity share upfront – they will need to get a loan from a bank or other financial institution. Entering into a shared equity arrangement requiring a loan can be done in various ways: one way is for the CLT to provide the loan to the Resident and charge interest. This is what is done by some State Governments via their loan products for shared equity schemes. Otherwise, the loans can be sourced via a normal mortgage offered by a bank or other financial institution.

Assuming the CLT has sufficient reserves, the attraction for a CLT of offering loan finance directly is that the CLT lender could charge interest and thus generate income from the loan. A CLT may be able to offer more agreeable loan terms compared with profit-oriented banks – i.e. lower interest rates, or more flexible terms. However, this would require the CLT to have a very large amount of money to begin with, which is why governments offer these types of loans, whereas small to medium sized housing organisations do not: smaller organisations usually aren't capitalised enough to do so.

The most likely scenario for a small to medium sized CLT is that a potential Resident will have to borrow from a bank or other financial institution at commercial rates of interest. A shared equity contract may require that the mortgage be approved by the CLT and contain certain specified terms or be provided by approved lenders. This is to protect the borrower, as well as the CLT, from potential mortgage default.

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reinstated for land rent properties. Unlike a CLT, there is no restriction on lease resale (or more accurately, transfer of lease) by the lessee-owner.

## 8.4 What would be in the shared equity agreement?

As with a long term leasehold (see Chapter 7), a shared equity Agreement (deed) would spell out which party is responsible for what.

### 8.4.1. Mortgage

The Agreement can specify what type of mortgage the shared equity owner can enter in to – this is referred to as an ‘approved’ or ‘permitted’ mortgage and is to make sure the shared equity owner can pay the mortgage and has less chance of defaulting.

### 8.4.2. Exclusive possession

A Resident in a shared equity model would be given exclusive possession of the premises (control over it). This is subject to the CLT/equity partner’s defined rights in the deed – to inspect at an agreed frequency, enter in the case of emergency, etc.

### 8.4.3. Maintenance and repairs

The Resident will be responsible for repairs and maintenance with some provision relating to the state of premises at the commencement of the shared equity arrangement. Typically, the Resident will be responsible for:

- Payment of rates and any other charges imposed by local government
- Repairs and maintenance
- All utility costs (water, gas, electricity, etc)
- Complying with safety requirements (smoke alarms)
- Looking after the premises

Typically, the CLT will be responsible for:

- Making sure the premises is fit for habitation and complies with relevant safety laws at start of the Agreement
- Inspecting once or more times a year
- Paying any taxes associated with being a multiple property owner (e.g. land tax)
- Buying back the equity from the Resident at an agreed price when the agreement ends.

Sometimes, a CLT as co-owner may agree to take on certain repairs and maintenance (cyclical repairs) such as replacing big-ticket items such as roofs every 10-20 years. However, generally the Resident has all the day to

day responsibility for the home. An Agreement might specify terms of agreement on many other things such as:

- Administration fees and increases
- Subletting
- Pets
- Swimming pools
- Changes or renovations of the premises
- Water saving devices
- Valuation of improvements made at the time of resale.

#### **8.4.4. CLT Administration charge**

A Resident may be required to pay the CLT an administration charge or levy. This amount contributes to the CLT's operational costs, insurance and any cyclical maintenance work that the CLT has agreed to carry out. This amount (usually a modest amount similar to the ground lease fee in the US) is not recoverable and does not form part of the Resident's equity stake in the premises.

#### **8.4.5. Insurance**

A CLT may specify that it will pay for the house insurance while the Resident can pay for contents insurance, if they so choose. Thus if the house is destroyed, it can be replaced; but the Resident is responsible for protecting their own personal possessions. Alternatively, the agreement may stipulate the Resident pay for all insurance including home insurance.

#### **8.4.6. Pre-emptive right to purchase**

The CLT would have the first option on purchasing the Resident's equity if the Resident was to exit the arrangement. This is to ensure the CLT maintains a stake in the premises long-term and maintains the affordability of the premises into the future. A term of the contract would require that if the Resident wished to sell their share, that they must give written notice to the CLT (some UK CLTs require notice of six weeks) offering to transfer (sell) the Resident's share of the property to the CLT. The CLT can then agree to purchase the share itself, or nominate a buyer (another eligible household on the CLT's waiting list). The Agreement would prevent the Resident from unilaterally selling their share of the property to just anyone, for any price. This is to prevent a windfall gain going to the Resident in a housing market that may have gone up.

The price for the equity share will already be known as this will be specified in the shared equity agreement and reference a formula or rule. Some CLTs

may choose a formula based on market valuation and other CLTs may base the formula on CPI or even a set annual amount.

Apart from the Resident giving notice that they wish to sell their share, there is no specific end point for a shared equity arrangement. The CLT would not be able to terminate the agreement for no reason. The agreement would need to set out how the agreement could be terminated and under what circumstances – usually only when a serious breach of the Agreement has occurred or the Resident is not paying their mortgage. An Agreement will deal with worst case scenarios – such as:

- If the Resident defaults on the mortgage and the bank is about to sell the house
- If the premises is destroyed or is uninhabitable
- If the Resident persistently fails to pay any administration fee
- If the Resident seriously breaches the Agreement.

Under the contract, quite specific provision has to be made in relation to the termination of the shared equity agreement: the grounds upon which the CLT may be able to enforce a buyout; the responsibilities and compensation payable on buyout; and, the transmission to others by sale, sublet or inheritance. The Agreement could only be ended by the CLT for specified reasons.

#### **8.4.7. Legal arrangements and legislation**

A shared equity agreement involves an agreement contract between the CLT and Resident and a title deed and mortgage with more than one name on it. In legal parlance, the CLT and Resident will be ‘tenants in common’ (that is, co-owners). The Resident will agree to pay the mortgage (as the mortgage is for their share of the equity). The legislation of relevance will vary in each jurisdiction but will be legislation such as the Real Property Act (NSW), the Property Act (Vic) and the various Conveyancing Acts. The contractual arrangements come under common law of contracts and are subject to consumer protection laws. Shared ownership of property and an accompanying contract is a similar process in all Australian jurisdictions.

#### **8.4.8. The typical CLT shared equity agreement**

The terms of a typical Shared Equity Agreement are set out in the form of a Model Shared Equity Deed in Appendix 6. The terms of the Agreement are in essence identical to those in the long-term lease found in Appendix 5.

The difference is that the nature of the interest held by the Resident is freehold, rather than leasehold, but in the eyes of the law, the Resident’s

interest is similar in nature. In both, the Resident has a 'share' in the property and a partner (the CLT).

## 8.5 Pros and cons of a modified shared equity model

One advantage of a modified shared equity model is it gives the Resident freehold ownership – that is, a sense of 'this is my home'. The Resident is a co-owner rather than a tenant or lessee, which they would technically be under long-term leasehold. The CLT remains the long-term co-owner of the CLT home. The Resident has rights and security of tenure very similar to that of any other home owner. It is true that some of their rights (for example, to the full value of any capital gain) are restricted, but on the other hand they receive benefits such as security of tenure and being able to afford a home they otherwise could not afford. For example, a CLT could offer a home that usually cost \$500,000 for around 50 per cent of that cost. In return for this discount, the Resident agrees to forgo some of the benefits associated with unfettered freehold, such as to access to 100 per cent of capital gains upon sale, in return for the significant benefit of living in an affordable and secure home for the long-term.

One con is that the Resident does not have complete control over the premises and will not receive 100 per cent of any gain in the market value. Shared equity is a trade-off – if a household wants 100 per cent ownership, CLT ownership may not be for them. They may have to save up for a larger deposit, and purchase on the open market; however, it may be in an area that is more affordable and more remote from urban centres. A CLT may be able to offer better-located housing.

In a shared equity agreement, both the CLT and Resident are in partnership and both have a registrable interest in the premises (that is, property rights in the home) and this is recorded at the Land Titles office. In the case of any dispute, the contract forms the basis of what was agreed and is subject to the general law of contracts. The contract will also set out a dispute resolution process, which can occur prior to any party having to go to court.

## 8.6 Conclusion

Shared equity is a growing mechanism for providing access to home ownership for an affordable price. A CLT that wishes to confer a sense of ownership in a freehold sense may opt to use a modified shared equity model as its chosen vehicle. A mortgage and shared equity contract can be used in any State or Territory in Australia. The core objectives of CLTs to hold land out of the market can be readily achieved via a modified shared equity product which is, after all, what the classic CLT effectively is.

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## 9 Reversion Price

Derek Mortimer

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### **Important information you should know before you read this section.**

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### 9.1 Introduction<sup>198</sup>

The purpose of this Chapter is to help CLT proponents to work through many issues involved in designing a resale price (or ‘reversion price’) to suit their circumstances. The Chapter focuses on formulas designed to regulate the Reversion Price of single, owner-occupied housing units. Many but not all, of the factors discussed will also apply to formulas designed for other types of CLTs including housing co-operatives and not for profit service providers. CLTs that anticipate entering into Agreements with such entities may need to develop specialised formulas based on their specific goals and practical concerns.

A CLT reversion formula<sup>199</sup> helps to establish the upper limit on the price that the Resident may claim from the CLT on termination of the lease or co-ownership deed. The reversion formula is embedded in the CLT Agreement as a schedule.

Once a CLT adopts a reversion formula, the usual expectation is that it will be written into all of that CLT’s Agreements.

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<sup>198</sup> This Chapter borrows heavily from National Community Land Trust Network (2011d) but adapted to the Australian approach of a long term lease. Readers of this Manual are encouraged to peruse National Community Land Trust Network (2011d).

<sup>199</sup> Otherwise known as the “resale formula” in the USA.

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The process of designing a reversion formula arguably is one of the most important and difficult tasks that CLT proponents will undertake. Whatever formula is adopted will affect the specific rights and obligations of both the CLT and its many Residents for generations to come.

The precedent constitution included as Appendix 7 to this Manual requires an elaborate process to change the reversion formula, involving votes by both the membership and board of directors.

## 9.2 Theoretical basis to allocate appreciation

A Resident's equity is the value of the home minus any debt that encumbers the home – in other words, the amount of money that a Resident can expect to receive upon the sale of their interest in the home after all debt secured by mortgages has been paid off. The Resident's equity normally equals the amount of the down-payment, which is typically a small percentage of the upfront Premium. As the Resident makes monthly mortgage payments, their equity normally will increase (slowly at first, when payments consist mainly of interest; then more rapidly as an increasing portion of each payment is applied to the principal).

Appreciation in the value of real estate can be caused by two basic factors. One source of appreciation is the dollars, materials, and labour that the Resident invests in the home over time. The other source of appreciation is a set of social and economic factors that are beyond the control of the Resident – factors that can include changes in the level of private investment in the surrounding neighbourhood, public investment in streets, sidewalks, streetlights, parks, schools; changes in transportation patterns, employment trends, or population in the surrounding region; and, changes in tax policies or land use regulations, among many other possible factors.

As an underlying policy, CLT proponents in the US have tried to allocate appreciated value fairly – to its true source.<sup>200</sup> However this policy may be moderated by practical considerations. In other words, as far as possible value produced or purchased by the Resident should be allocated to the Resident and should add to the Resident's equity. Value produced by other social and economic factors should be retained by the CLT (in the form of a reduction in the Premium that a new Resident pays upon entering the Agreement).

A CLT reversion formula does not guarantee that a Resident will receive all of the value that they would ideally be entitled to, or even all of the value

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<sup>200</sup> National Community Land Trust Network (2011d).

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that the reversion formula would allow, just as the market does not guarantee this kind of return to conventional owners.

A CLT pays an outgoing Resident a limited price (the “Reversion Price”). This Reversion Price is usually a price that is the lesser of:

- the price determined by the reversion formula; and
- the appraised value of the home at the time the lease expires.

It is the design of this reversion formula that this Chapter will focus upon.

A CLT cannot promise that a home’s appraised market value will not be less than the Premium initially paid by the Resident upon entering the Agreement. CLTs do not normally have the resources that would allow them to pay a Reversion Price higher than what they can expect to gain from a subsequent Resident’s payment of their premium.

### 9.3 Goals in designing a formula

Making the assumption that a CLT has as its principal purpose the provision of housing for persons of lower income, the primary goals in designing a CLT reversion formula are:

- To ensure fair access to homeownership for subsequent Residents by preserving the affordability of the CLT home;
- To give the present Resident a fair return on their investment when they sell their CLT home.

These goals are not mutually exclusive, but there is a tension between them. Formulas that are most certain to give the outgoing Resident a fair return are likely to run a higher risk of eroding the home’s affordability for future Residents.

Reversion formulas most certain to preserve affordability run the risk of preventing a “fair” return. Each CLT must decide for itself what is fair and what is likely to preserve affordability, and must then design a formula in which these two essential concerns are reasonably balanced.

In addition, the US Manual<sup>201</sup> recommends considering a number of important secondary goals:

1. **Encouragement of long-term occupancy, avoidance of incentives for quick resale.** CLTs have a basic interest in promoting stable

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<sup>201</sup> National Community Land Trust Network (2011d).

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neighbourhoods and in providing long-term security for residents of these neighbourhoods. They do not intend to provide homeownership opportunities as way for Residents to turn a quick profit and make a fast exit;

2. **Promotion of resident mobility.** When a Resident wishes to sell their home, the Resident has an interest in obtaining a Reversion Price high enough to allow them to purchase a home in their new community. Some people argue that if a CLT is to provide permanent benefits for lower income people in an increasingly mobile society, it should allow Reversion Prices high enough to allow continued homeownership for those who move away. Others, however, see this goal as inconsistent with the CLTs concern with long-term occupancy and neighbourhood stability, or may see it as impractical in light of the primary goal of preserving the affordability of CLT homes.
3. **Incentives for useful improvements.** In some situations, CLTs have reason to encourage Residents to make useful improvements in their homes, and perhaps make other improvements on the leased land. CLTs may want to encourage other energy-saving improvements of existing homes. Some may want to encourage the expansion of smaller homes to accommodate larger families. In some urban situations, however, a CLT may decide that small Resident lots are already used to the optimum and may not want to encourage substantial additions to existing homes. A few CLTs in the US have chosen not to reward—or even permit—improvements because the restriction encourages Residents to move out of their “starter homes” when their fortunes increase, making room for the next lower-income, first-time buyer.
4. **Ease of comprehension by those affected.** In an effort to allocate equity with perfect fairness, a CLT can develop a formula so complicated that it will be incomprehensible to potential or actual Residents – and perhaps to everyone except its creators. At some point it must be recognised that a formula that allocates value less precisely to its source, but that is readily comprehensible, may be preferable to one that is more intricately precise but less comprehensible.
5. **Ease of administration.** Reversion formulas that require extensive record-keeping or frequent, detailed assessments of the value of improvements to the home may be very fair in theory, but they may also be beyond the capacity of a CLT with limited staff to administer, accurately and consistently, for many homes over many years. Ease

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of monitoring, record-keeping, and documentation are important concerns.

6. **Lack of intrusiveness; sense of ownership.** It is important that Residents feel they are “real” owners, with a sense of privacy and control over their homes comparable to that of conventional home owners. A formula that requires frequent inspections and prior approval of repairs and improvements can undermine this sense of ownership.
7. **Avoidance of disputes.** All reversion formulas involve a tension between the interests of the Resident and the interests of the CLT. Disputes can easily arise from this tension, but occasions for dispute can be minimised to the extent that the formula does not require subjective, debatable judgements on the part of CLT personnel in order to determine the Reversion Price.

Given these various and important concerns, it should be clear that there is no one perfect reversion formula. A number of trade-offs—among potentially conflicting social goals, economic interests, and practical concerns—must be made in designing a formula. The process of deciding on these trade-offs involves difficult choices, defining the rights and responsibilities of many people. A CLT that tries to avoid or minimise the difficulties of the process is likely to sow the seeds of future confusion and dispute.

CLT proponents in the US recommend that the process of designing a reversion formula should be inclusive and deliberate. It cannot be hurried.

## 9.4 Premium, equity build-up and reversion price

### 9.4.1. Defining the Premium

Almost all the US CLT reversion formulas begin by stating a “Premium”, which the formula then adjusts by one method or another to arrive at the “Reversion Price”. The Premium is the amount that the Resident actually pays for the home (here also called the “Premium”), including the amount of the Resident’s down payment and the amount of the loan that the Resident may take out under a mortgage of the improvements.<sup>202</sup>

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<sup>202</sup> The Premium does not include any subsidies permanently and directly held by the CLT affecting the value of the home for the initial and subsequent purchasers. A suggested example is where under a government grant scheme the CLT arranges for installation of energy efficient appliances or renewable energy generation plant. Other forms of subsidy, such as deferred loans to the Resident are not discussed

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### 9.4.2. Building equity by retiring debt

Not all of the Premium paid by the Resident represents their equity until all the portion of the price that was borrowed by the Resident has been repaid. At the time of the entering the Agreement, the Resident's equity consists of the down-payment, which may occasionally include not only their cash investment but also any value contributed as sweat equity prior to acquiring the home.

This equity will increase as debt is retired. The assumption is that the amount of monthly equity build-up will be determined by the portion of that month's mortgage payment credited to principal (a small portion at first, when most of the payment goes to cover interest; a larger and larger portion as debt is retired). However, this assumption may undermine affordability for subsequent Residents in cases where the interest has been subsidised in order to increase affordability for an initial Resident.

High interest rates can be a major barrier to homeownership for lower-income people. This barrier may be reduced by below-market-rate mortgage financing for a family acquiring a CLT home. The interest "subsidy" represented by the lower rate will allow the family's a monthly mortgage payments to be lower. It will also mean that a smaller portion of each monthly payment consists of interest, with a larger portion going to retire principal.

In such cases, CLT proponents must decide what portion of the retired debt should be credited to the Resident as equity. If all repaid principal is credited as equity, the Resident with subsidised interest will build up equity faster than those paying the same monthly amount on mortgages at higher interest rates.

The accelerated equity build-up raises both a question of fairness and a question of future affordability. If a household whose mortgage interest is subsidised is able to accumulate substantial equity through monthly payments of principal and then sells the home for at least the original price, the value of the interest subsidy will be removed – privatised – by the seller.

If the CLT relies on interest subsidy to make a certain purchase price affordable for a Resident who could not otherwise afford that price, and if the interest subsidy is then captured by that Resident, then the CLT will need to arrange another equally low-interest loan (additional interest

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here. Readers are encouraged to investigate the consequences of subsidies on design of a reversion formula in National Community Land Trust Network (2011d).

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subsidy) if the home is to be equally affordable for the next Resident at that income level.

Any CLT that relies on a subsidy to make a home affordable, rather than establishing an affordable Premium, is likely to face affordability problems in the future – unless the issue is addressed in the design of the reversion formula.

Some CLTs address the problem by not crediting the full amount of debt retired in such situations as equity build-up. Instead, they establish a standard minimum interest rate (normally at or close to market rate) which is used to calculate the amount of interest the Resident would have paid without the subsidy, which then allows a calculation of the amount of interest subsidy received during the time in question. This amount is then subtracted from the Reversion Price, so that the value of the subsidy is passed on directly to the next buyer.

#### **9.4.3. Adjusting the Premium to determine the reversion price**

Most of the questions that a CLT must address in designing a reversion formula have to do with the way that the Premium will be adjusted upward (or possibly downward ) to arrive at the Reversion Price. It is in deciding on the method for making these adjustments that a CLT must balance its two primary goals of fairness and affordability, while also taking into account its secondary goals.

### **9.5 Overview of popular formulas**

Reversion formulas in the US fall between the extremes of the more theoretically pure “itemised” and “mortgage based formulas”.<sup>203</sup> The itemised formula offers as complete a method of measuring a Resident’s earned equity. At the other extreme the mortgage-based formula offers as certain a method of preserving affordability.

Popular reversion formulas avoid, or at least moderate, the major practical disadvantages of the theoretically pure approaches, and all are easier to explain and implement.

This chapter will review the three popular types of formulas commonly used by CLTs:

1. Appraisal-based formulas

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<sup>203</sup> See National Community Land Trust Network (2011d, pp. 7–12) for background on itemised and mortgage based formulas.

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2. Fixed-rate formulas, which allow the price to increase by a fixed annual percentage.
  3. Indexed formulas, which allow the price to increase in proportion to changes in an index such as the Consumer Price Index or the medium household income.

## 9.6 Appraisal-based formulas

Appraisal based formulas adjust the Reversion Price by adding a certain percentage of any increase in appraised market values. Rather than itemising the factors that can cause increases or decreases in value, these formulas let the market measure changes in value. Any increase in value is then shared between the CLT and the Resident on a specified basis.

The basic idea behind all appraisal-based formulas is that the Resident should receive a share of the appreciation of that part of the overall property that the Resident has purchased. The original assumption was simply that what the Resident has purchased is the value of the improvements only, but not the land in which she has only a leasehold interest. In some respects, however, the reality is more complicated than this assumption suggests.

Because of these complications there have come to be three subtypes of appraisal-based formula:

- The “improvements-only” formula which gives the Resident a share of the appreciation of the appraised value of the improvements
- The “simple” formula which gives the Resident a share of the appreciation of the appraised value of the land and improvements (usually a smaller share than given by the improvements-only formula)
- The “compound” formula, which give the Resident a share of the appreciation of that portion of the value of the whole property that the purchase price actually covers.<sup>204</sup>

The initial appraisal process used for appraisal-based formulas can also assist the leasehold mortgage lender who will finance the home for the next purchaser.<sup>205</sup>

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<sup>204</sup> See National Community Land Trust Network (2011d, pp. 14-17) for details of these appraisal based formulas.

<sup>205</sup> The lender will calculate a “bottom line value” (the value of the premises) that is different from the value that will be used in calculating the Reversion Price.

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### 9.6.1. Advantages of appraisal-based formulas

These formulas allow Residents to capture a modest amount of appreciated value, while preventing expensive improvements from pushing the Reversion Price beyond the level of affordability (since the Resident receives only a portion of the value added by improvements).

These formulas avoid all of the difficulties involved in distinguishing repairs from improvements (though improvements may still be regulated for reasons unrelated to the reversion formula).

Because these formulas rely on professional appraisals, utilising standard techniques for appraising market value, the CLT itself does not have to make difficult and potentially controversial assessments of value.

Detailed record-keeping and fussy arithmetic are not required, relieving CLT personnel of burdensome tasks, and avoiding the confusion and conflict that can result from inaccurately or incompletely maintained records.

### 9.6.2. Disadvantages of appraisal-based formulas

Appraisals entail significant time and expense. Residents cannot know exactly what Reversion Price they will be permitted to receive unless or until an appraisal is completed.

During periods of rapid market appreciation, these formulas may give an unduly high rate of return to Residents who sell only a few years after having purchased with little or no down payment.

These formulas do not distinguish between value added by the Resident and value added by market factors beyond the owner's control. In most market situations, a Resident who has made substantial improvements will recapture only a portion of what they have invested.

There is therefore less incentive for making improvements and perhaps less incentive for repairs and replacements as well.

These formulas do not isolate that portion of apparent appreciation that results from monetary inflation.

If the local real estate market is appreciation only at the rate of inflation, a long-term Resident who receives only a portion of this apparent appreciation will receive less value than they have invested.

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### 9.6.3. Improvements-only appraisal-based formulas

It was the US CLTs that first adopted appraisal-based formulas using the “improvements-only” type. Typically these formulas allocate something like 25 per cent of the appreciated value of the improvements (but not the land) to the Resident, some CLTs allocate a higher percentage, and some adjust the percentage upward as a Residents tenure increases (e.g., a percentage ranging from five per cent after one year to 30 per cent after 30 years).

Improvements-only formulas assume that the improvements are the property that the Resident purchases – therefore the property in which the Resident has a right to share in appreciation that is likely to derive, at least in part, from the Residents own efforts. If the market value of the underlying land increases, on the other hand, it is assumed that the appreciation has been generated by the surrounding real estate market.

In clearly distinguishing between land value and improvement value, improvements-only formulas are solidly based on the fundamental CLT precept that land and improvements should be treated differently. Land tends necessarily to appreciate because it is a finite resource. The supply of land cannot be expanded to meet increasing demand, whereas the supply of housing units, as products of human industry, can always be increased.

#### 9.6.3.1. Advantages of improvements-only formulas

As compared to other types of appraisal-based formulas, improvements-only formulas have the important advantage of excluding increases in land value from the determination of Reversion Prices. At least they do this in so far as the nature of real estate appraisals makes it possible to do so, but there are some limitations on what is possible.

The primary method of appraising Resident-occupied homes is the “market comparison” method, by which a home is compared to more or less similar homes that have recently sold, for known prices, in the vicinity of the subject home. The sale prices of the “comparables” provide a base, from which value is added or subtracted as the subject property is compared, feature by feature, to these comparable properties.

When the value of a CLT home (improvements only) is appraised through a comparison with recently sold properties that include land as well as improvements, then, if a simple appraisal-based formula is used, the market value of the land must be subtracted from the prices of the comparables. Conceptually, this adjustment is one with which professional appraiser have no problem, since they are accustomed to adjusting market comparisons to

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account for differences in site value. However, these adjustments can be quite imprecise.

The precision of this method depends on the existence of relevant comparables for both land and improvements. The method is most dependable in situations such as recently developed suburban areas, where most homes and most lots can be closely and meaningfully compared. It is least dependable in low-income neighbourhoods, where good comparables may be hard to find.

It is difficult to establish the value of land through the comparison method in disinvested neighbourhoods. In such circumstances land may actually have a kind of negative market value. The “undesirable” location of a lot can reduce the value of a building on that lot to an amount substantially below the replacement cost of the building, so the land actually subtracts value from the building, rather than adding value to it.

But an appraisal by the market comparison method in such a neighbourhood will not assign a negative value to the lot. It will recognise the effect of the location on the overall value of the property, but it will do this in effect, by reporting the value of the building itself as less than its replacement cost, whilst assigning a nominal positive value to the lot. If the neighbourhood later becomes a more desirable place to live—perhaps through the neighbourhood improvements of the CLT itself—an appraisal will then show the building itself having gained substantial value. Really it is the land (location) that has gained value, but the appraisal may assign much or all of the increase to the building.

#### 9.6.3.2. Disadvantages of improvements-only formulas

Even in less extreme market situations, it remains difficult for appraisers to distinguish precisely between the part of the property’s value that derives from the land and the part that derives from improvements. This is one of the disadvantages of improvements-only formulas.

Another disadvantage stems from the fact that, because most real estate transactions do not require anyone to separate the value of improvements from the value of the land, there is virtually no record of historical trends in the prices of improvements separate from land. There is therefore no precise way that a new CLT can test the way an improvements-only appraisal-based formula would have performed in the local market over past years, as can be done with other common types of formulas.

A final disadvantage of these formulas lies in the fact that the Premium that the Resident pays is usually not the same as the appraised value of the

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improvements – which raises a question of fairness, especially in expensive markets where the Resident may actually pay for a significant portion of the land value as well as the value of the improvements, as will be noted below in connection with the discussion of “compound appraisal-based” formulas.

#### **9.6.4. Simple appraisal-based formulas**

These formulas address the difficulties in separating the value of improvements from the value of the land: they simply do not separate them. They measure the appreciation of the combined value of both land and improvements, and then allocate to the Resident a percentage of this appreciated value, normally that is smaller than would be assigned by an improvements-only formula in the same circumstances.

##### **9.6.4.1. Advantages of simple appraisal-based formulas**

Because they eliminate one of the variables inherent in improvements-only formulas, these formulas are in fact simpler to apply. If the Resident’s share of appreciation is set at an appropriately low level, the simple formula will be as effective as improvements-only formulas in preserving affordability against rising land values. Another advantage is that, because reliable historical data is available regarding trends in home sale prices (land and improvements combined), it is possible for new CLTs to determine with some precision the effect that such a formula would have had on Reversion Prices over past years.

##### **9.6.4.2. Disadvantages of simple appraisal-based formulas**

In their simplicity these formulas abandon the significant distinction between the factors that may cause increases in the value of land and improvements. They may limit the effect of increasing land values, but they do not screen it out. Therefore, in an effort to preserve affordability against rising land values, they must allocate to the Resident such a small percentage of overall appreciated value that there will be little economic incentive for preserving and enhancing the value of the improvements. The percentage may also be so low that, in any but the hottest real estate markets, Reversion Prices will not keep up with inflation.

Like improvement-only formulas, simple formulas do not consider the percentage of a property’s appraised value that the Resident actually paid for through the purchase price. For this reason the Resident of a deeply subsidised home will receive a significantly higher rate of return than the Resident whose purchase price covered most of the appraised value of the property.

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**Example**

Suppose a home appraised value of \$100,000 is sold to one Resident for \$90,000, while a home appraised for the same amount sold to another buyer, requiring more subsidy for \$60,000. Suppose that over a certain period of time the appraised value of both homes increases to \$150,000, and both Residents receive 20 per cent share of the \$50,000 appreciation. The purchaser of the less deeply subsidised home will receive an 11.11 per cent return, over time of their ownership, on the investment of \$90,000. The purchaser of the more deeply subsidised home will receive a 16.67 per cent return on the investment of \$60,000. The lack of fairness here can be seen as a problem.

### 9.6.5. Compound appraisal-based formulas

What are called in the US Manual “compound appraisal-based formulas” give Residents a percentage of the appreciated value of that portion of the total property that they have actually paid for through the purchase price. These formulas are like simple appraisal-based formulas in that they begin with the appreciated value of both land and improvements. They are like improvements-only formulas in that they give the Resident a specified percentage of only a part of that overall appreciation – but a part defined not in terms of the distinction between the value of land and the value of improvements but in terms of the distinction between the value covered by the purchase price and the value covered by the subsidy.

The first step in implementing these formulas is to determine what percentage of the total value of land and improvements is covered by the purchase price – by dividing the purchase price by the appraisal value of the total property at the time of purchase. At the time of resale, the amount of any appreciation for the total property is multiplied by this percentage to determine the amount by which the value of what the Resident paid for has appreciated. The CLT then applies its “appreciation sharing percentage” to the resulting amount.

**Example**

Let’s look again at the two homes described above, both of which appreciated in value from \$100,000 to \$150,000. For the home originally purchased with a Premium of \$90,000, the Premium covers 90 per cent of the value. If the appreciation sharing percentage is then 25 per cent, the Premium covers 60 per cent of the value. If the appreciation sharing percentage is then 25 per cent, the Resident would receive a share of appreciation equal to 25 per cent of 60 per cent of \$50,000, or \$7,500 (thus a total Reversion Price of \$67,500). Both Residents thus receive a 12.5 per cent return on investment over the time of their ownership.

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As this example illustrates, these formulas have the advantage of being fairer than simple appraisal based formulas, which provide a lower rate of return for those able to pay a higher Premium (those needing less subsidy) than for those paying a lower Premium (those needing more subsidy). It can be said that these formulas are fairer than improvements-only formulas, which give a higher rate of return to those whose Premium was less than the original value of the improvements alone, and a lower rate of return to those whose Premium was greater than the value of the improvements alone (whose Premium paid for part of the cost of land).

Like simple appraisal-based formulas, compound appraisal-based formulas have the advantage of avoiding the imprecision and inconsistency entailed in distinguishing the value of improvements from the value of land. Also like simple appraisal-based formulas, these formulas have the disadvantage of allowing Reversion Prices to include some portion of appreciated land value, which in hot real estate markets may undermine affordability.

As compared with both improvements-only and simple appraisal-based formulas, compound appraisal-based formulas have the disadvantage of being harder to explain, and, on a superficial level, more complicated to justify. Though these formulas are actually fairer than other appraisal-based formulas, it may still strike some people as unfair to give the Resident only a “piece of a piece” of appreciated value.

#### **9.6.6. Other variations of appraisal-based formulas**

Some of the disadvantages of the several types of appraisal-based formulas can be addressed through other kinds of variations. These variations give up some of the simplicity that is the central advantage of appraisal-based formulas, but they may still be worth considering. One such variation is discussed below. Others are possible.

*Appraisal-based formulas with capital improvement factors* are formulas that combine certain features of itemised and appraisal-based formulas. Like most itemised formulas they credit the Resident with equity for the value of at least certain specified major improvements made at the Residents expense. They allocate to the Resident a certain percentage of any additional appreciation, beyond the value of the Residents improvements, as determined by appraisals.

##### **Example**

Suppose a CLT Resident has paid a Premium of \$80,000 for a home (improvements only) that appraised for \$80,000 (land cost being subsidised), and has then made improvements (e.g. added a bedroom) that have been

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duly valued at \$10,000. When they decide to sell the home, it is appraised at \$120,000. If the CLTs formula allocates 25 per cent of additional appreciation to the Resident, the Reversion Price would be calculated as follows: \$80,000 Premium, plus \$10,000 in improvements, plus 25 per cent of the \$30,000 additional appreciation (\$7,500) equals a Reversion Price of \$97,000. If the formula had not included an improvement factor and they received a straight 25 per cent of the total \$40,000 appreciation, the Reversion Price would have been \$90,000.

This example involves an improvements only appraisal-based formula, but other formulas can be varied in this way as well. This type of variation avoids one of the major disadvantages of other appraisal-based formulas (failure to compensate Residents directly for their investments in improvements), but in doing so it assumes one of the disadvantages of itemised formulas (the burden of defining and assessing the value of improvements).

However, most CLTs that have adopted such formulas in the US have kept this burden within manageable bounds by limiting the improvements for which equity can be earned to a specific list of useful, separately appraisable major improvements such as the addition of a bedroom or a garage.

## 9.7 Fixed-rate formulas

The simplest of all types of reversion formulas, fixed-rate formulas adjust the Reversion Price upward by applying what is in effect a fixed rate of interest on the Premium (not the settlement price) from year to year. At any given time, a simple mathematical calculation will allow either the CLT or the Resident, independently, to determine the then current purchase option price.

According to the US CLT Manual, the fixed rate formula has become popular. The percentage rates applied in these formulas typically range from two per cent to three per cent. In most cases the rates are compounded annually – so that the rate is applied at the end of each ownership year to an amount equal to the Premium plus accumulated “interest” as of the beginning of that year.

Both the advantages and disadvantages of these formulas flow from the fixed and simple nature of the mechanism. They require neither the burdensome record-keeping and potential disagreements entailed by itemised formulas nor the expensive and time consuming appraisal required by appraisal-based formulas. They make it easy not only to determine the present purchase option price but also to project what the price will be at any given time in the future. There are disadvantages in that these formulas

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do not establish any relationship with either current market conditions or the Residents efforts to preserve or enhance the value of the home.

### **9.7.1. Advantages of fixed-rate formulas**

Easy to apply, involving no record keeping by the CLT and no difficult judgments.

Residents know exactly what price they can receive for their home at any given time – now or in the future.

The Reversion Price cannot be pushed upward beyond the intended level of affordability by spikes in the local housing market (as appraisal-based formulas may) or by sharp rises in consumer prices or wages (as indexed formulas may).

Recognise the Resident’s interest in receiving some return on their investment in the home, while limiting that return to a level likely to keep the home affordable for the next Resident.

Avoids the possible complications that can result from changes in the ways indexes are generated or published.

### **9.7.2. Disadvantages of fixed-rate formulas**

Like the indexed formulas, described below, fixed-rate formulas do not distinguish between “earned equity” and “unearned equity”, since the Reversion Prices have no relationship to the degree to which the Resident maintains or improves the home. They do not provide an economic incentive for sound maintenance.

Like indexed formulas, these formulas guarantee a high rate of return for “highly leveraged” short-term owners, while providing only a limited return for long-term owners who have paid off their mortgages.

In weak housing markets, these formulas can allow Reversion Prices to increase faster than market prices, thereby diminishing the effect of the subsidy and making marketing more difficult.

When the rate of inflation exceeds the fixed rate applied by these formulas, the real value of the Reversion Price for the seller will be less than the original purchase price.

## **9.8 Indexed formulas**

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Indexed formulas adjust the Reversion Price (above or below the Premium) by applying a single factor drawn from an index such as a median income or the Consumer Price Index. Indexed formulas were once rare among CLTs but, according to the US CLT manual, are relatively common.

Median-income-based formulas are sometimes a response to government program regulations requiring that homes subsidised through the program remain affordable for a certain number of years for households of a given income level.

With both fixed-rate and indexed formulas, the relationship between the settlement price and the subsidy will have especially important consequences. Subsidies that are structured as deferred loans or grants to the homebuyer are normally included in the settlement price – i.e. a market rate price is made affordable for the Resident by assistance provided directly to the Resident, not by subsidising the CLTs costs.

In such situations, there is an important distinction to be noted between the application of the index to the Reversion Price, and its application to the Premium. Application of the index to the Reversion Price may result in a higher Reversion Price than if the index is applied only to the Premium.

In deciding what index to use CLT proponents in the US consider the following questions to be relevant:

- Does the index measure changes in the cost of goods (as in the case of the CPI) or changes in the income of households.
- Is the index relevant for the population being served?
- Is the index relevant for the area being served?
- Is the index consistent from year to year?
- Is the index published with enough frequency and reliability to be available and current when needed?
- Is the index published by an objective, reputable public or private agency?
- Can the average person easily understand the index and if necessary, easily confirm for herself that the CLT is using the correct index information?

### **9.8.1. Advantages of indexed formulas**

These formulas allow a reasonable return to the Resident while limiting Reversion Prices to a level that is likely, though not certain, to be affordable for other households at the same income level as the initial family.

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Though not as simple as fixed-rate formulas, these formulas are relatively simple and do not require subjective judgements by CLT personnel or professional appraisers. These formulas are likely to provide a return to the Resident that is more predictable and less drastically affected by the ups and downs of local real estate markets (though not as predictable as fixed-rate formulas).

Information regarding common indexes is readily available, so it is relatively easy for a CLT to provide periodic reports of what the reversion formula of a home would be if the owner were to sell at that time.

These formulas should be easily approved under guidelines of public subsidy programs with which a CLT may be working.

Compared with fixed-rate formulas, these formulas – particularly CPI-based formulas - are more likely to allow the real value of Reversion Prices to keep up with inflation.

### **9.8.2. Disadvantages of indexed formulas**

Because these formulas do not distinguish between value produced by the Resident and value produced by other factors, they may not provide adequate incentive for maintenance and repairs – and may fail to provide a reasonable return on actual investment for owners who actually improve their homes.

A formula that allows Reversion Prices to rise at the same rate as area median income (AMI) or the consumer price index (CPI) may not preserve real affordability for lower-income households. Low-income people may not benefit from economic trends reflected by area-wide median income.

Reversion Prices pegged to median income may tend to widen the gap between haves and have nots. Indexes such as CPI, that reflect costs can have a similar effect, since increases in the costs borne by low-income people can easily outstrip increases in their incomes.

The leverage provided by these formulas is likely to yield an unduly high rate of return for short-term Residents.

In weak housing markets, these formulas can allow Reversion Prices to increase faster than market prices, thereby diminishing the effect of the subsidy and making marketing more difficult. For the long term there is no guarantee that indexes will continue to be generated and published as they are now. Discontinuation or significant changes in an index would create major problems for CLTs relying on that index.

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## 9.9 Testing possible formulas

Testing the possible consequences of different types of formulas is obviously an important part of the formula design process. CLT proponents should test specific formulas by projecting its effect on resale process for different Residents situations in different hypothetical economic situations, including the economic situation that has prevailed in the immediate area over the past ten years or longer.

CLT proponents in the US suggest one should try to answer the hypothetical question: How would the affordability of a home compare with what it was ten years ago? The availability and reliability of the data needed to address such a question will vary from area to area, as well as from one type of data to another, but it should be possible to find relevant data, of most types in most areas.

### 9.9.1. Burlington Associates interactive tool

CLT proponents may wish to make use of the “interactive reversion formula comparison tool” that can be found in the Burlington Associates CLT Resource Centre.<sup>206</sup> Bear in mind the tool assumes conditions in the US and terminology reflects that used in the US CLT Technical Manual.

The tool allows proponents to test various appraisal-based, indexed, “fixed-rate” and mortgage-based formulas over different “holding periods”, under different economic conditions. For a given formula you can specify the cost of producing the home, the amount of subsidy to be applied, the length of time the home is owned by the initial buyer, and projected rates of medium home price inflation (or deflation), median income inflation, and different interest rates.

### 9.9.2. Building consensus in support of the formula

The model Constitution requires that the CLTs reversion formula be approved by 75 per cent vote of the organisation’s membership, as well as by its Board of Directors. It is important that this approval be based, as much as possible, on a real understanding of the issues and a real acceptance of the formula itself – not on blind faith that the board or committee members “must know what they are doing”. A new CLT should involve as many people as possible, representing as many constituencies as possible, in the process of deciding on the formula.

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<sup>206</sup> Burlington Associates in Community Development (2012).

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A smaller committee may need to coordinate this process and do the careful background work needed to test the possible consequences of different types of formulas, but the committee should consult regularly with the membership. The pros and cons of alternative approaches should be explained, and feedback from the membership should be invited.

The fact that this will necessarily be a slow process should be seen as an advantage, rather than a burden. Price restrictions go against common perceptions toward “investing” in real estate. The reversion formula will almost certainly be questioned.

### **9.9.3. Ensuring informed consent from Residents**

Informed consent is of course necessary if the terms of the Agreement are to be legally enforceable. Informed consent is also essential if the CLT and its approach to restricted ownership are to be accepted and supported in the community. Any suspicion that the CLTs Residents have been deceived—that they do not really understand what they are doing when they enter into an Agreement that limits the Reversion Price of their home—can seriously undermine support for the CLT.

It is also important to provide carefully prepared written materials to accompany oral explanations of the formula. These materials should be clear and concise—but again not over-simplified—and should include examples of typical resales, showing how an actual Reversion Price is arrived at. Every serious prospect for CLT homeownership should be given such materials.

### **9.9.4. Record-keeping**

Though the nature of the records will vary, depending on the specific formula in effect, some form of record-keeping is essential to the implementation of all reversion formulas. Itemised formulas can impose heavy record-keeping burdens on a CLT, and it is important to evaluate the organisation’s capacity to bear the burden, consistently, over time, before adopting such a formula. Appraisal-based formulas require much less burdensome record-keeping, but it is still crucial to preserve the relevant documents – including the signed appraiser’s report completed at the time of purchase (a copy of which should be attached to the Agreement). Generally, CLTs should remind themselves that they not only need to collect the information required to calculate the Reversion Price at the time of resale, but must be able to document and preserve this information.

### **9.9.5. Reporting and retraining**

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Most Residents will pay close attention to the reversion formula in their Agreement at only two times: when they first purchase their home and when they later resell it. Years, even decades, may pass between these times. It is a mistake for a CLT to allow this period to pass without reminding its Residents of the conditions and limits that are placed on the resale of their homes.

The formulas used by some CLTs (fixed-rate and indexed formulas, in particular) allow the CLT to report periodically to its Residents what the formula-based prices of their homes would be if they were to sell them at that time. This kind of reporting is an important way of reinforcing the Residents' understanding of the limited-equity arrangement and, at the same time, a way of reassuring them that the CLT is fully accountable and attentive to their rights. It should greatly reduce the likelihood of misunderstandings or disputes at the time of resale.

Even formulas that do not lend themselves to periodic reporting of what the current Reversion Price would be (notably appraisal-based formulas) should be periodically reviewed with Residents who are subject to them. It may be as important to offer long-time CLT Residents an occasional "refresher course" in the details of their reversion formula as it is to offer an introductory course to a first-time homebuyer who is considering the purchase of an interest in a CLT home.

#### **9.9.6. Amending reversion formulas**

The model Constitution makes it difficult to change a reversion formula after it has been adopted. See Chapter 5 for further discussion.

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# Part IV – Financial issues



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# 10 Financial Feasibility of Australian Community Land Trusts

Peter Phibbs

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## 10.1 Introduction

This section provides a broad analysis of the financial feasibility of CLTs in Australia. This is a difficult task, largely because of the wide variety of possible CLT structures and activities. The review of the US literature on CLTs highlights the wide variety of possible organisational structures, housing types and financing mechanisms. A recent overview of the UK CLT movement reveals a similar variety.

This section does not cover all the potential forms of CLTs in Australia, but explores the financial feasibility of CLTs in a variety of land markets. A number of possible structures are described but it is not meant to suggest that these are the “preferred” or the only endorsed models. A range of different CLT structures is likely to emerge in Australia, just as they have in other places. A variation on a CLT model that removes (“discounts”) land value from the property price is described in the most detail. That model is the most well-known vehicle and a variation on this is also likely to provide the opportunity for the fastest path to financial viability for Australian CLTs. However, the financial model developed for this task, can be used to develop a financial model for a broad range of CLT structures and models.

Where appropriate, discussion will also compare the situation of two potential operating models:

1. **A partnered CLT** – a larger organisation, which is formed through a partnership with an existing organisation such as a large community housing provider; and,
2. **The independent CLT** – a smaller organisation, which develops with the sole purpose of forming a CLT.

The chapter focuses on two keys principles of CLTs:

1. **They need to be financially sustainable** – start-up CLTs have to be able to generate enough capital to sustain themselves and indeed have the resources to grow. The US experience has shown that without the injection of land and/or significant capital from external parties (e.g. Governments at all levels, charities, bequests) it is very

difficult for CLTs to move from “the idea” to outcomes. The difference between start-up subsidy injections for CLTs and other housing subsidy programs is that CLTs have been able to develop mechanisms to protect and recycle this subsidy (see point 2).

2. **Schemes that provide benefits to early participants of CLTs have to be available on an ongoing basis** – any subsidies provided at the start of a CLT need to be available to be recycled to future participants (think the opposite of First Home Owner Grants). This is sometimes referred to as ‘subsidy retention’.

## 10.2 An introduction to housing economics

The two elements of housing are land costs and dwelling costs. A review of housing prices in Australia and other developed economies show that over time dwelling costs on a square metre basis<sup>207</sup> have remained reasonably stable in real terms (i.e. after we adjust for inflation). The large increase in housing costs has been associated with an increase in the costs for land.

In many Australian cities, the land component of housing now exceeds 50 per cent of the total costs. Land as a proportion of housing costs varies significantly within and between Australian urban settlements. On an international scale, Australian housing and land costs are very high. Note that in regional and rural locations, land is a much smaller component of total housing costs. Estimates of some typical Australian land and housing costs are included in Table 10.1.

The high costs of housing in Australian cities now mean that many households that traditionally would have been homeowners in Australia are now either being squeezed out of the market or have to delay their entry into the home ownership market for a considerable time. The high cost of land is the reason for the popularity of the CLT model, as taking the land value out of the purchase equation significantly reduces the entry costs for a secure housing product. In comparison to, say, many North American cities, in the Australian urban context the very high land costs provides both an opportunity for CLTs in that there will be a demand for a housing product with reduced land costs, and a barrier in that there might be substantial costs in assembling the land needed to commence a CLT. Table 10.1 shows the considerable variation in the costs of land in different areas or sub-markets.

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<sup>207</sup> Dwelling costs have increased significantly over the last twenty-five years mainly as a result of a trend to larger dwellings, not because of an increase in per square metre costs (in real terms).

<b>NSW</b>	<b>Approximate Price range-Land ('000)</b>	<b>Dwelling price ('000)*</b>	<b>Approximate ratio of dwelling to land</b>
Inner city apartment site (no water views)	80-100	180-260	2.4
Suburban apartment site	50-70	180-260	3.7
Inner city residential site	450-550	300-400	0.7
Suburban residential site	220-400	230-250	0.8
Regional residential site**	70-110	240-260	2.8
Rural/remote**	30-50	280	7
<b>VICTORIA</b>	<b>Approximate Price range ('000)</b>	<b>Dwelling price ('000)*</b>	<b>Approximate ratio of dwelling to land</b>
Inner city apartment site (no water views)	80-100	180-260	2.4
Suburban apartment site	50-70	180-260	3.7
Inner city residential site	420-520	300-400	0.7
Suburban residential site	200-380	230-250	0.8
Regional residential site**	100-150	240-260	2.0
Rural/remote**	50-90	280	4
<b>WESTERN AUSTRALIA</b>	<b>Approximate Price range ('000)</b>	<b>Dwelling price ('000)*</b>	<b>Approximate ratio of dwelling to land</b>
Inner city apartment site (no water views)	80-100	240-300	3
Suburban apartment site	60-80	240-300	3.9
Inner city residential site	450-550	300-400	0.7
Suburban residential site	220-350	250-270	0.9
Regional residential site**	140-220	240-260	1.4
Rural/remote**	100-120	280	2.5
Rural/Remote - Mining	220-360	400-450	1.5

**Table 10.1. Typical land costs – Australian urban areas.**

\*2 bedroom unit and 4 bedroom house \*\*excludes resource regions  
Source: Author, based on a variety of cost estimates.<sup>208</sup>

The data in Table 10.1 would suggest that in the first instance a CLT that discounts land value might make the most sense in an Australian context in middle suburbs of major cities where the land costs are high enough to enable the discount of land value to deliver large benefits, but not so large as to make the land assembly costs potentially prohibitive. The table also suggests that in the case of high-rise apartments, a CLT focused on removing land costs might be problematic because of the relatively low land component. A CLT which removed land costs might only reduce costs by about \$50-\$70,000 on a middle suburb apartment block. Against this

<sup>208</sup> REIWA (2012), Department of Sustainability and Environment (2011), Rawlinsons (2011).

reasonably modest cost savings, the Resident would incur some restrictions on their ownership rights. In higher cost markets such as inner city areas, the land costs are likely to be substantially higher (say \$100,000 per unit).

However, even at this level, given the restrictions on ownership, this may again prove problematic in a marketing sense. In order to overcome this issue, the high-rise case described later in this chapter assumes that the equity contribution of the CLT includes some value of both land and dwelling (i.e. not a CLT model in which land value alone is discounted).

A second observation would be that CLTs in remote regions could also be more challenging as the land cost component is not as significant, although in some of these areas CLTs might make sense for other reasons. However, in regional areas, particularly in mining communities where land values have become inflated and housing stock has become scarce, the use of CLTs to protect housing affordability for the local community could be very cost-effective.

### 10.3 Major Costs and Revenues of a CLT

The costs of a CLT can be split into two categories: organisational costs and land costs. The former includes all the traditional costs with starting and running an enterprise:

- “start-up” costs that are the costs associated with starting an enterprise; and
- running costs of the organisation.

Land costs are associated with acquiring land to put into the CLT. The CLT would also need an amount of working capital, especially if it was going to act as a buyer of last resort and purchase equity from Residents who could not meet their mortgage payments.

The start-up costs involve initial legal work and organisational development work, including the development of a business plan and negotiating with a variety of project sponsors. The running costs include staff wages and a range of normal office/organisational costs including office rent and communication charges. These costs could be significantly reduced if the CLT was attached to an existing organisation say, for example, a large housing association.<sup>209</sup>

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<sup>209</sup> One point of attractiveness of a CLT product to a housing association with a comprehensive range of products is that it provides a transition into home ownership for their affordable rental clients so can prevent bottle-necking or moving people out of their communities.

In order to achieve the necessary time and focus to help develop the CLT it is assumed that the CLT would require a minimum of one full-time equivalent staff member during its development phase. Office/support costs are set at 25 per cent of the salary costs for a CLT partnering with an existing organisation and 65 percent for an independent CLT. Again the advantage of partnering with another organisation is that there could be a more efficient utilisation of labour as the scheme develops; this has been found to be the case in the US for CLTs that have started within existing housing providers.

Based on the US model, the revenue stream of a CLT might include the following.

### **10.3.1. Membership fees**

The CLT usually has a membership that includes both the Residents and members of the surrounding community, and charge a membership due. While these dues do not generally add up to a large total sum, they can be a stable source of revenue and can build important support for the organisation that leads to much larger individual donations.

### **10.3.2. Development fees**

Where a CLT is a development partner with private sector partners, a development fee is often charged. This is an important source of income for larger CLTs in the USA and is in the order of \$10,000 per completed dwelling. In the start-up feasibilities shown in the next section, no development fees have been charged since it is not envisaged that an Australian CLT would be heavily engaged in development during its start-up phase.

### **10.3.3. Services Fee**

A services fee is sometimes charged for the costs of qualifying potential CLT members and providing advice and support in order to help them qualify for any relevant government programs, to help organise builders and a range of other services. The size of this fee is usually dependant on the financial circumstances of CLT members. Based on the experience in the USA, we have set a fee of \$1,000.

### **10.3.4. Administration Fee**

A fee, usually called a ground lease fee in the USA, is charged to the residents in CLT dwellings. While these fees may be the most reliable source of revenue, the affordability objectives of the CLT are compromised if the fee is too high. Whatever Residents pay in administration fees is not

available to their mortgage on their dwelling. We have assumed an administration fee of \$100 per month.

### 10.3.5. Other costs

The legal chapters have indicated that the two legal options are to adopt a 99-year lease or co-ownership deed. In both cases, by writing in conditions, the Resident can be made responsible for:

- repairs and maintenance;
- Local Government rates;
- water; and,
- insurance.

Or, the CLT may take on all of these costs, or some of them only – for example, some CLTs could provide cyclical maintenance only (replacing large items such as roofs, kitchens, etc.).

Although costs can be passed on in their entirety to the Resident, it may be prudent for the CLT when they are undertaking their financial feasibility to adopt very conservative assumptions and expect to undertake some of the maintenance from time to time.

Or, if a CLT is leasing out dwellings under short-term lease arrangements that fall under the Residential Tenancies Act (acting as landlord) costs will be greater.

### 10.3.6. The financial model

The financial model should be viewed as a model used to examine broad feasibility and financial sustainability issues, rather than providing a very detailed cash flow model for the operation of a CLT.

The model attempts to develop a common model structure and to allow a range of assumptions to be varied, and the impact on the financial bottom line of the CLT to be examined. Rather than use a range of more complicated financial measures such as the internal rate of return or the net present value, the first round of simulations with these models look at two issues:

- The estimated cash balance in the CLT at year 10 of operation
- The year in which the CLT is first cash flow positive.

The range of assumptions in the model that need to be populated are shown in Table 10.2.

Model label	Urban	Suburban	Regional	High-rise
<b>Operational issues</b>				
<b>Independent</b>	Yes	Yes	No	No
Number of lots per year	25	25	25	25
<b>Values (\$000)</b>				
Land and home price (zero if donated)	450	250	100	250
Land value (for ground rent)	450	250	100	100
Dwelling costs	300	250	250	230
<b>Costs (\$000)</b>				
<b>Startup costs - year 1</b>				
Legal	15	15	15	15
Business plan	10	10	10	10
Other	5	5	5	5
<b>Ongoing costs</b>				
<b>Wages (\$000)</b>	90	90	90	90
Overheads (as percent of wages)	25%	25%	25%	25%
Overheads - independent CLT (as percent of wages)	75%	75%	75%	75%
<b>Cyclical Maintenance Costs</b>				
Maintenance Fund (% of dwelling value)	1.0%	1.0%	1.0%	1.0%
<b>Revenues</b>				
Administration Fee per month	100	100	100	100
Services Fee (\$000)	1.	1	1	1
Membership fees (\$000)	0.025	0.025	0.025	0.025
Number of members (% of dwellings)	200%	200%	200%	200%
Sales rate after year 4 (% of total stock)	4%	4%	4%	4%
Average age of sold property (years)	5	5	5	5
<b>Financial assumptions</b>				
Interest charges on deficits	7%	7%	7%	7%
Interest received on surpluses	4%	4%	4%	4%

**Table 10.2. Assumptions that need to be populated in the CLT feasibility model.**

## 10.4 Financial Estimates — urban, suburban, regional and high-rise CLTs

Table 10.3 summarises the likely financial position of an Australian CLT based on the operation of the financial model. Estimates are provided for four scenarios: an urban, suburban, regional and inner city high-rise CLT. The main differences, except in the case of the high-rise development, are the land costs in the scenarios. The urban, suburban and regional scenarios are based on the provision of separate dwellings or semi-detached dwellings

and townhouses on separate titles. Note that the assumptions used in each of the scenarios are also shown in Table 10.2. Note that it is assumed that the CLT adds 25 dwellings per annum over the ten year period.

In all cases, except the high-rise scenario, the equity contribution of the CLT is the value of the land (i.e. analogous to the CLT Classic). In the case of the high-rise CLT, it is considered that the land value component alone is unlikely to be enough to sustain the CLT. In this case, an additional equity component is included, which can be used to reduce the cost of the dwelling to the Resident.

The clear findings of the analysis are that:

- Without a land donation CLTs are not financially sustainable
- With a land donation, CLTs are financially sustainable
- After ten years (or 250 donated lots), CLTs in urban and suburban are making healthy surpluses which could be used to grow the CLT.

	Urban	Suburban	Regional	High-rise
<b>Land purchase</b>				
Surplus/Deficit Year 10	-\$8.6	\$-6.1	\$-3.6m	\$-4.1m
Year the scheme makes a surplus	n/a	n/a	n/a	n/a
<b>Land donation</b>				
Surplus/Deficit Year 10	\$0.16m	\$ 0.17m	\$0.17m	\$ 0.23m
Year the scheme makes a surplus	4	4	4	3

**Table 10.3. Summary of the CLT financials – 25 lots per annum.**

Source: CLT feasibility model

## 10.5 High-rise CLTs

One way of overcoming the high cost of land in Australia has been to increase densities. Although there is no agreed definition of what is high-rise, we have followed the NSW Department of Planning view that high-rise is any building greater than eight storeys.

A high-rise CLT may require the Residents to fulfil the requirements of being part of the Owner's Corporation. However, the bigger stumbling block for high-rise CLTs is the relatively low value of the land component in many of these developments – the whole idea of increased density is to decrease this land value. This may make the discounting of land value in high-rise situations difficult to market because for a relatively modest savings in land costs, the Resident will be asked to forfeit some property rights. However, other ways of allocating equity could work effectively in a high-rise situation (or indeed any apartment building). The CLT could take out an equity share

in a way described in Chapter 8. It may be possible to reduce the land costs of such a project even further through achieving a planning bonus for providing affordable housing as part of the development. The administration fee could be embedded in the strata fees for the dwelling (providing the CLT owned the whole block). Or, the Resident would pay both the strata fee to the Owners Corporation and a small administration fee to the CLT.

One issue that needs to be considered here is that the ability to deliver affordable housing as part of the development can be impacted by the construction costs associated with higher density development. Construction costs per square metre for high-rise development in some Australian markets are four times larger than those for a separate house.<sup>210</sup> Affordable housing providers have often had to provide quite small apartments to overcome this cost penalty. There are substantial cost increases once apartments rise over three levels (since a lift is required) and once again when buildings are higher than eight stories since a higher standard of construction is required, especially in relation to fire safety.

## 10.6 Examining alternative structures

As mentioned in the Introduction, this section is examining the case of a partnered CLT and an independent CLT.

### 10.6.1. The partnered CLT

The financial analysis undertaken previously described the scenario where a CLT commenced in partnership with another organisation, which had the support of a state wide intermediary. This is the least cost option. The cost savings stem from reducing the fixed costs for the CLT – the role of the intermediary means the CLT doesn't need to spend time preparing a range of materials/documentation that are needed before the CLT can put the first Resident into a dwelling.

Partnering with an existing organisation means the CLT can take advantage of the systems and staff existing providers already have in place. This is particularly important given the range of activities the CLT will undertake, including:

- financial analysis;
- financial counselling;
- education;
- sustainability advice;
- construction advice;

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<sup>210</sup> See Rowley and Phibbs (2012).

- revenue collection;
- liaising with financial institutions; and,
- legal issues.

The advantage of partnering with another organisation is that many of these activities would already be undertaken and hence the CLT can take advantage of these economies of specialisation.

This would suggest that in the short term a partnering approach would seem the most viable option for a large replicable CLT sector.

### **10.6.2. Independent CLTs**

Whilst a partnering approach might be appropriate for large CLTs, smaller independent CLTs could have an important role in an Australian CLT sector, particularly in rural areas. Smaller independent CLTs with strong local connections might have better opportunities at attracting resources into their CLT such as:

- donated or subsidised land (from both the private and public sectors);
- sweat equity (many UK rural CLTs have been based on sweat equity models where the future residents help build their house);
- donated labour and materials (through utilising the goodwill of local builders and merchants); and
- securing external grant funding (from a range of government agencies and foundations).

### **10.6.3. A State wide peak/resourcing agency**

Both models described above will be greatly assisted by the presence of a State wide peak and/or resourcing agency. The role of that organisation would be to resource CLT start-ups and to prevent the need for start-ups having to re-invent the wheel. This is not a large role – initially it could be one person whose job would be to assist CLT start-ups with a range of documents and provide strategic support. The CLT peak might be best located in a community housing peak or similar.

It would seem unlikely that in the short term the sector would develop independently of substantial government support. The need for subsidy to start CLTs is obvious. It could possibly occur with the very active role of a benefactor. The benefactor would require a degree of regulation or fall-back mechanisms to ensure that any subsidy they provided was retained. As with existing community housing organisations, it is not envisaged that start-up

CLTs would be part of government – rather they might partner with government in order to increase housing opportunities.

However, whilst the CLT might require a government subsidy (e.g. through the provision of land) in its ‘start-up’ phase, once these land costs are provided, the CLT would be able to be financially self-sustaining. Indeed the modelling shows there is an ability for the CLT to generate significant surpluses which can help the CLT grow over time. This would suggest that perhaps a state-wide revolving loan fund would be a good mechanism to facilitate the development of the sector by supporting CLTs in their start-up phase. The CLT could be assisted with their running costs in early years and then repay the fund when the CLTs passed the break even stage.

## 10.7 Access to Finance

A key issue with the development of CLTs is the ability of CLT clients to access mortgage finance in order to purchase a new dwelling. This issue is important for two reasons:

- access to finance allows households to participate in the scheme – so it facilitates demand; and,
- good access to finance also deepens the market for a CLT product and allows a CLT Resident to sell their Interest to another purchaser if they decide to move and/or if they are having difficulty meeting their mortgage payments.

A good test of CLT-type models and access to finance has been the land rent scheme of the Australian Capital Territory (ACT) Government. More details of the scheme are contained in Appendix 2. In summary, the scheme involves the ACT Government (who controls the land supply in the ACT) allowing households to rent land at single lot sales rather than purchase it through a traditional ACT 99-year Crown lease. Depending on their household income, households pay a land rent of either four per cent or two per cent of the unimproved capital value. Households at any stage can apply to purchase the Crown lease on the land they are renting or sell their property whilst maintaining the land rent status of the lot (the buyer can opt to purchase it as a land rent lot or pay the entire price for the lot and thus not be liable for land rent). The effect of the scheme has been to approximately halve the cost of buying. The scheme commenced in 2008.

The scheme was slow to start because of difficulty in attracting interest from the finance sector. None of the big four Australian banks are participating in the scheme. However now two second tier financial institutions are involved in the scheme – the Community CPS and bankmecu. Community CPS was the original financial partner of the scheme and originally required

households to provide a 20 per cent deposit of their dwelling costs in order to secure a loan. They are now able to provide finance on a ten per cent deposit with the assistance of a mortgage insurance product provided by insurance company QBE.

It is possible that the larger banks might get involved as the CLT sector expanded but perhaps in niche roles targeting particular groups such as Indigenous households. The small scale of the emerging CLT sector is a barrier to the larger banks as is the amount of time required to negotiate, what in traditional banking terms, is a reasonably small loan.

The main assumption in this section is that new dwellings would be constructed on CLT land. Whilst the purchase of existing dwellings is also possible, it is likely that this would generate extra complications in the short term for gaining access to finance – banks might be less keen to lend money on a dwelling if the dwelling was not new.

## 10.8 Assessing Demand for CLTs

Again the experience of the ACT land rent product is a guide here. The scheme started very slowly largely because of a lack of finance but has now gained popularity. Some of these are households that intend to be owner-occupiers whilst others are property investors and builders who are accessing the land rent scheme as a method for reducing their financing costs.

The scheme has proved popular with moderate-income households who are using the scheme as a means of entering a home ownership market that was previously inaccessible. Note that all participants have to attend a compulsory three-hour training workshop run by Canberra Institute of Technology before they can participate in the scheme.

The experience of the ACT land rent scheme indicates that a CLT has potentially a strong market in higher cost housing markets, largely because of the desire to have control of a home and achieve secure accommodation. The experience of the scheme also indicates that securing financing partners will be challenging but is feasible, and that the start-up time for a CLT could be reasonably long as the various stakeholders in the housing sector come to terms with the new product.

As discussed above, the area where a scheme would be most attractive would be areas where land costs are reasonably high but not too high, and where markets are reasonably 'deep'; i.e. in areas where there are likely to be a larger number of buyers. In rural areas with low land costs a model based on discounting land value alone could be problematic because the

costs of starting and running a CLT might not generate large improvements in affordability. Hence people are less likely to be interested in reducing their 'ownership' rights for this relatively small affordability improvement.

The other issue with rural markets is that because of the lower demand for a product, it may be difficult for a CLT owner to sell their dwelling if they need to relocate or if they are having difficulty making their mortgage payments. A CLT in a shallow market such as a rural area may need to have an additional capital buffer to act as a buyer of last resort to make the scheme viable. However, the advantage of a "buyer of last resort" mechanism is that it would make home finance more accessible since the lender would be exposed to less risk.

## 10.9 Funding the Purchase of Land

The discussion above highlights that land costs can be a barrier to the establishment of a CLT. If land has to be bought or financed, CLTs at any scale and in any geographical location cease to be financially feasible. In the US context the capital to acquire land or the land itself has often been provided by government and/or a benefactor. Part of the rationale for governments providing land is that the CLT is able to manage the subsidy in a way that enables it to be sustained over time.

The issue of retaining the subsidy over time has been examined by USA CLT analysts. Table 10.4 shows a comparison of the subsidy required to support five households into home ownership using a home in a homebuyer loan, where the resident returns any subsidy they receive at the time of purchase (middle column) with a CLT.

In the case of the homebuyer loan, the sale price of housing is simply the market price, whereas in the case of the CLT the sale prices tracks the changes in area median income. It is assumed that households sell their house after seven years. In the homebuyer loan, after 30 years a subsidy of \$342,000 is required to maintain affordability because of the increase in house prices. In the case of the CLT no additional subsidy is required after the initial \$50,000 subsidy.

The reason why Australian Governments might be attracted to contributing land into a CLT is that it preserves any subsidy they contribute to a household. The downside of an investment of government capital into schemes such as the First Home Owner's Grant is that the subsidy only helps one household and the government subsidy is likely to be inflationary: the larger the subsidy, the greater the pressure on housing prices, leading to a need to keep increasing the level of the subsidy over time.

<b>Initial Sale</b>	<b>Homebuyer Loan</b>	<b>CLT Model (AMI* Index)</b>
Initial market value	US \$250 000	US \$250 000
Subsidy	50 000	50 000
Initial sale price	250 000	200 000
<b>Resale in Year 7</b>		
Sale price	375 000	245 000
Repay first mortgage	(174 051)	(174 051)
Repay public subsidy	(50 000)	0
Sales costs (6%)	(22 500)	(14 700)
<b>Seller's net proceeds</b>	<b>128 449</b>	<b>56 249</b>
Affordable price to next buyer	245 000	245 000
Recaptured subsidy	50 000	0
<b>Additional subsidy required</b>	<b>80 000</b>	<b>0</b>
Total subsidy for next buyer	130 000	0
<b>Resale in Year 14</b>		
Sale price	565 000	303 000
<b>Additional subsidy required</b>	<b>132 000</b>	<b>0</b>
<b>Resale in Year 21</b>		
Sale price	850 000	372 000
<b>Additional subsidy required</b>	<b>216 000</b>	<b>0</b>
<b>Resale in Year 28</b>		
Sale price	1 278 000	458 000
<b>Additional subsidy required</b>	<b>342 000</b>	<b>0</b>

\*AMI is the area median income

**Table 10.4. Performance of Alternative subsidies over time – USA model.**

Source: Davis and Jacobus (2008, p. 9) after Jacobus and Lubell (2007).

The contribution of land to a CLT can also act as a counter-cyclical strategy: governments could dedicate more land to CLTs at the bottom of the building cycle and hence stimulate housing construction. The counter-cyclical nature of the model has been seen in the US, where the model assisted lower-income buyers into housing when the market was running hot and helped keep them in housing when the market turned cool.<sup>211</sup>

One of the possible causes of the slowdown in house construction in Australia is that increasing house prices are starting to price a large segment

<sup>211</sup> Davis (2010b).

of the traditional home owning population out of the market.<sup>212</sup> It will take a considerable period of time of flat or decreasing house prices to improve house-purchasing opportunities for moderate-income households. Another advantage of a CLT model for government is that it opens the home ownership market to a group of households that have been increasingly excluded.

State or Territory governments might be able to allocate a proportion of land from existing government holdings into a CLT. For example, part of the conditions of sale/planning approval might be for part of the land to be dedicated to a CLT. In very large ex-Government sites (e.g. old defence sites), this might generate a very significant yield for the CLT.<sup>213</sup> The other opportunity would be for governments to allow redevelopment of part of the land currently dedicated to public housing to be dedicated to a CLT. This might be a particular opportunity when large public housing estates are redeveloped for mixed public, private and community housing.

On the non-government side, many charities, foundations and other not-for-profit organisations have dedicated land to CLTs in the USA. There are likely to be similar opportunities in Australia. The Churches and Local Government would seem to offer some particular opportunities in Australia; see 10.10.1.

Some larger community housing providers are also for-profit developers. For example, Brisbane Housing Company has developed and sold into the market a number of land lots on the sites of old government land (usually old school sites). They could retain some lots from some of these sites and allocate them to a CLT. However, such activities, whilst able to add some stock to CLTs, are not being undertaken on a sufficient scale to provide the sole basis for the CLT sector. There are only a small number of community housing providers that are active in the for-profit development space.<sup>214</sup> Perhaps an approach would be for State Governments to call for expressions of interest from the not for profit sector asking for indications of potential leverage (i.e. how many additional lots could they contribute) based on the allocation of a number of housing lots. However, it is not recommended that a start-up CLT, without access to an organisation with extensive development experience, be asked to act as a developer to help fund their CLT business.

The other possibility would be for larger CLTs to generate over time an annual surplus which could be used to purchase additional housing lots for

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<sup>212</sup> Rowley and Phibbs (2012).

<sup>213</sup> In current projects, often the developer is required to construct a number of affordable homes as part of the development agreement (e.g. the old ADI site in Western Sydney).

<sup>214</sup> Milligan et al (2009).

the CLT. This would enable CLTs to grow once the initial contribution from Government or other parties is withdrawn. It would be possible for this growth to be accelerated if the CLT had other sources of revenue, such as social enterprises. Some of the larger US CLTs have been able to generate significant non-housing revenues through leasing a variety of commercial and retail premises.

## 10.10 Other issues

### 10.10.1. The role of local government in enabling CLTs

While local government does not usually see itself primarily as an affordable housing provider, there are several ways in which local government may enable the local establishment and operation of CLT programs. These vary between the various States and Territories, but can include:

1. Provision of access to local government property for affordable housing provision, including airspace;
2. Use of a planning uplift mechanism to generate benefits for a CLT;
3. Utilisation of existing affordable housing provisions, such as mandatory developer contributions or inclusionary zoning requirements; and,
4. Negotiated outcomes with developers.

Each of these is discussed in turn below.

#### 10.10.1.1. Provision of access to local government property

Local government property offers a particular opportunity for securing discounted value or donated land, as municipalities can be property rich. In rural areas they often own vacant land. In urban and rural/regional areas, municipalities often own land with only ground level uses, such as car parking or community facilities. This provides an opportunity for the development of CLT housing in the airspace and its transfer to CLTs through plans of subdivision (where existing lots remains in the ownership of the municipality, and new lots are created for ownership by the CLT). This can be achieved under two development scenarios:

1. Development of airspace over public car parking that is replaced as part of the development of the housing.
2. Development of airspace over existing facilities such as community centres and libraries when the facilities reach the end of their economic life or require major upgrading or asset renewal. Housing

can be constructed at the same time the facilities are upgraded or renewed, under single building contracts.<sup>215</sup>



**Figure 10.1. Woodstock community housing.**

Woodstock community housing was developed in the air space by the City of Port Phillip in 2006 over a replacement public car park.

#### 10.10.1.2. Use of a planning uplift mechanism

A change in planning regulations for a block of land can lead to a change in the value of the block. Where this change leads to an increase in land value, this increase in value is called planning uplift.

The ability of local government to direct this uplift to the provision of affordable housing varies between jurisdictions, although it is becoming more widespread. In some jurisdictions particular sections of planning legislation is used, but in other jurisdictions the outcomes are the results of negotiated outcomes.<sup>216</sup>

Where the capture of this uplift is facilitated by the planning system, the approach is reasonably straightforward. A different approach is used for rezoning compared to when planning controls are changed (for example, such as an increase in Floor Space Ratio), or height limits.

<sup>215</sup> Thanks to Gary Spivak from the City of Port Phillip for providing this material.

<sup>216</sup> Gurrans (2012).



**Figure 10.2. Liardet community housing.**

Liardet community housing was developed by the City of Port Phillip in 2004 over the Liardet Community centre as the centre was being upgraded.

Rezoning:

1. Calculate the land value before and after the rezoning.
2. Estimate the increase in land value.
3. Estimate the public benefit share.
4. Negotiate a range of benefits delivered by the developer that add up to the value estimated in 3.
5. Direct these benefits to the CLT.

Change in planning controls:

1. Calculate the land value per square metre of gross developable area;
2. Estimate the benefit as the number of additional square metres resulting from the change of controls by the value in 1.
3. Estimate the public benefit share.
4. Negotiate a range of benefits delivered by the developer that add up to the value estimated in 3.
5. Direct these benefits to the CLT.

#### 10.10.1.3. Utilisation of existing affordable housing provisions

In some specified areas, developers are required to make mandatory contributions (of housing or money) for affordable housing purposes. Such

levies are usually imposed in growth areas or areas where large-scale redevelopment is taking place. For example, the South Australian Government has mandated as a condition of consent for new developments, that 15 per cent of new housing be affordable housing. In the Local Environment Plan for the City of Sydney, affordable housing contributions are mandated for the Ultimo-Pyrmont and Green Square precincts. Australia's inclusionary zoning mechanisms are not as strong or as widespread as in other countries (for example, the US, UK or Canada).

Local governments are restricted in how they can mandate such levies. Unless a planning instrument authorises the imposition of affordable housing levies, local government cannot impose affordable housing requirements as a condition of consent to a development application.

#### 10.10.1.4. Negotiated outcomes with developers

Some local governments have been able to use a negotiation process to generate affordable housing units in their LGA. The City of Port Phillip is a good example. CLTs may be able to form partnerships with local government in order to gain access to some of that housing stock.

### 10.10.2. **Recurrent housing costs and environmental performance**

In order to assist households minimise the recurrent housing costs, which includes energy and water use and dwelling maintenance costs, it is important that the CLT plays a key role in influencing the design of CLT housing.

The CLT has a range of options here – they could insert design requirements into the Agreement (the stick approach), or they could help provide a range of advice, help negotiate with builders and organise bulk discounts for solar panels, etc. The other strategy that the CLT could adopt is to insist that the orientation and location of any land lots that are dedicated to the CLT are suitable for maximising environmental outcomes.

The CLT could partner with best practice in this area – various state land agencies, developers and Housing Authorities have made great progress in this area in recent years.<sup>217</sup> It might also be possible for the CLT to access pre-fab construction companies with very high energy saving products that still maintain affordability. These products could be especially relevant in rural areas where the construction workforce might be difficult to access.

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<sup>217</sup> See for example the sustainability framework of LandCorp in Western Australia (Landcorp n.d.).

It would also be important for CLTs to educate their future Residents about the financial benefits of good environmental design.<sup>218</sup> In a time of very significant increases in utility costs, the economic case for sustainable design is very robust.

### 10.10.3. Mixed income developments

One of the advantages of the CLT model is that since the organisation is not normally undertaking the role of a residential tenancy manager, there are no real cost benefits of having one large contiguous subdivision for the CLT.<sup>219</sup> The CLT can allocate its lots across a suburb, or larger area. This can help to generate a mixed income portfolio and reduce the concentration of households receiving a subsidised housing product.<sup>220</sup> This is part of the advantage of CLT models over other subsidised housing products.

### 10.10.4. Mixed use developments

An attraction of some US CLTs has been the development of mixed-use areas where the CLT owns a range of sites that are used for business purposes in addition to housing. Some of these businesses are conventional businesses (such as supermarkets), which are simply generating an income stream for the CLT whilst others are social enterprises, which are helping to provide employment for members of the CLT or other community spaces and services. The inclusion of such mixed sites would be a clear benefit to CLTs but might require an increased subsidy in the short term. The inclusion of these mixed sites is not formally included in the modelling in this report, but the addition of mixed uses into CLT portfolios can have clear advantages.<sup>221</sup>

## 10.11 Conclusion

This is the first attempt to examine the issue of the financial viability of CLTs in Australia. It mainly focuses on a CLT model that seeks to discount land value alone from property value, with a focus on households that can sustain a moderate mortgage. The financial and organisational challenges, particularly the long start-up phase, mean that the financial viability of a CLT

<sup>218</sup> A recent report (Szatow 2011) partly sponsored by Sustainability Victoria, highlights the substantial economic benefits associated with the incorporation of sustainability features in housing.

<sup>219</sup> If the CLT was using Residential Tenancy leases, proximity may reduce the maintenance costs.

<sup>220</sup> Obviously the lots cannot be so dispersed that it would reduce the probability of the CLT households forming a community.

<sup>221</sup> Note that it is a practice adopted by many existing Community Housing Providers (e.g. City West in NSW and Brisbane Housing Company).

will be assisted if the CLT partners with, or is embedded within, an existing organisation. If the existing organisation is a Housing Association or other current affordable housing provider, it has the advantage of providing a transition to home ownership product for existing tenants. However, smaller independent CLTs might also have an important role in a mature Australian CLT sector, particularly in rural areas.

The other conclusions include:

- mid-cost land markets would appear the best place to initiate a CLT;
- without a substantial donation of land a CLT is not financially viable because of the difficulties of servicing a loan to purchase land whilst keeping costs affordable for potential Residents;
- at a moderate scale a CLT has the ability to begin its own moderate land purchase program to grow beyond the initial land donation size;
- finance for CLTs is likely to be available but probably at a modest scale; and
- there will be a substantial lead times for the growth of a CLT.



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# The Appendices



## 11 Appendix 1 – Modelling for a hypothetical CLT home

Louise Crabtree

Peter Phibbs

### 11.1 Scenario 1: House price growth exceeds income growth and 50-50 share of capital gains

Income growth		3%			
House price growth		5%			
Resident share of capital gain		50%			
<b>Year</b>	<b>Value</b>	<b>Resident gain</b>	<b>Resale price*</b>	<b>Income</b>	<b>Loan/income ratio</b>
<b>0</b>	<b>500,000</b>			65,000	<b>3.85</b>
5	638,141	69,070	319,070	75,353	<b>4.23</b>
10	814,447	157,224	407,224	87,355	<b>4.66</b>
15	1,039,464	269,732	519,732	101,268	<b>5.13</b>
20	1,326,649	413,325	663,352	117,397	<b>5.65</b>

#### Assumptions:

The following assumptions apply to all scenarios in Appendix 1. NB: These are hypothetical household models, not CLT business models.

Income growth	annual increase in income
House price growth	annual increase in house price
Resident share of capital gain	the share that the Resident would receive on any capital gain on resale
Value	market value. Note: Resident's share is 50% of this value (i.e. at Year 0 in Scenario 1, this is \$250,000)
Year	Number of years into arrangement
HO gain	Value of Resident share of capital gain
Resale price	Initial Resident share (in Scenario 1, \$250,000) + Resident gain
Income	Income of household
Loan/income ratio	Home owner share divided by their income. For example in Year 0 of Scenario 1, this would be \$250,000/\$65,000 = 3.85

## 11.2 Scenario 2: House price growth exceeds income growth and Resident retains 25% of capital gain

Income growth		3%			
House price growth		5%			
Resident share of capital gain		25%			
<b>Year</b>	<b>Value</b>	<b>Resident gain</b>	<b>Resale price*</b>	<b>Income</b>	<b>Loan/income ratio</b>
<b>0</b>	<b>500,000</b>			65,000	<b>3.85</b>
5	638,141	34,535	284,535	75,353	<b>3.78</b>
10	814,447	78,612	328,612	87,355	<b>3.76</b>
15	1,039,464	134,866	384,866	101,268	<b>3.8</b>
20	1,326,649	206,662	456,662	117,397	<b>3.9</b>

## 11.3 Scenario 3: Income growth exceeds house price growth, 50-50 share of capital gains

Income growth		3%			
House price growth		2%			
Resident share of capital gain		50%			
<b>Year</b>	<b>Value</b>	<b>Resident gain</b>	<b>Resale price*</b>	<b>Income</b>	<b>Loan/income ratio</b>
<b>0</b>	<b>500,000</b>			65,000	<b>3.85</b>
5	552,040	26,020	276,020	75,353	<b>3.66</b>
10	609,497	28,728	278,728	87,355	<b>3.19</b>
15	672,934	31,718	281,718	101,268	<b>2.78</b>
20	742,974	35,020	285,020	117,397	<b>2.43</b>

## 11.4 Scenario 4: House price growth equals income growth, 50-50 share of capital gains

Income growth		3%			
House price growth		3%			
Resident share of capital gain		50%			
<b>Year</b>	<b>Value</b>	<b>Resident gain</b>	<b>Resale price*</b>	<b>Income</b>	<b>Loan/income ratio</b>
<b>0</b>	<b>500,000</b>			65,000	<b>3.85</b>
5	579,637	39,819	289,189	75,353	<b>3.85</b>
10	671,958	85,979	335,979	87,355	<b>3.85</b>
15	778,984	139,492	389,492	101,268	<b>3.85</b>
20	903,056	201,528	451,528	117,397	<b>3.85</b>

### 11.5 Scenario 5: House price growth equals income growth, Resident retains 25% of capital gain

Income growth		3%			
House price growth		3%			
Resident share of capital gain		25%			
Year	Value	Resident gain	Resale price*	Income	Loan/income ratio
<b>0</b>	<b>500,000</b>			65,000	<b>3.85</b>
5	579,637	19,909	269,909	75,353	<b>3.58</b>
10	671,958	42,990	292,990	87,355	<b>3.35</b>
15	778,984	69,746	319,746	101,268	<b>3.16</b>
20	903,056	100,764	350,764	117,397	<b>2.99</b>

## 12 Appendix 2 – Details of the ACT land rent scheme

Peter Phibbs  
Hazel Blunden

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### 12.1 Description

The Land Rent Scheme is part of the ACT Government's Affordable Housing Action Plan. The Land Rent Scheme gives a lessee the option of renting land through a land rent lease rather than purchasing the land to build a home. The Land Rent Act 2008 is administered under the Taxation Administration Act 1999. Note that in the ACT all land is owned by the Crown and subject to leasehold.

Under the scheme, purchasers of a single dwelling residential block (previously unleased land) sold by the Land Development Agency have the option of applying for the crown lease to be issued as a land rent lease. The advantage for potential lessees in taking up this option is the reduction of the up-front costs associated with owning a house. That is, lessees will not need to finance the cost of the land, only the costs associated with the transfer of the land (such as duty) and the construction of the home.

Land rented under a land rent lease is subject to payment of an annual land rent charge. In addition, the lessee will be liable to duty on the grant of the land rent lease, rates, and, if applicable, land tax.

Duty is payable on the land rent lease on the same basis as applies to the grant of a nominal crown lease. The dutiable value is not reduced by virtue of the lessees taking a land rent option.

Applicants for a land rent lease are encouraged to seek legal advice.

### 12.2 Land rent amount

The discount land rent rate is two per cent of the unimproved value of the leased land. The standard land rent rate is four per cent of the unimproved value of the leased land.

When a land rent lease is granted, lessees will commence on the standard land rent rate. Lessees who are eligible for the discounted land rent rate must apply to the Commissioner for ACT Revenue using the Application for discount. The discount land rent rate will apply from the date of the grant of the land rent lease for eligible lessees.

A change from the standard rate to the discount rate of land rent during the term of the lease will normally apply from the start of the financial year after an application is approved. However, a lessee may, on the grounds of financial hardship, apply for the discounted land rent to be applied from the date the application is made using the Application for discount based on financial hardship.

### **12.3 Eligibility for discount land rent rate**

The eligibility criteria for discounted land rent are as follows:

- the total annual income of all lessees must not exceed \$85,500, increasing by \$3,330 per child up to a maximum of \$102,150 for five or more children;
- lessees cannot own any other real property; and
- at least one of the lessees must reside in the property once a Certificate of Occupancy has been issued.

### **12.4 Application processing time**

The current standard for processing applications is ten working days from the provision of all required documentation.

### **12.5 Annual review**

Lessees who have been approved for the discount rate of land rent are required to confirm by 30 September each year (commencing 2009) that their annual income has remained under the applicable income threshold amount using the Annual review of eligibility for discounted land rent form.

An annual review of lessees' income will be conducted to determine their continuing eligibility for discounted land rent. The standard rate of land rent as set by disallowable instrument 2008-138 at four per cent of the Unimproved Value of the leased land applies where the lessees are no longer eligible for discounted land rent for any of the following reasons:

1. the lessees' total income exceeds the income threshold; or
2. if a Certificate of Occupancy has been issued—the lessees fail to take up residency or all of the lessees move out of the property; or
3. if any one of the lessees purchases other real property.

## **12.6 Annual land rent increases**

To protect lessees from large rental increases attributable to increases in unimproved land values, annual rent increases will be capped by wages growth. Land rent is an annual charge billed quarterly; however, lessees have the option of paying weekly, fortnightly, monthly or quarterly.

## **12.7 Conversion of entitlement**

Lessees have the option of converting the land rent lease to a nominal rent lease (i.e. a traditional ACT lease) at any time. The amount payable to convert the lease from a land rent lease to a nominal rent lease will be based on the unimproved market value of the land at the time of conversion, i.e. not the original value when the land rent lease was entered into. Land rent payments do not contribute towards the amount required to convert the lease from a land rent lease to a normal crown lease.

## 13 Appendix 3 – Selected online CLT resources

Louise Crabtree

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### 13.1 Australian resources

- AHURI CLT reports  
Research report – ‘Principles and practices of an affordable housing community land trust model’:  
[http://www.ahuri.edu.au/publications/download/70639\\_rp](http://www.ahuri.edu.au/publications/download/70639_rp)  
  
Final report – ‘Community land trusts and Indigenous housing options’:  
[http://www.ahuri.edu.au/publications/download/70639\\_fr](http://www.ahuri.edu.au/publications/download/70639_fr)
- Australian Taxation Office non-profit materials  
<http://www.ato.gov.au/nonprofit/>
- Community Housing Federation of Australia  
<http://www.chfa.com.au/>
- National Rental Affordability Scheme  
<http://www.fahcsia.gov.au/sa/housing/progserv/nras/Pages/default.aspx>

### 13.2 UK resources

- Scottish Community Land Network  
<http://www.communityland.org.uk/>
- UK CLT Network website  
<http://www.communitylandtrusts.org.uk/home>  
  
Sector report – ‘Proof of concept: community land trusts’:  
<http://www.communitylandtrusts.org.uk/upload/public/Publications/Proof%20of%20Concept%20Final.pdf>  
  
Sector report – ‘Lessons from the first 150 homes’:  
<http://www.communitylandtrusts.org.uk/upload/public/Publications/150homes.pdf>

### 13.3 US resources

- 'Asset building and affordable homeownership' video:  
<http://blip.tv/shared-equity/asset-building-and-affordable-homeownership-5205476>

- Burlington Associates  
<http://www.burlingtonassociates.com/>

Online resale formula tool:

<http://www.burlingtonassociates.com/home-slides/resale-formula-comparison-tool/>

- Champlain Housing Trust

Resale study 2003:

[http://www.champlainhousingtrust.org/literature\\_107815/Permanently\\_Affordable\\_Housing](http://www.champlainhousingtrust.org/literature_107815/Permanently_Affordable_Housing)

Resale study 2009:

[http://www.champlainhousingtrust.org/literature\\_107814/Lands\\_In\\_Trust\\_Homes\\_That\\_Last](http://www.champlainhousingtrust.org/literature_107814/Lands_In_Trust_Homes_That_Last)

- Community Legal Resources CLT legal toolkit  
<http://www.clronline.org/resources/clt>

- US CLT Network website  
<http://www.cltnetwork.org/>

CLT technical manual 2011:

<http://www.cltnetwork.org/index.php?fuseaction=Blog.dspBlogPost&postID=1614>

Video – 'Homes and hands: community land trusts in action':

<http://www.cltnetwork.org/index.php?fuseaction=Blog.dspBlogPost&postID=85>

## 14 Appendix 4 – Towards a statutory definition for CLTs

Derek Mortimer

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The purpose of this Appendix is to briefly review two current statutory definitions for CLTs and describe some matters that CLT proponents in Australia may want to consider should they wish to move towards a statutory definition of CLTs in Australia. At this very early stage of development of CLTs in Australia it is too early for us to prescribe what a statutory definition may look like.

The 2 current statutory definitions for CLTs are found in the US and the UK.

The classic CLT model as developed in the US and defined in the *Housing and Community Development Act 1992* via the so-described *Cranston-Gonzales National Affordable Housing Act 42 USC 12773* (“the Cranston-Gonzales Act”). A copy of the Cranston-Gonzales Act is to be found in 14.4.

The broader definition of CLTs as an “English body” is found in the UK *Housing and Regeneration Act 2008 s79* (“the UK Act”). A copy of section 79 of the UK Act is found in 14.5. We also reprint clause 59 of the UK Act to provide context.

### 14.1 The Cranston-Gonzales Act

It will be seen at clause (a)(3) of the Cranston-Gonzales Act that the definition of CLT in effect is a not-for-profit organisation that acquires fee simple title to land to hold in perpetuity. The CLT uses this land to convey long-term ground leases and ownership of structural improvements to lessees and retains an option to purchase such improvements at a price determined by a formula. The purpose of this formula is to ensure the improvements remain affordable for low to moderate income families.

The Cranston-Gonzales Act then goes on to specify that the CLT Board must comprise an equal number of lessees, corporate members who are not lessees and other categories of persons permitted by laws of the CLT. This is the classic “tripartite” CLT Board structure.

Hence the Cranston-Gonzales Act focuses on the classic CLT model of long-term ground leases, some form of conveyance or transfer of improvements to the homeowner and the tripartite board of a not for profit CLT as the fee simple title owner of land.

## 14.2 The UK Act

As will be seen from the UK Act, a CLT is an “English body” which has a purpose of furthering the interests of local communities. The CLT is said to further these interests by “acquiring” and “managing” land to provide benefits to the local community. You will see in particular that the effect of clause 79(4)(b) of the UK Act is that a CLTs land could be sold or developed in any way that the CLTs members think, providing the decision benefits the local community. As can be seen this definition gives considerable latitude to the CLT as to how it should manage land.

Importantly the UK Act definition does not mention the need for a CLT to lease land or purchase improvements sold to their homeowners at a pre-determined purchase option price.

The UK Act should be understood in the context that CLT proponents in the UK have avoided use of long-term leases and some form of transfer of improvements to homeowners. The reasons for this are discussed elsewhere.<sup>222</sup>

Instead, UK CLTs focus on the use of covenants and second mortgages. We reviewed covenants and second mortgages in Chapter 4. With both a covenant and second mortgage, the CLT conveys the fee simple title to the homeowner. CLTs under the UK Act limit the resale of those titles through the covenant and second mortgage devices.<sup>223</sup>

## 14.3 Observations

It can be said that the definition of CLTs between the Cranston-Gonzales Act and the UK Act are diametrically opposed when it comes to ownership of the fee simple title. This fact alone we think will be a source of much discussion and further research in Australia when CLT proponents consider an appropriate statutory definition.

We will make the following observations.

1. The Australian CLT models as discussed in this Manual are closer to the Cranston-Gonzales Act definition of CLTs, albeit there is no separate conveyance of improvements to the Resident. However, the CLT is generally the owner of the fee simple title.

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<sup>222</sup> See also UK National CLT Network (n.d.c., section 5.2) for a discussion on the problem of “leasehold enfranchisement”.

<sup>223</sup> See, for example, case studies in Paterson and Dayson (2011).

2. Particularly in the case of CLTs under the UK Act that use second mortgages to limit prices, it is arguable whether the CLT is in fact a “land trust”. Using the second mortgage model the CLT does not hold freehold title to land and any interests over the land it may have by way of the mortgage are merely to provide security for repayment of sums under the second mortgage. In this sense then the CLT is acting more like a financial institution. It may be CLT that use second mortgages to limit resale prices is better described as a “revolving loan fund” than a land trust.
3. It is important for CLT proponents in Australia to define the purpose or benefits of a statutory definition of CLTs.<sup>224</sup>

We understand that both the Cranston-Gonzales Act and the UK Act were designed primarily for the purpose of permitting CLTs to avail themselves of government funding.

The UK Act should also be understood in the context of clause 56 which states that the law relating to CLTs and other English Bodies is designed for the purpose of regulating social housing.

We also note CLT proponents in Australia may also see the benefit of a statutory definition of CLTs as conferring some sort of “imprimatur” of legitimacy on CLTs. That is, a statutory definition is needed to simply for the purpose of recognising CLTs in Australia.

With regard to observation 3, CLT proponents in Australia may wish to identify relevant legislation that may enable CLTs to access government funding or to regulate provision of housing. State based legislation for example, may include the various Housing Acts familiar to those involved in provision of social housing. A difficulty with the state legislation of course is that CLT proponents will need to seek changes in each jurisdiction. In addition, those changes would need to be consistent.

CLT proponents may also like to consider Federal government suggestions to develop a statutory definition of charity. The Government has flagged the introduction of a statutory definition of charity following the establishment of the Australian Not for Profit and Charity Commission. We understand a statutory definition of charity is scheduled to commence on 1 July 2013.<sup>225</sup>

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<sup>224</sup> Following comments of attendees at the UWS CLT Legal Roundtable 1 March 2012, Sydney.

<sup>225</sup> Baird (2012).

Importantly a definition of CLTs in a statutory definition of charity should make it easier for CLTs to obtain tax concessions and deductibility of gifts.<sup>226</sup> It may be this legislation would be a useful place to provide a definition of CLTs.

With regards to use of a statutory definition to provide some form of “imprimatur”, CLT proponents may wish to consider at least as an interim solution the following means to gain recognition:

- **ATO tax concessions and DGR endorsement for CLTs** – recognition by the ATO could give CLTs some sense of legitimacy particularly in regard to the CLTs “purpose” and application of its funds. Registration by the ACNC it can be assumed will also give a sense of legitimacy for CLTs.
- **Ministerial approval** – simply having a government minister launch a CLT may provide benefits such as:
  - Those involved may feel that what they are doing is “right”;
  - Government officers may become more supportive (particularly if it is their Minister that has done the “launching”;
  - Corporate sponsors may feel the project has legitimacy.<sup>227</sup>

In our opinion, based on experience in the not for profit sector, CLT proponents will face a long and frustrating road to achieving a statutory definition in Australia because of the complexity of multi jurisdictions. This is why it is important for CLT proponents to be clear that a statutory definition is necessary.

At this stage it may be best for CLT proponents simply to begin the conversations.

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<sup>226</sup> Australian Taxation Office (2011b).

<sup>227</sup> See Mortimer (2003, p.30).

## 14.4 US federal definition of community land trusts

H11966 CONGRESSIONAL RECORD – HOUSE October 5, 1992

### SEC. 212. HOUSING EDUCATION AND ORGANIZATIONAL SUPPORT FOR COMMUNITY LAND TRUSTS

(a) COMMUNITY LAND TRUSTS. Section 233 of the Cranston-Gonzales National Affordable Housing Act (42 U.S.C 12773) is amended –

- (1) in subsection (a)(2) by inserting “community land trusts” after “organizations”;
- (2) in subsection (b), by adding at the end the following:

(6) COMMUNITY LAND TRUSTS. Organizational support, technical assistance, education, training, and community support under this subsection may be available to community land trusts (as such term is defined in subsection (f) and to community groups for the establishment of community land trusts”; and

(3) by adding at the end of the following: (f) **DEFINITION OF COMMUNITY LAND TRUST.** For the purposes of this section, the term “community land trust” means a community housing development organization (except that the requirements under subparagraphs (C) and (D) of section 104(6) shall not apply for the purposes of this subsection)—

- (1) that is not sponsored by a for-profit organization
- (2) that is established to carry out the activities under paragraph (3);
- (3) that—
  - (A) acquires parcels of land, held in perpetuity, primarily for conveyance under long-term ground leases;
  - (B) transfers ownership of any structural improvements located on such leased parcels to the lessees; and
  - (C) retains a pre-emptive option to purchase any such structural improvement at a price determined by formula that is designed to ensure that the improvement remains affordable to low- and moderate income families in perpetuity;
- (4) whose corporate membership that is open to any adult resident of a particular geographic area specified in the bylaws of the organization; and
- (5) whose board of directors---

- (A) includes a majority of members who are elected by the corporate membership; and
- (B) is comprised of equal numbers of (i) lessees pursuant to paragraph (3)(B), (ii) corporate members who are not lessees, and (iii) any other category of persons described in the bylaws of the organization.”

## 14.5 UK national definition of a community land trust

The following is the definition of a Community Land Trust, as found in the *Housing and Regeneration Act 2008*:

### 59 Purpose

The purpose of this Part is to regulate the provision of social housing (as defined in sections 68 to 77) (below market rate rental and ownership) by English bodies (as defined in section 79).

### 79 English bodies

- a) In this Part “English body” means—
- (a) a registered charity whose address for the purposes of registration by the Charity Commission is in England,
  - (b) an industrial and provident society whose registered office for the purposes of the Industrial and Provident Societies Act 1965 (c. 12) is in England,
  - (c) a registered company which has its registered office in England,
  - (d) a community land trust which owns land in England, and
  - (e) any other person (whether or not a body corporate registered under the law of the United Kingdom) which—
    - (i) is not a Welsh body within the meaning of section 1A of the Housing Act 1996 (c. 52), and
    - (ii) makes available, or intends to make available, accommodation in England.
- b) In subsection (1)(d) “community land trust” means a body corporate which satisfies the conditions below.
- c) In those conditions “local community” means the individuals who live or work, or want to live or work, in a specified area.
- d) Condition 1 is that the body is established for the express purpose of furthering the social, economic and environmental interests of a local community by acquiring and managing land and other assets in order—
- (a) to provide a benefit to the local community, and
  - (b) to ensure that the assets are not sold or developed except in a manner which the trust’s members think benefits the local community.
- e) Condition 2 is that the body is established under arrangements which are expressly designed to ensure that—

- (a) any profits from its activities will be used to benefit the local community (otherwise than by being paid directly to members),
- (b) individuals who live or work in the specified area have the opportunity to become members of the trust (whether or not others can also become members), and
- (c) the members of the trust control it.



## **15 Appendix 5 – Model 99 year lease and commentary**

Avril Shahib-Smith

Lisa Chung

Hazel Blunden

Louise Crabtree

---



Date     /     /

## Lease

**## Insert address of the Premises]**

**## CLT]**  
ACN **##]**  
and

**##]**  
Resident

**This is an example document that is solely intended to provide a general understanding of the contractual arrangement that may take place between a CLT and the individuals that occupy CLT property.**

**This document is not and should not be regarded as legal advice. Parties should obtain their own legal advice prior to using this Lease. Legislation continues to change and the law relevant at the time this Lease was produced may have since been amended, replaced or no longer be enforceable. The authors do not guarantee or warrant the accuracy, completeness or currency of this document.**

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## Parties

**[##]** Community Land Trust ACN **[##]** of **[##address]** (CLT)

and

The Person or Persons named and described in Item 2 of the Particulars (Resident)

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## Recital

1. The CLT is the registered proprietor of the Premises.
2. The CLT has agreed to grant the Resident a lease of the Premises on the terms of this Lease.
3. The Lease is for a term of 99 years.
4. The parties have recorded their rights and obligations in respect of their contractual relationship in this Lease.

## Lease Particulars

<b>Item 1.</b>	<b>CLT:</b> (Clause 1)	<b>[##]</b> CLT, ACN <b>[##]</b>
<b>Item 2.</b>	<b>Resident:</b> (Clause 1)	<b>[##]</b> of <b>[##],[##]</b>
<b>Item 3.</b>	<b>Land:</b> (Clause 1)	The land contained in <b>[Vic only - Certificate of Title Volume ## Folio ##] [## NSW only – Folio Identifier] [## TAS only – Lot ## Plan ##]</b> known as <b>[##insert address]</b>
<b>Item 4.</b>	<b>Premises</b> (Clause 1)	The Land (as shown on the plans attached as set out in Schedule 6) together with the Building and any other improvements.
<b>Item 5.</b>	<b>Commencement Date:</b> (Clause 1)	<b>[##]</b>
<b>Item 6.</b>	<b>Term:</b> (Clauses 1 & 2.1)	99 years
<b>Item 7.</b>	<b>Premium:</b> (Clauses 1, 3 and Schedule 1)	<b>[\$## (exclusive of GST) calculated in accordance with Schedule 1]</b>
<b>Item 8.</b>	<b>Administration Fee:</b> (Clause 4)	<b>[##\$]</b> as adjusted in accordance with Clause 4 of this Lease
<b>Item 9.</b>	<b>Permitted Use:</b> (Clauses 1 & 13.1)	As the Resident's principal place of residence <b>[##CLT to incorporate any further restrictions on use to ensure consistency with the CLT's charitable objectives.]</b>
<b>Item 10.</b>	<b>Insurable Amount:</b> (Clause 11.2)	<b>[##CLT to specify the amount of insurance coverage the Resident must take out in respect of the Building. Where the CLT procures the insurance itself, the proportionate cost of insurance that benefits the Resident / Premises will be deemed to be a Property Expense.]</b>

## 1. Definitions

In this Lease unless expressed or implied to the contrary:

**Administration Fee** means the amount specified in Item 8.

**Administration Fee Review Notice** means a notice in the form set out in Schedule 5 from the CLT to the Resident notifying the Resident of an adjustment to the Administration Fee.

**Affordable Housing Provider** means an organisation that offers accommodation that is deemed to be affordable to those with a very low, low or moderate household income and prices so that such households are able to meet other basic needs on a sustainable basis.

**Approved Mortgage Lender** means:

- a) a body registered by the Australian Prudential Regulation Authority with a Standard and Poors Australia rating of at least 'A-'; or
- b) any other entity approved in writing by the CLT.

**Authorisation** means:

- a) an approval, authorisation, consent, declaration, exemption, permit, licence, notarisation or waiver, however it is described; and
- b) in relation to anything that could be prohibited or restricted by law if a Government Agency acts in any way within a specified period, the expiry of that period without that action being taken, including any renewal or amendment.

**Building** means all buildings and other improvements on the Land from time to time.

**CLT** means the CLT specified in Item 1 and includes the CLT's successors and assigns and where it is consistent with the context includes the CLT's employees and agents.

**Commencement Date** means the date specified in Item 5.

**Contamination** means the presence in, on, under or above any land of a substance at a concentration above the concentration at which the substance is normally present in, on, under or above land in the same locality being a presence which presents a risk of harm to human health or any other aspect of the environment.

**CPI** means the Consumer Price Index – All Groups [## Sydney] [## Melbourne] [## Hobart] or if this index is not available or is discontinued or suspended, such other index that represents the rise in cost of living in [## Sydney] [## Melbourne] [## Hobart], as the CLT reasonably determines.

**Essential Terms** means those Clauses within this Lease identified in Clause 21.7.

**Government Agency** means:

- a) a government or government department or other body;
- b) a governmental, semi-governmental or judicial person, including a statutory corporation; or
- c) a person (whether autonomous or not) who is charged with the administration of a law.

**Insurable Amount** means the amount specified in Item 10.

**Item** means an item in the Lease Particulars.

**Land** means the land specified in Item 3.

**Lease Particulars** means the schedule of items specified on the page at the front of this Lease.

**New CLT** has the meaning given to it in Clause 21.6.

**Owners Corporation** means owners corporation **[[Insert name of the owners corporation]]**.

**Owners Corporation Agreement** means the agreement(s) and/or licence(s) between the CLT and the Owners Corporation in respect of the Building.

**Owners Corporation Rules** means the rules of the Owners Corporation, as may be amended from time to time.

**Permitted Use** means the use specified in Item 9.

**Personal Information** means personal information, as defined in the *Privacy Act 1988* (Cth) about a party to this Lease who is an individual.

**Premises** means the premises specified in Item 4

**Premium** means the amount calculated in accordance with Schedule 1.

**Property Expenses** means all amounts payable in respect of the Premises (plus GST on those amounts) including the following:

- a) Rates and Taxes;
- b) Owners Corporation charges and levies;
- c) all premiums (excluding the Premium) and other amounts payable in respect of insurances effected from time to time relating to the Resident's Property, the Premises and the use and occupancy of the Building;
- d) the cost of all maintenance, repair, servicing, redecoration and renovation of the Building;
- e) the cost of cleaning and disposal of refuse; and

- f) the cost of supplying, maintaining and repairing any services supplied to the Premises.

**Rates and Taxes** means:

- a) local government rates and charges;
- b) water rates and charges, including water usage charges;
- c) sewerage and drainage rates and charges;
- d) land tax, on the basis assessed to the CLT; and
- e) all other rates, taxes, charges and levies assessed in connection with the Premises.

**Resident** means the Resident specified in Item 2 and includes the Resident's executors, administrators, successors and where it is consistent with the context includes the Resident's employees, contractors, agents, invitees and persons the Resident allows in the Premises.

**Resident's Property** means all property of the Resident in the Premises including all fixtures and fittings owned or leased by the Resident and the Building, and any other improvements constructed on the Land by the Resident.

**Reversion Price** means the amount calculated in accordance with Schedule 2.

**Term** means the term specified in Item 6.

**Termination Notice** means:

- a) from the CLT, the notice in the form set out in Schedule 3 completed with the relevant information and in accordance with Clause 18.1; and
- b) from the Resident, a notice in the form of the notice in Schedule 4, completed with the relevant information and in accordance with Clause 18.2.

**Valuer** means a member (of at least 5 years standing) of the [## New South Wales] [## Victoria] [## Tasmania] Division of the Australian Property Institute Inc. who:

- a) is licensed to practise as a valuer of the same type of property as the Premises;
- b) has at least 5 years' experience in valuing that type of property; and
- c) is active in the market for valuation of that type of property.

**Works** means the construction of buildings, structures or other improvements, on the Land.

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## 2. Duration of the Lease

### 2.1. Grant of Lease

The CLT leases the Premises to the Resident for the Term, starting on the Commencement Date.

**2.2. Resident to take as Owner**

Unless stated otherwise in this Lease and to the extent permitted by law, the Resident will take and be subject to the same responsibility in regard to persons and property and otherwise to which the Resident would be subject as if during the Term the Resident was the owner of the freehold of the Premises.

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**3. Premium**

In consideration of the grant of this Lease, the Resident must pay the Premium to the CLT on or before the Commencement Date.

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**4. Change of circumstances**

**4.1. Notification**

If the Resident owns, purchases or acquires or is likely to own, purchase or acquire, any right or interest in any real property (other than the Premises), (each a Change in Circumstance), the Resident must notify the CLT in writing within 14 days of the Change in Circumstance or any likely Change in Circumstance.

**4.2. Termination due to a Change in Circumstances**

Unless agreed otherwise by the CLT, the Resident's written notice of a Change in Circumstance will have the same effect as a Termination Notice issued by the Resident pursuant to Clause 18.2 and this Lease will terminate upon the expiration of 14 days from the CLT's receipt of such notice.

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**5. Administration Fee**

**5.1. Administration Fee**

The Resident must pay the CLT the Administration Fee to the CLT on the [##] day of each calendar month during the Term.

**5.2. Administration Fee Review**

On each anniversary of the Commencement Date during the Term, the CLT may adjust the Administration Fee by issuing to the Resident an Administration Fee Review Notice.

**5.3. Calculation**

The adjustment to the Administration Fee must:

- 5.3.1. not exceed the Administration Fee applicable for the preceding 12 month period by an amount greater than 10%; and
-

- 5.3.2. take effect on the date stated in the Administration Fee Review Notice which must be no earlier than 60 days after the date of the Resident's receipt of the Administration Fee Review Notice.

## **6. Property Expenses**

### **6.1. Payment of Property Expenses by Resident**

During the Term, the Resident must pay all Property Expenses and must:

- 6.1.1. wherever possible and appropriate, become the person rated or assessed for Property Expenses; and
- 6.1.2. produce to the CLT if requested in writing by the CLT, documentary evidence of payment of all or any Property Expenses.

### **6.2. Payment of Property Expenses by CLT**

Without prejudice to Clause 6.1, if the CLT pays any Property Expenses:

- 6.2.1. the CLT must notify the Resident in writing of the amount of Property Expenses and any related GST for which the Resident is liable; and
- 6.2.2. the Resident must reimburse the CLT the amount of each item of Property Expenses within 14 days of a request by the CLT.

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## **7. Other expenses**

The Resident must pay to the CLT within 14 days of demand:

- 7.1.1. any stamp duty and registration fees payable on this Lease (including penalties and fees);
- 7.1.2. the CLT's reasonable costs in considering the granting of any consent or approval under this Lease (regardless of whether the CLT actually gives such consent or approval);
- 7.1.3. any costs incurred by the CLT in connection with any sublease, mortgage or other encumbrance referred to in this Lease; and
- 7.1.4. the CLT's costs (including charges on a solicitor-own client basis) incurred as a result of a breach of this Lease by the Resident.

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## **8. Payment requirements**

### **8.1. No deduction or right of set-off**

The Resident must pay all amounts due under this Lease to the CLT without deduction or right of set-off.

**8.2. Interest on late payments**

The Resident must pay to the CLT on demand interest on any money payable by the Resident under this Lease and remaining unpaid after the due date at the rate per annum equal to the sum of the 90 day bank bill swap reference rate published in the Australian Financial Review on, or as near as possible to, the due date plus 4% (or if no such rate has been published another rate determined by the CLT acting in good faith). Interest will be computed from the date on which such payment became due.

**8.3. Method of payment**

The Resident must make all payments under this Lease in such manner as the CLT reasonably requires, which may include by direct debit.

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**9. Works**

**9.1. CLT consent to Works**

The Resident may carry out Works with the CLT's prior written consent.

**9.2. Requirements for Works**

If the Resident carries out any Works on the Premises it must:

- 9.2.1. first obtain all relevant Authorisations in respect of the Works;
- 9.2.2. carry out the Works only in accordance with such Authorisations; and
- 9.2.3. not impede public access over or use of any adjoining or neighbouring property.

**9.3. Indemnity**

The Resident indemnifies the CLT against any liability, cost, loss, expense or damage in connection with or arising out of:

- 9.3.1. the Resident's undertaking of the Works; and
  - 9.3.2. any breach by the Resident of Clauses 9.1 or 9.2.
- 

**10. Repair and maintenance**

The Resident must:

- 10.1.1. keep the Premises and the Resident's Property clean and free from rubbish, store all rubbish in proper containers and have it regularly removed;
  - 10.1.2. keep the Premises in good repair and condition;
-

- 10.1.3. maintain in working order all plumbing, drains, pipes and sewers exclusively servicing the Premises;
- 10.1.4. maintain any gardens or landscaped areas in the Premises in good condition, well watered and free of weeds;
- 10.1.5. make good any damage caused to any adjacent property by the Resident;
- 10.1.6. take all reasonable measures to ensure that any fair wear and tear to the Premises does not cause any loss or damage to the Premises, the Building, or any person; and
- 10.1.7. give the CLT prompt written notice of any material damage to the Premises or anything likely to be a risk to the Premises, or any person in the Premises or any neighbouring premises.

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## **11. Insurance**

### **11.1. Public liability**

- 11.1.1. The Resident must take out public liability insurance:
  - a) for an amount no less than \$20 million concerning 1 single event (or such greater sum as reasonably required by the CLT); and
  - b) in the joint names of the CLT and the Resident.

### **11.2. Building Insurances**

- 11.2.1. The Resident must take out building insurance in respect of the Building and any other improvements from time to time on the Land:
  - a) against such risks as a prudent owner of the Building and other improvements would reasonably insure against;
  - b) for at least the Insurable Amount; and
  - c) which notes the interest of the CLT as an insured party.
- 11.2.2. At any time during the Term the Insurable Amount may be varied as agreed by the CLT and the Resident and, in default of agreement, will be the amount certified by a Valuer at the request of either the CLT or the Resident, as the full replacement cost of the Building and other improvements on the Land.

### **11.3. Payment and production of policies**

The Resident must pay all insurance premiums on or before the due date for payment and produce to the CLT before the Commencement Date and where required in writing by the CLT copies of the certificate of currency.

**11.4. Not invalidate policies**

The Resident must:

- 11.4.1. not do anything without the CLT's consent which may make any insurance effected by the CLT or the Resident invalid, capable of being cancelled or rendered ineffective, or which may increase any insurance premium effected by the CLT; and
- 11.4.2. despite Clause 11.4.1 if the Resident does something that has the effect of increasing the insurance premium (including undertaking Works under Clause 9) without limiting the rights of the CLT, the Resident must pay any increase in the insurance premium caused by the Resident's act, default or use of the Premises.

**11.5. Proceeds of insurance**

If any loss occurs which is covered by any insurance provided for in this Lease and if the Resident is entitled to proceeds of such insurance, the Resident must:

- 11.5.1. apply for the insurance proceeds immediately; and
- 11.5.2. subject to Clause 22.2, use the proceeds to restore, replace, repair or reinstate the loss and must supplement the proceeds with the Resident's own money to the extent that the proceeds are insufficient.

**11.6. Cross-liability clause and condition in policies**

The Resident must ensure that the policies effected under Clause 11:

- 11.6.1. are taken out with an insurance company approved by the CLT;
- 11.6.2. contain a cross-liability clause extending the policy so that the words 'the insured' are considered as applying to each party comprising the insured, as though a separate policy has been issued to each of the parties, in the same manner as if that party were the only party named as the insured; and
- 11.6.3. contain a condition that the insurer will notify the CLT at least 14 days before the policies lapse.

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**12. Release, indemnity and no compensation**

**12.1. Risk**

The Resident occupies the Premises at its own risk. Anything which the Resident is obliged to do under this Lease is to be done by the Resident at its own cost and risk.

**12.2. Release**

The Resident releases the CLT from all claims resulting from any damage, loss, death or injury in connection with the Premises except to the extent that such claims arise out of the CLT's negligence.

**12.3. Indemnity**

The Resident must indemnify and hold harmless the CLT against all claims, losses, liabilities, costs or expenses incurred in connection with or resulting from:

- 12.3.1. any damage, loss, death or injury in connection with the Premises and the use and occupation of the Premises by the Resident except to the extent that such claims arise out of the CLT's negligence;
- 12.3.2. the use or occupation of the Premises by the Resident; and
- 12.3.3. any default by the Resident under this Lease.

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**13. Permitted Use**

**13.1. Permitted Use**

The Resident must use the Premises for the Permitted Use and not use the Premises for any other purpose.

**13.2. No warranty**

The Resident:

- 13.2.1. acknowledges that the CLT does not represent that the Premises are suitable for the Permitted Use; and
- 13.2.2. must make its own enquiries as to the suitability of the Premises for the Permitted Use.

**13.3. Illegal purpose**

The Resident must not use the Premises for any illegal purpose or carry on any noxious or offensive activity on the Premises.

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**14. Other obligations concerning the Premises**

**14.1. Compliance with laws**

The Resident must, at its own cost, comply with all laws and any requirements of any Government Agency in connection with the Premises and the Resident's use and occupation of the Premises.

**14.2. Nuisance**

The Resident must not do anything in connection with the Premises which may:

cause a nuisance or interfere with any other person; or be dangerous or offensive in the CLT's reasonable opinion.

**14.3. Security**

The Resident must keep the Premises secure at all times and comply with any security requirements under the insurances procured by the Resident under this Lease.

**14.4. Endanger Premises**

The Resident must not do or permit anything to be done in connection with the Premises which in the opinion of the CLT may endanger the Premises or be a risk to any person or property.

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**15. Resident's environmental obligations**

The Resident must not spill or deposit, or carry out any activities on the Premises which may cause any Contamination, or permit any Contamination to escape in any other way into or on the Premises, drainage or surrounding environment.

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**16. Dealing with Interest in the Premises**

**16.1. No assignment**

The Resident must not assign this Lease.

**16.2. Subletting**

The Resident must not sub-lease the Premises without the CLT's consent.

The CLT will not unreasonably withhold its consent to a sub-lease if the Resident:

- 16.2.1. requests the CLT in writing to consent to the sub-lease;
- 16.2.2. has remedied any breach of this Lease for which the Resident has received written notice from the CLT;
- 16.2.3. provides to the CLT the name and address of the sub-lessee, the rent to be charged to the sub-lessee and proves to the CLT's reasonable satisfaction that the sub-lessee:
  - a) is solvent;
  - b) is able to comply with its obligations under this Lease or the sub-lease; and
  - c) falls within a class of persons which the CLT is established to benefit;
- 16.2.4. executes, and procures the sub-lessee to execute a sub-lease in a form reasonably approved by the CLT; and

- 16.2.5. pays the CLT's reasonable costs in connection with approving the sub-lessee and the costs of the preparation, negotiation and stamping of any document required under this Clause.

## **17. Mortgage or charge**

### **17.1. Mortgage or charge**

Subject to this Clause 17, the Resident may:

- 17.1.1. procure a mortgage with an Approved Mortgage Lender; or

- 17.1.2. charge,

its interest in the Premises under this Lease.

### **17.2. Preconditions to mortgage or charge**

Prior to the mortgage or charge taking effect:

- 17.2.1. the Resident must notify the CLT of its intention to mortgage or charge its interest and provide the details of the mortgage or charge which must include:

- a) identifying the relevant Approved Mortgage Lender providing the mortgage or the party of which the charge is in favour; and
- b) the terms upon which the mortgage or charge is to be granted;

- 17.2.2. the Approved Mortgage Lender or the chargee must enter into a binding written agreement with and in a form acceptable to the CLT under which:

- a) the CLT agrees to notify the Approved Mortgage Lender or chargee of any circumstances that may give rise to a termination of the Lease;
- b) the Approved Mortgage Lender or chargee agrees to:

- (i) notify the CLT of any breach of or default under the mortgage or charge;

- (ii) notify the CLT if it appoints a receiver, or receiver and manager, to any of the assets of the Resident, or otherwise enters into possession of any assets secured by the mortgage or charge; and

- (iii) be liable for the performance of the Resident's covenants under this Lease for any period during which the Approved Mortgage Lender or chargee is in possession of the Premises; and

- (iv) any other provision reasonably required by the CLT.

## **18. Termination of lease**

### **18.1. CLT's right to terminate**

The CLT may terminate the Lease if:

- 18.1.1. any moneys owing by the Resident to the CLT are in arrears for 28 days after the CLT has demanded payment in writing;
- 18.1.2. the Resident is in breach of an Essential Term and does not remedy the breach within 28 days of receipt of written notice from the CLT;
- 18.1.3. the CLT receives notification from the Resident's mortgagee or chargee that the Resident is in breach of or default under the relevant mortgage or charge;
- 18.1.4. the Premises are deemed unfit for human habitation or have been destroyed totally or to such an extent as to be rendered unsafe;
- 18.1.5. subject to Clause 18.3, the CLT becomes aware of the Resident's death;
- 18.1.6. the CLT receives a notice from a Government Authority for the compulsory acquisition of the Premises; or
- 18.1.7. the Resident repudiates its obligations under this Lease,

by giving a Termination Notice to the Resident.

### **18.2. Resident's right to terminate**

The Resident may terminate the Lease:

- 18.2.1. for no reason upon 60 days' notice;
- 18.2.2. if the CLT is in breach of an essential term and does not remedy the breach, within 28 days of receipt of written notice from the Resident;
- 18.2.3. if the Premises have been destroyed or damaged to such an extent as to be rendered unsafe or uninhabitable; or
- 18.2.4. if the Resident has received an offer of social housing or a place in an aged care facility, upon 14 days' notice,

by giving a Termination Notice to the CLT.

### **18.3. Death of Resident**

If the Resident dies, the Resident's executor or administrator may terminate this Lease with immediate effect by providing notice in writing to the CLT.

### **18.4. Transfer to devisee under Resident's Will**

- 18.4.1. Subject to Clause 18.4.2 upon receipt of a written notice from:

- a) the Resident at any time; or
- b) the Resident's executor or administrator within 30 days of the date of the Resident's death,

identifying the devisee to the Resident's interest in this Lease, the CLT must, unless it has good cause not to, grant a new lease on substantially the same terms as this Lease to such person or persons.

18.4.2. The CLT is not obliged to grant a new lease to any devisee who is not eligible to be housed by the CLT and is not:

- a) a spouse of the Resident; or
- b) a child of the Resident.

18.4.3. If the CLT does not grant the devisee a lease of the Premises, the devisee will be entitled to reside at the Premises for a period of 12 months commencing on the date of the Resident's death provided the devisee and the CLT enter into a tenancy agreement for the relevant period of the devisee's occupation.

18.4.4. In consideration of the CLT granting the devisee a new lease under Clause 18.4.1, the devisee must pay the Premium calculated as at the date of the Resident's death less any payments made by the Resident.

#### **18.5. Payment of Reversion Price on termination**

18.5.1. Within 30 days of termination pursuant to Clause 18.1, 18.2 or 18.3 the CLT must pay to the Resident or the Resident's executor or administrator (as applicable) the Reversion Price.

18.5.2. The CLT may offset any moneys owing by the Resident to the CLT under this Lease against the Reversion Price payable under this Clause 18.4.

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### **19. Resident's obligations at the end of this lease**

#### **19.1. Resident's obligations**

At the end of this Lease, the Resident must:

- 19.1.1. vacate and return the Premises to the CLT in a condition consistent with the Resident having complied with its obligations under this Lease;
- 19.1.2. remove the Resident's furnishings and all rubbish and make good any damage caused by the removal of the Resident's furnishings; and
- 19.1.3. give to the CLT all keys and other security devices for the purposes of obtaining access to the Premises.

**19.2. Resident's furnishings left in Premises**

Any furnishings left in the Premises 7 days after the end of this Lease will be deemed to be abandoned by the Resident and will become the property of the CLT and may be removed by the CLT at the Resident's cost and at the Resident's risk.

**19.3. Ownership of Improvements**

The Resident expressly acknowledges that at the end of this Lease, any improvements, fixtures and fittings constructed on the Premises become the property of the CLT and the Resident will not be entitled to any compensation in respect of such improvements, fixtures and fittings other than any compensation that forms part of the Reversion Price or as otherwise determined by the CLT in its absolute discretion.

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**20. Owners Corporation Rules**

**20.1. Resident must obey Owners Corporation Rules**

The Resident must observe and comply with the Owners Corporation Rules. A breach of the Owners Corporation Rules is a breach of this Lease.

**20.2. Lease prevails over Owners Corporation Rules**

If any of the Owners Corporation Rules are inconsistent with the terms of this Lease, the terms of this Lease prevails to the extent of the inconsistency.

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**21. CLT's rights and obligations**

**21.1. Quiet enjoyment**

As long as the Resident does not breach this Lease, the CLT must not interfere with the Resident's use and occupation of the Premises except as provided by this Lease.

**21.2. Dealing with the Premises**

The CLT may:

21.2.1. grant easements or other rights over the Land or the Premises required to facilitate the proper and efficient administration, trust and management of the CLT's operations as a community organisation, except where it will result in a detrimental effect on the value of the Premises; and

21.2.2. require the Resident to do everything reasonably necessary, including signing and producing documents and providing consents, to enable the CLT to exercise those rights.

**21.3. Entry by CLT**

The Resident acknowledges that the CLT may enter the Premises at any reasonable time after giving the Resident no less than 7 days' notice, to:

- 21.3.1. no more than twice in any 12 month period, inspect the condition of the Premises;
- 21.3.2. show the Premises to intending tenants after the Resident has issued a Termination Notice under Clause 18.2;
- 21.3.3. undertake a valuation of the Premises after the Resident has issued a Termination Notice under Clause 18.2;
- 21.3.4. rectify any default by the Resident under this Lease;
- 21.3.5. carry out any inspection, repairs, maintenance, works or alterations to any adjacent property of the CLT; or
- 21.3.6. do anything which the CLT must or may do under this Lease.

**21.4. Emergency**

Notwithstanding any other provision of this Lease, if the CLT decides that there is an emergency the CLT may, without giving notice to the Resident:

- 21.4.1. enter the Premises at any time;
- 21.4.2. temporarily stop the Resident from entering the Building; or
- 21.4.3. undertake any emergency repairs the CLT deems to be reasonably necessary, the cost of which will be a debt due and payable by the Resident to the CLT.

**21.5. CLT's consent**

Unless otherwise provided for in this Lease, where the CLT is required to give its consent under this Lease, the CLT must not unreasonably refuse its consent.

**21.6. Change in CLT**

If a person other than the CLT becomes entitled to the reversion of this Lease whether by operation of law or otherwise (**New CLT**) then:

the CLT is released from all further obligations under this Lease arising after the New CLT becomes entitled to the reversion of this Lease; and

the Resident must at the cost of the CLT enter into a deed required by the CLT (acting reasonably) under which the Resident covenants that the New CLT will have the benefit of all of the Resident's obligations under this Lease.

**21.7. Essential terms**

The following terms of this Lease are essential terms:

- 21.7.1. Clause 3 (Payment of Premium);
- 21.7.2. Clause 10 (Repair and Maintenance);
- 21.7.3. Clause 11 (Insurance);
- 21.7.4. Clause 13.1 (Permitted Use);
- 21.7.5. Clause 16 (Dealing with Interest in the Premises);
- 21.7.6. Clause 17 (Mortgage or Charge); and
- 21.7.7. Clause 23 (Personal Property Securities Act).

Any other obligation of the Resident under this Lease may also be an essential term.

The breach of an essential term is a repudiation of this Lease.

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## **22. Destruction or Damage of Premises**

### **22.1. Damage or Destruction**

If the Building or any improvements on the Land are damaged or destroyed, the Resident must:

- 22.1.1. make the Premises safe and secure;
- 22.1.2. give the CLT a report from a structural engineer as to the structural stability of the Premises; and
- 22.1.3. clear all debris from the Premises.

### **22.2. Rebuild to original design**

Provided the Resident has obtained the CLT's prior written consent in the event of damage or destruction of the Premises, the Resident may:

- 22.2.1. reinstate the Building and all other improvements on the Land substantially in accordance with its original design; or
- 22.2.2. rebuild to a different design.

The Resident must comply with Clause 9 with respect of the reinstatement or rebuilding under this Clause 22.

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## **23. Personal Property Securities Act**

### **23.1. Definitions**

In this Clause 23:

**CLT PPS Property** means any item of property:

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- a) in which the CLT has an interest; and
- b) which is situated on the Premises at any time during the term of this Lease;

**Permitted Security Interest** means any of the following:

- a) a Security Interest in favour of the CLT;
- b) a Security Interest granted with CLT's prior written consent, which consent may be granted or withheld in the CLT's absolute discretion and on any conditions that the CLT considers necessary or desirable at its absolute discretion;
- c) a Security Interest granted to a supplier in respect of goods supplied to the Resident by the supplier in the supplier's ordinary course of business; or
- d) a Security Interest that does not rank ahead of any of the CLT's Security Interests;

**PPS Act** means the Personal Property Securities Act 2009 (Cth);

**Resident PPS Property** means any item of property:

- a) in which the Resident has rights;
- b) which is situated on the Premises at any time during the term of this Lease; and
- c) of which, whether before or after the end of the term of this Lease:
  - (i) the CLT may require the Resident to transfer ownership to the CLT;
  - (ii) the Resident is obliged to transfer ownership to the CLT,but does not include any CLT PPS Property.

## **23.2. Interpretation**

Words and expressions that are not defined in this Lease but which have a defined meaning in the PPS Act have the same meaning as in the PPS Act.

## **23.3. Creation of a Security Interest**

The Resident:

- 23.3.1. charges its right title and interest in all Resident PPS Property in favour of the CLT, as security for the performance of the Resident's obligations under this Lease, including but not limited to the Resident's obligations to transfer ownership in the whole or any part of the Resident PPS Property to the CLT at the expiry or termination of the Lease;

- 23.3.2. acknowledges and agrees that the charge granted by the Resident under Clause 23.3.1 constitutes the grant of a Security Interest which the CLT is entitled to register under the PPS Act;
- 23.3.3. acknowledges and agrees that the grant of this Lease also constitutes the grant of a Security Interest in the CLT PPS Property in favour of the CLT, which interest the CLT is entitled to register under the PPS Act as a Purchase Money Security Interest; and
- 23.3.4. must do all things required by the CLT from time to time (including, without limitation, signing any documents required by the CLT) to enable the CLT to register its above Security Interests under the PPS Act, and to otherwise perfect its Security Interest in the Resident PPS Property and the CLT PPS Property so that the CLT's Security Interests have priority over any other Security Interests under the PPS Act in relation to the Resident PPS Property and the CLT PPS Property.

#### **23.4. Warranties**

The Resident:

- 23.4.1. warrants that it has not granted a Security Interest in respect of any CLT PPS Property on or prior to execution of this Lease that has not been previously disclosed to the CLT in writing; and
- 23.4.2. agrees that it will not grant in respect of any CLT PPS Property or Resident PPS Property any Security Interest other than a Permitted Security Interest.

The Resident must indemnify and hold harmless the CLT against all claims, damages or loss incurred by the CLT as a consequence of any breach by the Resident of this Clause.

#### **23.5. Resident's acknowledgements**

The Resident acknowledges and agrees that:

- 23.5.1. it waives its right under the PPS Act to receive a copy of any 'verification statement' or 'financing charge statement' (as those terms are defined in the PPS Act); and
- 23.5.2. on the expiration or earlier termination of this Lease, the Resident must sign (and procure any holder of a registered Security Interest to sign) any document that the CLT considers necessary or desirable under or as a result of the PPS Act to release any registered Security Interests under the PPS Act in relation to the Resident PPS Property and the CLT PPS Property.

#### **23.6. Termination**

If this Lease is terminated by the CLT as a consequence of a default by the Resident under this Lease, without limitation to any other rights of the CLT, the CLT may take possession of the Resident PPS Property by way of set off for any loss or damage the CLT is entitled to recover in connection with the Resident's breach of the Lease.

**23.7. Essential Term**

This Clause 23 is an essential term of this Lease.

**23.8. Inconsistency**

In the event of any inconsistency between this Clause and any other provision of this Lease, the provisions of this Clause will prevail and that other provision will be read down and interpreted accordingly.

---

**24. GST**

**24.1. GST Act**

In this Clause words that are defined in *A New Tax System (Goods and Services Tax) Act 1999* have the same meaning as their definition in that Act.

**24.2. Exclusive of GST**

Except as otherwise provided by this Clause, all consideration payable under this Deed in relation to any supply is exclusive of GST.

**24.3. Recipient must pay**

If GST is payable in respect of any supply made by a supplier under this Deed, subject to Clause 24.4 the recipient will pay to the supplier an amount equal to the GST payable on the supply at the same time and in the same manner as the consideration for the supply is to be provided under this Deed.

**24.4. Tax Invoice**

The supplier must provide a tax invoice to the recipient before the supplier will be entitled to payment of the GST payable under Clause 24.3.

---

**25. Disputes**

**25.1. Disputes**

In the event of a dispute connected with this Lease, the Resident and a senior officer of the CLT (who must have authority to negotiate and settle disputes) must meet and negotiate in good faith to attempt to resolve the dispute.

**25.2. Mediation**

If the dispute is not resolved within 28 days of the meeting under Clause 25.1, the parties agree to submit the dispute to mediation administered by The Institute of Arbitrators and Mediators Australia. The mediator must be an independent person agreed between the parties or, failing agreement, a mediator will be appointed by the President of The Institute of Arbitrators and Mediators Australia at the request of either party. Any mediation meetings and proceedings will be held in the capital city of the State or Territory in which the Premises are located. The costs of the mediation will be borne equally by the parties.

**25.3. Referral to Litigation**

If, within 28 days (or any other period agreed to in writing between the parties) after the appointment of a mediator the dispute is not resolved either party may refer the dispute to litigation.

**25.4. Continued Performance**

The parties must continue to comply with their obligations under the Lease despite any dispute between the parties.

---

**26. Notices**

**26.1. Notices**

Any notice required to be served under this Lease must be in writing and must be served by post, facsimile transmission or hand delivered to:

26.1.1. the Resident at its address set out in this Lease, the Resident's registered office address, the Premises, or the last known address of the Resident;  
and

26.1.2. the CLT at its address set out in this Lease or any other address notified in writing to the Resident by the CLT.

**26.2. Time of service**

A notice or other communication is deemed served:

26.2.1. if served personally or left at the person's address, upon service;

26.2.2. if posted, 2 business days after posted;

26.2.3. if served by facsimile transmission, subject to the next sub-clause, at the time indicated on the transmission report produced by the sender's facsimile machine indicating that the facsimile was sent in its entirety to the addressee's facsimile machine; and

26.2.4. if received after 6.00 pm in the place of receipt or on a day which is not a business day, at 9.00 am on the next business day.

## **27. General**

### **27.1. Entire understanding**

This Lease contains the entire understanding between the parties as to the subject matter contained in it. All previous agreements, representations, warranties, explanations and commitments, expressed or implied, affecting this subject matter are superseded by this Lease and have no effect.

### **27.2. Waiver**

If the CLT accepts the Premium or any other monies under this Lease (before or after the end of this Lease) or does not exercise or delays exercising any of the CLT's rights under this Lease, it will not be a waiver of the breach of this Lease by the Resident or of the CLT's rights under this Lease.

### **27.3. Governing law and jurisdiction**

This Lease is governed by and is to be construed in accordance with the laws of [## New South Wales] [## Victoria] [## Tasmania]. Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of [## New South Wales] [## Victoria] [## Tasmania] and waives any right to object to proceedings being brought in those courts.

### **27.4. Joint and several**

If a party consists of more than one person, this Lease binds them jointly and each of them severally.

### **27.5. Exclusion of statutory provisions**

To the full extent permitted by law, any legislation that adversely affects an obligation of the Resident, or the exercise of a right or remedy by the CLT, under this Lease is excluded from this Lease.

### **27.6. Operation of indemnities**

Each indemnity of the Resident in this Lease is a continuing obligation, independent of the Resident's other obligations and continues after this Lease expires or is terminated. It is not necessary for the CLT to incur an expense or make a payment before enforcing a right of indemnity under this Lease.

### **27.7. Personal Information**

Each party who is an individual:

- 27.7.1. acknowledges that the CLT has collected or may collect Personal Information about that party in connection with entering into this Lease; and

- 27.7.2. consents to that Personal Information being disclosed by the CLT in connection with its business, including without limitation being disclosed to any proposed purchaser or mortgagee of the Premises or to a related entity or advisor of the CLT.
- 

## **28. Interpretation**

### **28.1. Persons**

In this Lease, a reference to a person includes a firm, partnership, association, corporation or other corporate body.

### **28.2. Legislation**

In this Lease, a reference to a statute includes regulations under it and consolidations, amendments, re-enactments or replacements of any of them.

### **28.3. Clauses and headings**

In this Lease:

- 28.3.1. a reference to a Clause, schedule or annexure is a reference to a clause, schedule or annexure in or to this Lease; and
- 28.3.2. headings and sub-headings are inserted for ease of reference only and do not affect the interpretation of this Lease.

### **28.4. Severance**

In this Lease:

- 28.4.1. if a provision is held to be illegal, invalid, void, voidable or unenforceable, that provision must be read down to the extent necessary to ensure that it is not illegal, invalid, void, voidable or unenforceable; and
- 28.4.2. if it is not possible to read down a provision as required in this Clause, that provision is severable without affecting the validity or enforceability of the remaining part of that provision or the other provisions in this Lease.

### **28.5. Number and gender**

In this Lease, a reference to:

- 28.5.1. the singular includes the plural and vice versa; and
- 28.5.2. a gender includes the other genders.

### **28.6. Construction**

No rule of construction applies to the disadvantage of the CLT because the CLT was responsible for the preparation of this Lease.

## Execution

EXECUTED as a deed

**[##Insert execution clause for the CLT]**

**[##Insert execution clause for the Resident]**

## Schedule 1 Premium

- a) The Lease can only commence after the Premium is paid in full.
- b) The Resident has paid to the CLT the Premium for the grant of this Lease and that payment is acknowledged. Method of payment of Lease Purchase Price

Amount of Premium: \_\_\_\_\_

The method by which the Premium must be paid:

- a) to \_\_\_\_\_ at \_\_\_\_\_ by cash or cheque, or
  - b) into the following account, or any other account nominated by the Lessor:  
BSB number: \_\_\_\_\_ account number: \_\_\_\_\_  
account name: \_\_\_\_\_  
payment reference: \_\_\_\_\_ ,  
or
  - c) as follows: \_\_\_\_\_
- 

On or before //

### Premium formula

The Premium amount is calculated as follows:

(cross out where not applicable)

Option 1 Open market value method

**[##]**% of the market value of the Premises, as per the valuation conducted on //

Option 2 Nominated Price Method:

**[\$##Insert amount]**

Option 3 Other:

**[##Other formula as adopted by the CLT]**

## Schedule 2 Reversion Price

### Reversion Price on termination of lease

The Reversion Price is calculated as follows:

(cross out whatever is not applicable)

Option 1 Appraisal-based method

Premium + 25% of any appreciation of value of home at end of lease = reversion price

**##The Premium and valuation would need to be benchmarked against open market value. Any value of approved capital improvements will show up in the value at end of lease.]**

Variation 1: Resident must have been in the lease for no less than 8 years to receive 25% of appreciation in value

Variation 2: time specific : Up to 10 years, seller gets 25%; 10-15 get 35%; 15+ years get 40%

**##Variation 2 is not recommended for high housing cost growth areas]**

Option 2 Indexed method

Premium + compounded annually by CPI [of NSW/Australia] from the time of purchase  $\pm$  Value of approved capital improvements = Reversion Price

**##This option is better for high house price growth areas]**

Option 3 Other:

[Other formula as adopted by the CLT]

## Schedule 3 CLT Termination Notice

Please complete this form using a black pen in BLOCK LETTERS

To: .....  
(name of Resident/s)

I give you notice to deliver up vacant possession of the premises at:

**##Address of premises** .....  
.....Postcode.....

On: \_\_\_/\_\_\_/\_\_\_ (insert date on which Resident is required to vacate premises)

**This notice is being given on the following grounds:**

(tick appropriate box to indicate the grounds/reason and complete details as required)

- Moneys are owing by the Resident to the CLT and have been in arrears for 28 days following the CLT's demand for payment in writing dated on **##Insert date** (Clause 18.1.1)
- The Resident has breached an essential term and has not remedied the breach within 28 days of receipt of written notice from the CLT dated on **##Insert date** (Clause 18.1.2)
- The CLT has received notification from the mortgagee or chargee that the Resident has or is in breach of or default under the mortgage or charge instrument (Clause 18.1.3)
- The Premises are deemed unfit for human habitation (Clause 18.1.4)
- The Premises have been destroyed totally or to such an extent as to be rendered unsafe (Clause 18.1.4)
- The CLT has become aware of the Resident's death (Clause 18.1.5)
- The CLT has received a notice from an Authority for the compulsory acquisition of the Premises (Clause 18.1.6)
- The Resident has repudiated its obligations under the Lease (Clause 18.1.7)

In accordance with Clause 26.2 this notice is deemed served:

- a) if served personally or left at the person's address, upon service;
- b) if posted, 2 business days after posted;
- c) if served by facsimile transmission, subject to the next sub-clause, at the time indicated on the transmission report produced by the sender's facsimile machine indicating that the facsimile was sent in its entirety to the addressee's facsimile machine; and
- d) if received after 6.00 pm in the place of receipt or on a day which is not a business day, at 9.00 am on the next business day.

.....  
(signature of CLT or CLT's agent)

...../...../.....  
(date delivered/posted)

Name of CLT .....

Contact phone number of CLT .....

## Schedule 4 Resident Termination Notice

Please complete this form using a black pen in BLOCK LETTERS

To: .....

of .....

*(insert name and address of CLT)*

I give notice of termination of a Lease between me as Resident and you as CLT in respect of the premises at:

.....

.....

*(insert address of leased premises)*

I will deliver up possession of the premises to you on: ..../.../....

*(insert hand-over date)*

This notice is being given on the following grounds:

*(tick appropriate box to indicate the grounds/reason and complete details as required)*

- For no reason **##Resident to note that 60 days' notice is required** (Clause 18.2.1)
- The CLT has breached an essential term and has not remedied the breach within 28 days of receipt of written notice from the Resident dated **##Insert date** (Clause 18.2.2)
- The Premises have been destroyed totally or to such an extent as to be rendered unsafe (Clause 18.2.3)
- I have received an offer of social housing or a place in an aged care facility (14 days' notice required) (Clause 18.2.4)

In accordance with Clause 26.2 this notice is deemed served:

- a) if served personally or left at the person's address, upon service;
- b) if posted, 2 business days after posted;
- c) if served by facsimile transmission, subject to the next sub-clause, at the time indicated on the transmission report produced by the sender's facsimile machine indicating that the facsimile was sent in its entirety to the addressee's facsimile machine; and
- d) if received after 6.00 pm in the place of receipt or on a day which is not a business day, at 9.00 am on the next business day.

.....  
*(signature of Resident or Resident's agent)*

...../...../.....  
*(date delivered/posted)*

Name of Resident.....

Contact phone number of Resident.....

## Schedule 5 Administration Fee Review Notice

Please complete this form using a black pen in BLOCK LETTERS

To: .....  
(name of Resident/s)

I give notice of an adjustment to your Administration Fee:

- a) with effect from: **##Insert date that adjusted Administration Fee is to take effect which shall be not less than 60 days' notice from the date of this notice]**
  
- b) for the amount of: **\$\$\$Insert amount of adjusted Administration Fee]**

.....  
(signature of CLT or CLT's agent)

...../...../.....  
(date delivered/posted)

Name of CLT .....  
Contact phone number of CLT.....

In accordance with Clause 26.2 this notice is deemed served:

- a) if served personally or left at the person's address, upon service;
- b) if posted, 2 business days after posted;
- c) if served by facsimile transmission, subject to the next sub-clause, at the time indicated on the transmission report produced by the sender's facsimile machine indicating that the facsimile was sent in its entirety to the addressee's facsimile machine; and
- d) if received after 6.00 pm in the place of receipt or on a day which is not a business day, at 9.00 am on the next business day.

## **Schedule 6      Plans**

## 15.1 Commentary on model 99 year lease

The model 99-year lease provided in Appendix 5 is intended for use in NSW, Tasmania and Victoria. CLTs in other jurisdictions would require a regulatory or legislative change to the Residential Tenancies Act prior to using this model lease and will most likely need to seek ministerial exemption from Residential Tenancies legislation.

This commentary draws attention to clauses that individual CLTs might want to vary according to the organisation's and Residents' capacities and objectives. It does not comment on every clause but rather on the clauses most likely to be varied.

### Item 9 Permitted Use

The model clause states that the Permitted Use of the CLT home must be as the Resident's principal place of residence. This allows home businesses and other activities in line with local zoning permissions, e.g. a Resident can run a home office from their home if the relevant zoning allows this.

## 9 Works

The model clause allows the Resident to make improvements to the property (such as additions, renovations, etc) with the consent of the CLT. Individual CLTs might seek to vary this clause in accordance with their objectives regarding the Resident's right to improve or modify the home. A CLT might choose to:

- allow any modifications from a pre-approved list, and include that list in the deed; or
- allow any modifications on a case-by-case basis (which the current clause allows).

The CLT will then have to determine what, if any, implications modifications have on the reversion formula. Possible treatments of modifications within the reversion formula include:

- no additional value that is, the Reversion Price remains indexed to the original purchase price;
- value returned to the Resident on a dollar-for-dollar basis, on provision of proof of expenditure by the Resident;
- an agreed equity return on the basis of a new valuation that includes the uplift in value due to modifications; or
- another determined method.

## **10 Repair and maintenance**

When adopting this clause, individual CLTs will need to consider what repairs and maintenance they want the Resident to be responsible for – all, some or none. The model clause specifies that the Resident must keep the Premises in good repair and condition. It does not specify whether the CLT is responsible for major cyclical repairs and maintenance, such as the replacement of roofing or kitchens. CLTs will need to decide their position regarding these issues and modify the clause if they wish to specify that the CLT is responsible for certain repairs and maintenance items.

## **11 Insurance**

The model clause states that the Resident is responsible for public liability and building insurance, and can be required to provide copies of the certificate of currency to the CLT for this insurance. Individual CLTs will need to consider whether they wish to vary this and make the CLT responsible for insurance, including cost.

In instances where the CLT chooses to take out the insurance, it will then need to consider whether to recoup some or all of the cost by building annual insurance costs into the administration fee.

### **16.2 Subletting**

In the model clause, the CLT must give consent to any subletting by the Resident or all or part of their property. Individual CLTs will need to decide whether and under what circumstances they will allow a Resident to sub-let the CLT home. This will need to consider any restrictions, such as:

- the reason for sub-letting;
- the rent to be charged (e.g., at market rent, or to cover the Resident's costs, or another rate);
- the duration of the sub-letting; and,
- whether the sub-lessee has to meet the CLT's eligibility requirements and purpose.

## **17 Mortgage or charge**

Under the model clause, an Approved Mortgage Lender is a body registered by the Australian Prudential Regulation Authority with a Standard and Poors Australia rating of at least 'A-' (whether a bank, building society or other financial institution), or any other entity approved in writing by the CLT.

Individual CLTs will need to give consideration to whether they choose to provide a list of pre-approved lenders and require Residents to borrow only from those institutions, or whether they use the model clause.

#### **18.4 Transfer to devisee under Resident's will**

The model clause acknowledges that the Resident may gift the Resident Interest to a devisee under a will. The model clause provides that the devisee (inheritor) must be the spouse or child of the Resident and that the CLT must enter into a Lease on substantially the same terms as this Lease with the Resident's devisee.

Individual CLTs might choose to vary this clause to cover greater or lesser flexibility regarding inheritance in the event of a CLT Resident's death. Some CLTs might place eligibility constraints on heirs in line with core affordability objectives, while other CLTs might not place any such constraints. CLTs need to ensure this clause complies with the CLT's stated purpose and seek independent legal advice.



## **16 Appendix 6 – Model co-ownership deed and commentary**

Avril Shahib-Smith

Lisa Chung

Hazel Blunden

Louise Crabtree

---



Date     /     /

## Shared Equity Scheme Co-Ownership Deed

**##Insert address of the Property]**

**##CLT]**  
ACN **##]**  
and

**##]**  
Resident

**This is an example document that is solely intended to provide a general understanding of the contractual arrangement that may take place between a CLT and its co-owners.**

**This document is not and should not be regarded as legal advice. Parties should obtain their own legal advice prior to using this Deed. Legislation continues to change and the law relevant at the time this Deed was produced may have since been amended, replaced or no longer be enforceable. The authors do not guarantee or warrant the accuracy, completeness or currency of this document.**

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## Parties

**[##]** Community Land Trust ACN **[##]** of **[##address]**

(CLT)

and

The Person or Persons named and described in Item 2 of the Particulars **(Resident)**

---

## Recital

1. The CLT and the Resident are, or are entitled to be, registered as the proprietors of the Property, as tenants in common.
2. The parties' interests in the Property are as follows:
  - 2.1 the CLT owns the CLT Interest; and
  - 2.2 the Resident owns the Resident Interest.
3. The parties have recorded their rights and obligations in respect of the co-ownership of the Property in this Co-Ownership Deed.

## Particulars

<b>Item 1. CLT:</b> (Clause 1)	<b>[##]</b> CLT, ACN <b>[##]</b>
<b>Item 2. Resident:</b> (Clause 1)	<b>[##]</b> of <b>[##],[##]</b>
<b>Item 3. Property:</b> (Clause 1)	<b>[##Insert description of the land]</b> including all Buildings
<b>Item 4. Commencement Date:</b> (Clause 1)	<b>The date of this Deed</b>
<b>Item 5. Term:</b> (Clause 1)	From the Commencement Date until the Settlement Date in accordance with Clause 3 of this Deed.
<b>Item 6. Administration Fee:</b> (Clause 4)	<b>[##]</b> as adjusted in accordance with Clause 4 of this Deed
<b>Item 7. Permitted Use:</b> (Clauses 1 & 12.1)	As the Resident's principal place of residence <b>[##CLT to incorporate any further restrictions on use to ensure consistency with the CLT's charitable objectives.]</b>
<b>Item 8. CLT Interest</b>	<b>[##]%</b> Interest as tenant in common
<b>Item 9. Resident Interest</b>	<b>[##]%</b> Interest as tenant in common

## 1. Definitions

In this Deed unless expressed or implied to the contrary:

**Administration Fee** means the amount specified in Item 8.

**Administration Fee Review Notice** means a notice in the form set out in Schedule 5 from the CLT to the Resident notifying the Resident of an adjustment to the Administration Fee.

**Affordable Housing Provider** means an organisation that offers accommodation that is deemed to be affordable to those with a very low, low or moderate household income and prices so that such households are able to meet other basic needs on a sustainable basis.

**Approved Mortgage Lender** means:

- a) a body registered by the Australian Prudential Regulation Authority with a Standard and Poors Australia rating of at least 'A-'; or
- b) any other entity approved in writing by the CLT.

**Authorisation** means:

- a) an approval, authorisation, consent, declaration, exemption, permit, licence, notarisation or waiver, however it is described; and
- b) in relation to anything that could be prohibited or restricted by law if a Government Agency acts in any way within a specified period, the expiry of that period without that action being taken,

including any renewal or amendment.

**Building** means all buildings and other improvements on the Property from time to time.

**CLT** means the CLT specified in Item 1 and includes the CLT's successors and assigns and where it is consistent with the context includes the CLT's employees and agents.

**CLT Interest** means the equity interest the CLT has in the Property as tenant in common as specified in Item 18.

**Commencement Date** means the date specified in Item 5.

**Contamination** means the presence in, on, under or above any land of a substance at a concentration above the concentration at which the substance is normally present in, on, under or above land in the same locality being a presence which presents a risk of harm to human health or any other aspect of the environment.

**Contract of Sale** means a contract of sale for the transfer of the Resident's Interest in substantially the same form as the document set out at Schedule 4.

**CPI** means the Consumer Price Index – All Groups **##insert name of capital city in relevant state or territory** or if this index is not available or is discontinued or suspended, such other index that represents the rise in cost of living in **##insert name of capital city in relevant state or territory**, as the CLT reasonably determines.

**Environmental Protection Legislation** means any statute, regulation, code, proclamation, ministerial directive, ordinance, by law, planning policy or subordinate legislation, past, present or future, relating to pollutants and contaminants, use of land, human health and safety or protection of the environment.

**Essential Terms** means those Clauses within this Deed identified in Clause 23.4.

**Government Agency** means:

- a) a government or government department or other body;
- b) a governmental, semi-governmental or judicial person, including a statutory corporation; or
- c) a person (whether autonomous or not) who is charged with the administration of a law.

**Resident** means the Resident specified in Item 2 and includes the Resident's executors, administrators and successors, and where it is consistent with the context includes the Resident's employees, contractors, agents, invitees and persons the Resident allows in the Property.

**Resident Interest** means the interest the Resident has in the Property as tenant in common as specified in Item 19.

**Insurable Amount** means the amount calculated in accordance with Clause 10.2.

**Item** means an item in the Particulars.

**Notice of Intended Purchase** means a notice in the form set out in Schedule 3.

**Notice of Intended Sale** means a notice in the form set out in Schedule 2.

**Owners Corporation** means owners corporation **##Insert name of the owners corporation**.

**Owners Corporation Agreement** means the agreement(s) and/or licence(s) between the CLT and the Owners Corporation in respect of the Building.

**Owners Corporation Rules** means the rules of the Owners Corporation, as may be amended from time to time.

**Particulars** means the schedule of items specified on the page at the front of this Deed.

**Permitted Use** means the use specified in Item 9.

**Personal Information** means personal information, as defined in the *Privacy Act 1988* (Cth) about a party to this Deed who is an individual.

**Property** means the land specified in Item 3.

**Property Expenses** means all amounts payable in respect of the Property (plus GST on those amounts) including the following:

- a) Rates and Taxes;
- b) Owners Corporation charges and levies;
- c) all premiums and other amounts payable in respect of insurances effected from time to time relating to the Property and the use and occupancy of the Building;
- d) the cost of all maintenance, repair, servicing, redecoration and renovation of the Building;
- e) the cost of cleaning and disposal of refuse; and
- f) the cost of supplying, maintaining and repairing any services supplied to the Property.

**Rates and Taxes** means:

- a) local government rates and charges;
- b) water rates and charges, including water usage charges;
- c) sewerage and drainage rates and charges;
- d) land tax, on the basis assessed to the CLT; and
- e) all other rates, taxes, charges and levies assessed in connection with the Property.

**Sale Price** means the amount calculated in accordance with Schedule 1.

**Settlement Date** means the date the Resident's Interest is transferred to the CLT pursuant to the Contract of Sale.

**Term** means the term specified in Item 6.

**Valuer** means a member (of at least 5 years standing) of the [##insert name of relevant state or territory] Division of the Australian Property Institute Inc. who:

- a) is licensed to practise as a valuer of the same type of property as the Property;
- b) has at least 5 years' experience in valuing that type of property; and
- c) is active in the market for valuation of that type of property.

**Works** means the construction of buildings, structures or other improvements, on the Property.

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## **2. Change of circumstances**

### **2.1. Notification**

If the Resident owns, purchases or acquires or is likely to own, purchase or acquire, any right or interest in any real property (other than the Property), (each a Change in Circumstance), the Resident must notify the CLT in writing within 14 days of the Change in Circumstance or the likely Change in Circumstance.

### **2.2. Termination due to a Change in Circumstances**

Unless agreed otherwise by the CLT, the Resident's written notice of the Change in Circumstance will have the same effect as a Notice of Intended Sale issued pursuant to Clause 3.2 and the parties must act in accordance with Clause 3 as if the Resident had issued a Notice of Intended Sale to the CLT.

---

## **3. Sale of Resident's Interest**

### **3.1. Sale of Resident's Interest**

- 3.1.1. The Resident must not sell the whole or part of the Resident Interest other than in accordance with this Clause 3.
- 3.1.2. If the Resident wishes to sell the Resident Interest, the Resident must provide the CLT with a Notice of Intended Sale.
- 3.1.3. Within 14 days of receipt of the Notice of Intended Sale, the CLT must contact the Resident and the parties must:
  - a) endeavour to agree, acting in good faith, the Settlement Date and any other outstanding arrangements for the sale; and
  - b) calculate the Sale Price in accordance with the provisions set out in Schedule 1.

### **3.2. Contract of Sale**

- 3.2.1. Within 14 days of the parties agreeing the Settlement Date the CLT must issue to the Resident the Contract of Sale for the Resident Interest.

- 3.2.2. The Resident must execute the Contract of Sale and return it to the CLT within (7) days of the date of receipt.
- 3.2.3. Within (7) days of receipt of the Contract of Sale under Clause 3.2.2, the CLT must give the Resident a counterpart of the Contract of Sale executed by the CLT.

### **3.3. Adjustments**

- 3.3.1. On the Settlement Date:
  - a) the CLT must pay the Sale Price; and
  - b) the CLT is entitled to deduct from the Sale Price any moneys owing by the Resident to the CLT under this Deed including, without limitation:
    - (i) all reasonable conveyancing and legal costs incurred by the CLT in the transfer of the Resident's Interest to the CLT; and
    - (ii) any outstanding monies owing by the Resident to the CLT, including (but not limited to) the Administration Fee.
- 3.3.2. If the deductions under Clause b) exceed the Sale Price, the Resident must pay the CLT the difference between such deductions and the Sale Price on the Settlement Date.

### **3.4. CLT right to nominate**

The CLT may nominate a substitute purchaser to be named under the Contract of Sale.

---

## **4. Administration Fee**

### **4.1. Administration Fee**

The Resident must pay the CLT the Administration Fee to the CLT on the [##] day of each calendar month during the Term.

### **4.2. Administration Fee Review**

On each anniversary of the Commencement Date during the Term, the CLT may adjust the Administration Fee by issuing to the Resident an Administration Fee Review Notice.

### **4.3. Calculation**

The adjustment to the Administration Fee must:

- 4.3.1. not exceed the Administration Fee applicable for the preceding 12 month period by an amount greater than 10%; and
  - 4.3.2. take effect on the date stated in the Administration Fee Review Notice which must be no earlier than 60 days after the date of the Resident's receipt of the Administration Fee Review Notice.
-

## **5. Property Expenses**

### **5.1. Payment of Property Expenses by Resident**

During the Term, the Resident must pay all Property Expenses and must:

- 5.1.1. wherever possible and appropriate, become the person rated or assessed for Property Expenses; and
- 5.1.2. produce to the CLT if requested in writing by the CLT, documentary evidence of payment of all or any Property Expenses.

### **5.2. Payment of Property Expenses by CLT**

Without prejudice to Clause 5.1, if the CLT pays any Property Expenses:

- 5.2.1. the CLT must notify the Resident in writing of the amount of Property Expenses and any related GST for which the Resident is liable; and
- 5.2.2. the Resident must reimburse the CLT the amount of each item of Property Expenses within 14 days of a request by the CLT.

---

## **6. Other expenses**

### **6.1. Costs and duty**

The Resident must pay to the CLT within 14 days of demand:

- 6.1.1. the CLT's reasonable costs in considering the granting of any consent or approval under this Deed (regardless of whether the CLT actually gives such consent or approval);
- 6.1.2. any costs incurred by the CLT in connection with any sublease, mortgage or other encumbrance referred to in this Deed; and
- 6.1.3. the CLT's costs (including charges on a solicitor-own client basis) incurred as a result of a breach of this Deed by the Resident.

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## **7. Payment requirements**

### **7.1. No deduction or right of set-off**

The Resident must pay all amounts due under this Deed to the CLT without deduction or right of set-off.

### **7.2. Interest on late payments**

The Resident must pay to the CLT on demand interest on any money payable by the Resident under this Deed and remaining unpaid after the due date at the rate per annum equal to the sum of the 90 day bank bill swap reference rate published in the Australian Financial Review on, or as near as possible to, the due date plus

4% (or if no such rate has been published another rate determined by the CLT acting in good faith). Interest will be computed from the date on which such payment became due.

### **7.3. Method of payment**

The Resident must make all payments under this Deed in such manner as the CLT reasonably requires, which may include by direct debit.

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## **8. Works**

### **8.1. CLT consent to Works**

The Resident may carry out Works with the CLT's prior written consent.

### **8.2. Requirements for Works**

If the Resident carries out any Works on the Property it must:

- 8.2.1. first obtain all relevant Authorisations in respect of the Works;
- 8.2.2. carry out the Works only in accordance with such Authorisations; and
- 8.2.3. not impede access over or use of any adjoining or neighbouring property.

### **8.3. Indemnity**

The Resident indemnifies the CLT against any liability, cost, loss, expense or damage in connection with or arising out of:

- 8.3.1. the Resident's undertaking of the Works; and
  - 8.3.2. any breach by the Resident of Clauses 8.1 or 8.2.
- 

## **9. Repair and maintenance**

The Resident must:

- 9.1.1. keep the Property clean and free from rubbish, store all rubbish in proper containers and have it regularly removed;
  - 9.1.2. keep the Property in good repair and condition;
  - 9.1.3. maintain in working order all plumbing, drains, pipes and sewers exclusively servicing the Property;
  - 9.1.4. maintain any gardens or landscaped areas in the Property in good condition, well watered and free of weeds;
  - 9.1.5. make good any damage caused to any adjacent property by the Resident;
-

- 9.1.6. take all reasonable measures to ensure that any fair wear and tear to the Property does not cause any loss or damage to the Property or any person; and
- 9.1.7. give the CLT prompt written notice of any material damage to the Property or anything likely to be a risk to the Property or any person in the Property or any neighbouring property.

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## **10. Insurance**

### **10.1. Public liability**

The Resident must take out public liability insurance:

- 10.1.1. for an amount no less than \$20 million concerning 1 single event (or such greater sum as reasonably required by the CLT); and
- 10.1.2. in the joint names of the CLT and the Resident.

### **10.2. Building Insurances**

The Resident must take out building insurance in respect of the Property:

- 10.2.1. against such risks as a prudent owner of the Property would reasonably insure against;
- 10.2.2. for at least the Insurable Amount; and
- 10.2.3. which notes the interest of the CLT as an insured party.

At any time during the Term, the Insurable Amount may be varied as agreed by the CLT and the Resident and, in default of agreement, will be the amount certified by a Valuer at the request of either the CLT or the Resident, as the full replacement cost of the Building and other improvements on the Property.

### **10.3. Payment and production of policies**

The Resident must pay all insurance premiums on or before the due date for payment and produce to the CLT before the Commencement Date and where required in writing by the CLT, copies of the certificate of currency.

### **10.4. Not invalidate policies**

The Resident must:

- 10.4.1. not do anything without the CLT's consent which may make any insurance effected by the CLT or the Resident invalid, capable of being cancelled or rendered ineffective, or which may increase any insurance premium effected by the CLT; and

- 10.4.2. despite Clause 10.4.1, if the Resident does something that has the effect of increasing the insurance premium (including undertaking works under Clause 8) without limiting the rights of the CLT, the Resident must pay any increase in the insurance premium caused by the Resident's act, default or use of the Property.

**10.5. Proceeds of insurance**

If any loss occurs which is covered by any insurance provided for in this Deed and if the Resident is entitled to proceeds of such insurance, the Resident must:

- 10.5.1. apply for the insurance proceeds immediately; and
- 10.5.2. subject to Clause 24, use the proceeds to restore, replace, repair or reinstate the loss and must supplement the proceeds with the Resident's own money to the extent that the proceeds are insufficient.

**10.6. Cross-liability clause and condition in policies**

The Resident must ensure that the policies effected under this Clause 10:

- 10.6.1. are taken out with an insurance company approved by the CLT;
- 10.6.2. contain a cross-liability clause extending the policy so that the words 'the insured' are considered as applying to each party comprising the insured, as though a separate policy has been issued to each of the parties, in the same manner as if that party were the only party named as the insured; and
- 10.6.3. contain a condition that the insurer will notify the CLT at least 14 days before the policies lapse.

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**11. Release, indemnity and no compensation**

**11.1. Risk**

The Resident occupies the Property at its own risk. Anything which the Resident is obliged to do under this Deed is to be done by the Resident at its own cost and risk.

**11.2. Release**

The Resident releases the CLT from all claims resulting from any damage, loss, death or injury in connection with the Property except to the extent that such claims arise out of the CLT's negligence.

**11.3. Indemnity**

The Resident must indemnify and hold harmless the CLT against all claims, losses, liabilities, costs or expenses incurred in connection with or resulting from:

- 11.3.1. any damage, loss, death or injury in connection with the Property and the use and occupation of the Property by the Resident except to the extent that such claims arise out of the CLT's negligence;
  - 11.3.2. the use or occupation of the Property by the Resident; and
  - 11.3.3. any default by the Resident under this Deed.
- 

## **12. Permitted Use**

### **12.1. Permitted Use**

The Resident must use the Property for the Permitted Use and not use the Property for any other purpose.

### **12.2. No warranty**

The Resident:

- 12.2.1. acknowledges that the CLT does not represent that the Property is suitable for the Permitted Use; and
- 12.2.2. must make its own enquiries as to the suitability of the Property for the Permitted Use.

### **12.3. Illegal purpose**

The Resident must not use the Property for any illegal purpose or carry on any noxious or offensive activity on the Property.

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## **13. Other obligations concerning the Property**

### **13.1. Compliance with laws**

The Resident must, at its own cost, comply with all laws and any requirements of any Government Agency in connection with the Property and the Resident's use and occupation of the Property.

### **13.2. Nuisance**

The Resident must not do anything in connection with the Property which may:

- 13.2.1. cause a nuisance or interfere with any other person; or
- 13.2.2. be dangerous or offensive in the CLT's reasonable opinion.

### **13.3. Security**

The Resident must keep the Property secure at all times and comply with any security requirements under the insurances procured by the Resident under this Deed.

**13.4. Endanger Property**

The Resident must not do or permit anything to be done in connection with the Property which in the opinion of the CLT may endanger the Property or be a risk to any person or property.

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**14. Resident's environmental obligations**

The Resident must not spill or deposit, or carry out any activities on the Property which may cause any Contamination, or permit any Contamination to escape in any other way into or on the Property, drainage or surrounding environment.

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**15. Restrictions**

**15.1. Restrictive covenants**

The Resident must comply with all registered and any unregistered and implied easements, covenants and restrictive covenants that relate to the Property.

**15.2. Restrictions on dealing with the land**

Subject to Clause 16, the Resident must not do any of the following:

- 15.2.1. assign, lease or licence any of its rights, privileges, benefits or obligations under this Deed or all or part of the Property;
  - 15.2.2. create any easement, right of way or other encumbrance or right over or in relation to the Property unless required by law;
  - 15.2.3. grant any new lease, licence or other right for any person to occupy the Property; or
  - 15.2.4. grant, or agree to grant any other rights, restrictions, encumbrances, charges or covenants over or in relation to the Property,
  - 15.2.5. without the CLT's prior written consent.
- 

**16. Mortgage or charge**

**16.1. Mortgage or charge**

Subject to this Clause 16, the Resident may:

- 16.1.1. procure a mortgage with an Approved Mortgage Lender: or
  - 16.1.2. charge,
-

its interest in the Property.

## **16.2. Preconditions to mortgage or charge**

Prior to the mortgage or charge taking effect:

16.2.1. the Resident must notify the CLT of its intention to mortgage or charge its interest and provide the details of the mortgage or charge which must include:

- a) identifying the relevant financial institution providing the mortgage or the party of which the charge is in favour; and
- b) the terms upon which the mortgage or charge is to be granted;

16.2.2. the Approved Mortgage Lender or the chargee must enter into a binding written agreement with and in a form acceptable to the CLT under which the Approved Mortgage Lender or chargee agrees to:

- a) notify the CLT of any breach of or default under the mortgage or charge;
- b) notify the CLT if it appoints a receiver, or receiver and manager, to any of the assets of the Resident, or otherwise enters into possession of any assets secured by the mortgage or charge;
- c) comply with Clause 3 of this Deed, as if it were the Resident, if the Approved Mortgage Lender or chargee exercises any right or power to sell the Resident's Interest; and
- d) any other provision reasonably required by the CLT.

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## **17. Caveat in favour of CLT**

17.1. The Resident charges the Resident's Interest in favour of the CLT to secure the interests of the CLT under this Deed and the **###Insert title of loan document**.

17.2. The Resident agrees that the CLT may lodge a caveat on the title to the Property to protect the CLT's rights pursuant to this Deed and the **###Insert title of loan document**.

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## **18. Transfer of CLT's Interest**

18.1. The CLT may at any time during the currency of this Deed, transfer the CLT's Interest in the Property to a third party if:

- 18.1.1. the transferee has substantially similar aims as the CLT;
- 18.1.2. the transferee is an Affordable Housing Provider; and

18.1.3. the transferee executes an agreement pursuant to which the transferee assumes the obligations and rights of the CLT under this Deed, prior to the settlement date for such sale.

18.2. On transfer of the CLT's Interest under Clause 18.1 the CLT will be released from all obligations under this Deed.

18.3. Clause 18.2 does not apply to a default:

18.3.1. by the CLT if the default occurred before the transfer date; and

18.3.2. the Resident has notified the CLT of the default in writing before the transfer date.

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## **19. Owners Corporation Rules**

### **19.1. Resident must obey Owners Corporation Rules**

The Resident must observe and comply with the Owners Corporation Rules. A breach of the Owners Corporation Rules is a breach of this Deed.

### **19.2. Deed prevails over Owners Corporation Rules**

If any of the Owners Corporation Rules are inconsistent with the terms of this Deed, the terms of this Deed prevail to the extent of the inconsistency.

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## **20. Succession**

### **20.1. Notification of death**

If the Resident dies, within 30 days of the date of death, the Resident's executor or administrator must notify the CLT of the Resident's death.

### **20.2. Transfer to devisee under Resident's will**

The CLT acknowledges that the Resident may gift the Resident Interest to a devisee under a will.

### **20.3. Eligibility**

If the Resident's devisee is eligible to be housed by the CLT and is:

20.3.1. the spouse of the Resident; or

20.3.2. a child of the Resident,

Clause 20.4 does not apply and the CLT must enter into a Deed on substantially the same terms as this Deed with the Resident's devisee.

### **20.4. Purchase by CLT on Resident's death**

If Clause 20.3 does not apply, the Resident's death will have the same effect as a Notice of Intended Sale issued pursuant to Clause 3.1.2 and the Resident's executor or administrator and the CLT must act in accordance with Clause 3 as though the Resident issued a Notice of Intended Sale to the CLT, with the following changes:

- 20.4.1. any notices given to the Resident will be to the Resident's executor or administrator; and
- 20.4.2. the Resident's obligations will be satisfied and discharged by such executor or administrator who, where necessary, will first obtain a grant of probate or administration.

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## **21. Cost of transfer**

The Resident is responsible for all costs and expenses of preparing and registering each transfer relating to the Resident's Interest including:

- 21.1.1. the initial transfer creating the Resident Interest (including any stamp duty payable); and
- 21.1.2. the transfer of the Resident Interest to the CLT or a third party nominated by the CLT.

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## **22. CLT's rights and obligations**

### **22.1. Quiet enjoyment**

Provided the Resident does not breach this Deed, the CLT must not interfere with the Resident's use and occupation of the Property except as provided by this Deed.

### **22.2. Dealing with the Property**

The CLT may:

- 22.2.1. grant easements or other rights over the Property required to facilitate the proper and efficient administration, trust and management of the CLT's operations as a community, except where it will result in a detrimental effect on the value of the Property; and
- 22.2.2. require the Resident to do everything reasonably necessary, including signing and producing documents and providing consents, to enable the CLT to exercise those rights.

### **22.3. Entry by CLT**

The Resident acknowledges that the CLT may enter the Property at any reasonable time after giving the Resident no less than 7 days' notice, to:

- 22.3.1. show the Property to intending purchasers after the Resident has issued a Notice of Intended Sale;
- 22.3.2. undertake a valuation of the Property after the Resident has issued a Notice of Intended Sale;
- 22.3.3. rectify any default by the Resident under this Deed;
- 22.3.4. carry out any inspection, repairs, maintenance, works or alterations to any adjacent property of the CLT; or
- 22.3.5. do anything which the CLT must or may do under this Deed.

#### **22.4. Emergency**

Notwithstanding any other provision of this Deed, if the CLT decides that there is an emergency the CLT may, without giving notice to the Resident:

- 22.4.1. enter the Property at any time.; and
- 22.4.2. temporarily stop the Resident from entering the Property; and
- 22.4.3. undertake any emergency repairs the CLT deems to be reasonably necessary, the cost of which will be a debt due and payable by the Resident to the CLT.

#### **22.5. Change in CLT**

If a person other than the CLT becomes entitled to the CLT Interest whether by operation of law or otherwise (**New CLT**) then:

- 22.5.1. the CLT is released from all further obligations under this Deed arising after the New CLT becomes entitled; and
- 22.5.2. the Resident must at the cost of the CLT enter into a deed in a form required by the CLT (acting reasonably) under which the Resident covenants that the New CLT will have the benefit of all of the Resident's obligations under this Deed.

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### **23. CLT option to purchase where Resident breach**

#### **23.1. Option requirements**

The CLT has an option to purchase the Resident Interest in the Property if:

- 23.1.1. any moneys owing by the Resident to the CLT are in arrears for 28 days after the CLT has demanded payment in writing;
- 23.1.2. the Resident is in breach of an Essential Term and does not remedy the breach within 28 days of receipt of written notice from the CLT;

- 23.1.3. the CLT receives notification from the Resident's mortgagee or chargee that the Resident is in breach of or default under the relevant mortgage or charge and the Resident does not remedy the breach within 28 days of receipt of written notice from the CLT;
- 23.1.4. the Property is deemed unfit for human habitation or has been destroyed totally or to such an extent as to be rendered unsafe;
- 23.1.5. the CLT receives a notice from an authority for the compulsory acquisition of the Property; or
- 23.1.6. the Resident repudiates its obligations under this Lease,

and the Sale Price for such purchase shall be calculated either at the date of the Resident's breach or if a written notice or demand is required to be given by the CLT, at the date of the written notice.

## **23.2. Notice of Intended Purchase**

If the CLT wishes to exercise its right to purchase pursuant to this Clause 23, the CLT must issue to the Resident a Notice of Intended Purchase.

## **23.3. Effect of Notice**

The Notice of Intended Purchase will have the same effect as a Notice of Intended Sale issued pursuant to Clause 3.1.2, the parties must act in accordance with Clause 3 as though the Resident issued a Notice of Intended Sale to the CLT.

## **23.4. Essential terms**

The following terms of this Deed are essential terms:

- 23.4.1. Clause 9 (Repair and Maintenance);
- 23.4.2. Clause 10 (Insurance);
- 23.4.3. Clause 12 (Permitted Use);
- 23.4.4. Clause 15 (Restrictions); and
- 23.4.5. Clause 16 (Mortgage or charge).

Any other obligation of the Resident under this Deed may also be an essential term.

The breach of an essential term is a repudiation of this Deed.

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## **24. Destruction or Damage of Property**

### **24.1. Damage or Destruction**

If the Property or Building is damaged or destroyed, the Resident must:

- 24.1.1. make the Property safe and secure;

24.1.2. give the CLT a report from a structural engineer as to the structural stability of the Property; and

24.1.3. clear all debris from the Property.

**24.2. Rebuild to original design**

Provided the Resident has obtained the CLT's prior written consent in the event of damage or destruction of the Property, the Resident may:

24.2.1. reinstate the Property and any Building substantially in accordance with its original design; or

24.2.2. rebuild to a different design.

**24.3. Compliance**

The Resident must comply with Clause 8 with respect of the reinstatement or rebuilding under this Clause 24.

**25. GST**

**25.1. GST Act**

In this Clause words that are defined in *A New Tax System (Goods and Services Tax) Act 1999* have the same meaning as their definition in that Act.

**25.2. Exclusive of GST**

Except as otherwise provided by this Clause, all consideration payable under this Deed in relation to any supply is exclusive of GST.

**25.3. Recipient must pay**

If GST is payable in respect of any supply made by a supplier under this Deed, subject to Clause 24.4 the recipient will pay to the supplier an amount equal to the GST payable on the supply at the same time and in the same manner as the consideration for the supply is to be provided under this Deed.

**25.4. Tax Invoice**

The supplier must provide a tax invoice to the recipient before the supplier will be entitled to payment of the GST payable under Clause 24.3.

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**26. Disputes**

**26.1. Disputes**

In the event of a dispute connected with this Deed, the Resident and a senior officer of the CLT (who must have authority to negotiate and settle disputes) must meet and negotiate in good faith to attempt to resolve the dispute.

**26.2. Mediation**

If the dispute is not resolved within 28 days of the meeting under Clause 26.1, the parties agree to submit the dispute to mediation administered by The Institute of Arbitrators and Mediators Australia. The mediator must be an independent person agreed between the parties or, failing agreement, a mediator will be appointed by the President of The Institute of Arbitrators and Mediators Australia at the request of either party. Any mediation meetings and proceedings will be held in the capital city of the State or Territory in which the Property is located. The costs of the mediation will be borne equally by each of the parties.

**26.3. Referral to Litigation**

If, within 28 days (or any other period agreed to in writing between the parties) after the appointment of a mediator the dispute is not resolved either party may refer the dispute to litigation.

**26.4. Continued Performance**

The parties must continue to comply with their obligations under the Deed despite any dispute between the parties.

**27. Notices**

**27.1. Notices**

Any notice required to be served under this Deed must be in writing and must be served by post, facsimile transmission or hand delivered to:

- 27.1.1. the Resident at its address set out in this Deed, the Resident's registered office address, the Property, or the last known address of the Resident; and
- 27.1.2. the CLT at its address set out in this Deed or any other address notified in writing to the Resident by the CLT.

**27.2. Time of service**

A notice or other communication is deemed served:

- 27.2.1. if served personally or left at the person's address, upon service;
- 27.2.2. if posted, 2 business days after posted;
- 27.2.3. if served by facsimile transmission, subject to the next sub-clause, at the time indicated on the transmission report produced by the sender's facsimile machine indicating that the facsimile was sent in its entirety to the addressee's facsimile machine; and

- 27.2.4. if received after 6.00 pm in the place of receipt or on a day which is not a business day, at 9.00 am on the next business day.
- 

## **28. General**

### **28.1. Entire understanding**

This Deed contains the entire understanding between the parties as to the subject matter contained in it. All previous agreements, representations, warranties, explanations and commitments, expressed or implied, affecting this subject matter are superseded by this Deed and have no effect.

### **28.2. Waiver**

If the CLT accepts any monies under this Deed (before or after the end of this Deed) or does not exercise or delays exercising any of the CLT's rights under this Deed, it will not be a waiver of the breach of this Deed by the Resident or of the CLT's rights under this Deed.

### **28.3. Governing law and jurisdiction**

This Deed is governed by and is to be construed in accordance with the laws of **##insert name of relevant state or territory**. Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of **##insert name of relevant state or territory** and waives any right to object to proceedings being brought in those courts.

### **28.4. Joint and several**

If a party consists of more than one person, this Deed binds them jointly and each of them severally.

### **28.5. Operation of indemnities**

Each indemnity of the Resident in this Deed is a continuing obligation, independent of the Resident's other obligations and continues after this Deed expires or is terminated. It is not necessary for the CLT to incur an expense or make a payment before enforcing a right of indemnity under this Deed.

### **28.6. Personal Information**

Each party who is an individual:

- 28.6.1. acknowledges that the CLT has collected or may collect Personal Information about that party in connection with entering into this Deed; and
- 28.6.2. consents to that Personal Information being collected and being disclosed by the CLT in connection with its business, including without limitation being disclosed to any proposed purchaser or mortgagee of the Property or to a related entity or advisor of the CLT.

## **29. Interpretation**

### **29.1. Persons**

In this Deed, a reference to a person includes a firm, partnership, association, corporation or other corporate body.

### **29.2. Legislation**

In this Deed, a reference to a statute includes regulations under it and consolidations, amendments, re-enactments or replacements of any of them.

### **29.3. Clauses and headings**

In this Deed:

29.3.1. a reference to a Clause, schedule or annexure is a reference to a clause, schedule or annexure in or to this Deed; and

29.3.2. headings and sub-headings are inserted for ease of reference only and do not affect the interpretation of this Deed.

### **29.4. Severance**

In this Deed:

29.4.1. if a provision is held to be illegal, invalid, void, voidable or unenforceable, that provision must be read down to the extent necessary to ensure that it is not illegal, invalid, void, voidable or unenforceable; and

29.4.2. if it is not possible to read down a provision as required in this Clause, that provision is severable without affecting the validity or enforceability of the remaining part of that provision or the other provisions in this Deed.

### **29.5. Number and gender**

In this Deed, a reference to:

29.5.1. the singular includes the plural and vice versa; and

29.5.2. a gender includes the other genders.

### **29.6. Construction**

No rule of construction applies to the disadvantage of the CLT because the CLT was responsible for the preparation of this Deed.

## Execution

EXECUTED as a deed

**###Insert execution clause for the CLT**

**###Insert execution clause for the Resident**

## Schedule 1                      Sale Price

(cross out whatever is not applicable)

### Option 1 - Appraisal-based method

Original purchase price + 25% of any appreciation of value of home at date of calculation = Sale Price

**##The original purchase price would need to be assessed against open market value. Any value of approved capital improvements will be taken into account when calculating the Sale Price.]**

Variation 1: Resident must have owned the Property for no less than 8 years to receive 25% of appreciation in value

Variation 2, Time Specific : Ownership of up to 10 years, Resident gets 25%; 10-15 years get 35%; 15+ years get 40 %

**##Variation 2 is not recommended for high housing cost growth areas]**

### Option 2 - Indexed method

Original purchase price + compounded annually by CPI of **##insert name of relevant state or territory]** from the date of purchase + value (increase or decrease) of approved capital improvements = Sale Price

**##This option is better for high house price growth areas]**

### Option 3 Other:

**##Other formula as adopted by the CLT]**

## Schedule 2                      Notice of Intended Sale

TO: CLT

FROM: **##The Resident**

RE: **##Address of the Property**

(I/We) being the Resident/s to the Co-Ownership Deed (**Deed**) between the CLT and the Resident and dated **##Insert date**, hereby give the CLT notice pursuant to Clause 3 of the Deed of (my/our) wish to sell (my/our) interest in the Property which is the subject of that Deed.

DATED

.....  
Signature(s)

In accordance with Clause 27.2 this notice is deemed served:

- a) if served personally or left at the person's address, upon service;
- b) if posted, 2 business days after posted;
- c) if served by facsimile transmission, subject to the next sub-clause, at the time indicated on the transmission report produced by the sender's facsimile machine indicating that the facsimile was sent in its entirety to the addressee's facsimile machine; and
- d) if received after 6.00 pm in the place of receipt or on a day which is not a business day, at 9.00 am on the next business day.

## Schedule 3                      Notice of Intended Purchase

TO: **##The Resident**

FROM: CLT

RE: **##Address of the Property**

Pursuant to Clause 23 of the Co-Ownership Deed (**Deed**) between the CLT and the Resident and dated **##Insert date**, the CLT hereby gives the Resident notice of its intention to purchase your interest in the Property which is the subject of that Deed.

DATED

.....  
Signature(s)

In accordance with Clause 27.2 this notice is deemed served:

- a) if served personally or left at the person's address, upon service;
- b) if posted, 2 business days after posted;
- c) if served by facsimile transmission, subject to the next sub-clause, at the time indicated on the transmission report produced by the sender's facsimile machine indicating that the facsimile was sent in its entirety to the addressee's facsimile machine; and
- d) if received after 6.00 pm in the place of receipt or on a day which is not a business day, at 9.00 am on the next business day.

## Schedule 4            Contract of Sale

**[##To be prepared by CLT's legal representatives and annexed here]**

## Schedule 5 Administration Fee Review Notice

Please complete this form using a black pen in BLOCK LETTERS

To:

.....  
(name of Resident/s)

I give notice of an adjustment to your Administration Fee:

- (a) with effect from: **##Insert date that adjusted Administration Fee is to take effect which shall be not less than 60 days' notice from the date of this notice**
- (b) for the amount of: **##Insert amount of adjusted Administration Fee**

...../...../.....  
(signature of CLT or CLT's agent) (date delivered/posted)

Name of CLT.....

Contact phone number of CLT.....

In accordance with Clause 27.2 this notice is deemed served:

- a) if served personally or left at the person's address, upon service;
- b) if posted, 2 business days after posted;
- c) if served by facsimile transmission, subject to the next sub-clause, at the time indicated on the transmission report produced by the sender's facsimile machine indicating that the facsimile was sent in its entirety to the addressee's facsimile machine; and
- d) if received after 6.00 pm in the place of receipt or on a day which is not a business day, at 9.00 am on the next business day.



## 16.1 Commentary on model co-ownership deed

The model co-ownership deed is intended for use all Australian jurisdictions. CLTs may utilise a shared equity mechanism where using a long-term leasehold is currently not possible (see Appendix 8) or where CLTs expressly wish to utilise a co-ownership model rather than leasehold.

This option requires that the property be held as freehold land, so organisations with land held as long-term leasehold (e.g., in the ACT or under various Aboriginal Land Rights legislation) cannot utilise this model. This means that land held as long-term leasehold in those jurisdictions, where residential leases are not currently exempt from Residential Tenancies legislation (e.g., Western Australia, South Australia, Queensland and the Northern Territory), currently have limited options for CLT type activities and will most likely need to seek ministerial exemption from Residential Tenancies legislation.

This commentary draws attention to clauses that individual CLTs might want to vary according to the organisation's and Resident's capacities and objectives. It does not comment on every clause but rather on the clauses most likely to be varied.

### Item 7 Permitted Use

The model Item states that the Permitted Use of the CLT home must be as the Resident's principal place of residence. This allows home businesses and other activities in line with local zoning permissions, e.g. a Resident can run a home office from their home if the relevant zoning allows this.

## 8 Works

The model clause allows the Resident to make improvements to the property (such as additions, renovations, etc) with the consent of the CLT. Individual CLTs might seek to vary this clause in accordance with their objectives regarding the Resident's right to improve or modify the home. A CLT might choose to:

- allow any modifications from a pre-approved list, and include that list in the deed; or
- allow any modifications on a case-by-case basis (which the current clause allows).

The CLT will then have to determine what, if any, implications modifications have on the reversion formula. Possible treatments of modifications within the reversion formula include:

- no additional value that is, the Reversion Price remains indexed to the original purchase price;
- value returned to the Resident on a dollar-for-dollar basis, on provision of proof of expenditure by the Resident;
- an agreed equity return on the basis of a new valuation that includes the uplift in value due to modifications; or
- another determined method.

## **9 Repair and maintenance**

When adopting this clause, individual CLTs will need to consider what repairs and maintenance they want the Resident to be responsible for – all, some or none. The model clause specifies that the Resident must keep the Premises in good repair and condition. It does not specify whether the CLT is responsible for major cyclical repairs and maintenance, such as the replacement of roofing or kitchens. CLTs will need to decide their position regarding these issues and modify the clause if they wish to specify that the CLT is responsible for certain repairs and maintenance items.

## **10 Insurance**

The model clause states that the Resident is responsible for public liability and building insurance, and can be required to provide copies of the certificate of currency to the CLT for this insurance. Individual CLTs will need to consider whether they wish to vary this and make the CLT responsible for insurance, including cost.

In instances where the CLT chooses to take out the insurance, it will then need to consider whether to recoup some or all of the cost by building annual insurance costs into the administration fee.

### **15.2 Restrictions on dealing with the land**

In the model clause, the CLT must give consent to any letting by the Resident or all or part of their property. Individual CLTs will need to decide whether and under what circumstances they will allow a Resident to lease the CLT home. This will need to consider any restrictions, such as:

- the reason for leasing;
- the rent to be charged (e.g., at market rent, or to cover the Resident's costs, or another rate);
- the duration of the lease; and,
- whether the tenant has to meet the CLT's eligibility requirements and purpose.

## **16 Approved mortgage**

Under the model clause, an Approved Mortgage Lender is a body registered by the Australian Prudential Regulation Authority with a Standard and Poors Australia rating of at least 'A-' (whether a bank, building society or other financial institution), or any other entity approved in writing by the CLT. Individual CLTs will need to give consideration to whether they choose to provide a list of pre-approved lenders and require Residents to borrow only from those institutions, or whether they use the model clause.

## **17 Caveat in favour of CLT**

In instances where the CLT is not the provider of mortgage finance to the Resident, a caveat must be lodged on the title in order to note the CLT's interest in the property. This ensures that the CLT's interest is upheld across resale and inheritance, such that subsequent co-owners understand the property carries the CLT interest. It also alerts any potential buyers and others to the special arrangements pertaining to CLT properties.

## **20.2 Transfer to devisee under Resident's will**

The model clause acknowledges that the Resident may gift the Resident Interest to a devisee under a will. The model clause provides that the devisee (inheritor) must be the spouse or child of the Resident and that the CLT must enter into a Lease on substantially the same terms as this Lease with the Resident's devisee.

Individual CLTs might choose to vary this clause to allow greater or lesser flexibility regarding inheritance in the event of a Resident's death. Some CLTs might place eligibility constraints on heirs in line with core affordability objectives, while other CLTs might not place any such constraints. CLTs need to ensure this clause complies with the CLT's stated purpose and seek independent legal advice.



## **17 Appendix 7 – Model CLT constitution and commentary**

Derek Mortimer

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A COMPANY LIMITED BY GUARANTEE

# Constitution of [insert company name] Community Land

ACN [xxx]

[##name of law firm]

Ref:

## 1. PRELIMINARY

### 1.1 Exclusion of replaceable rules

The replaceable rules contained in the Act do not apply to the Company.

### 1.2 Definitions and interpretation

In this Constitution:

- (a) “Act” means the *Corporations Act 2001* or any statutory modification or re-enactment thereof for the time being in force.
- (b) “the Company” means [insert name and ACN of company] Community Land.
- (c) “Directors” means the directors for the time being of the Company.
- (d) “Board” means the board of Directors for the time being of the Company.
- (e) “Chair” means the person appointed to the office of chairperson under clause 5.10(a).
- (f) “Guaranteed Amount” means the amount set out in clause 1.6.
- (g) “Member” means a person whose name is entered in the Register either as a:
  - (i) Resident Member; or
  - (ii) General Member
- (h) “Resident Member” means a person enters into a **##insert whether a lease or co-ownership deed** with the Company.
- (i) A “General Member” means a person, 18 years of age or older who is admitted by the Board of the Company as a member under the process described clause 2.2.
- (j) “Office bearers” means a Director appointed as an office bearer under clause 5.10 including the Chair, Deputy Chair, Secretary and Treasurer.
- (k) “Principal Purpose” means the purpose set out in clause 1.3.
- (l) “Register” means the Register of Members under clause 2.3.
- (m) “Seal” means the common seal of the Company (if any).

- (n) “Secretary” means the secretary for the time being of the Company and if there are joint secretaries, any one or more of such joint secretaries.
- (o) Except so far as the contrary intention appears in this Constitution, an expression has, in a provision of this Constitution that deals with a matter dealt with by a particular provision of the Act, the same meaning as in that provision of the Act.
- (p) Words importing any one gender shall be deemed and taken to include all genders and the singular to include the plural and the plural the singular unless the contrary as to gender or number is expressly provided.

### 1.3 Principal Purpose

- (a) The Principal Purpose for which the Company is established is to **##insert principal purpose**.
- (b) Solely for the purpose of furthering the Principal Purpose, the activities the Company will undertake may include, but are not limited to:
  - (i) **##insert activities**; and
  - (ii) Undertaking such other incidental activities it considers will support the Principal Purpose.

### 1.4 The Principal Purpose is charitable.

The Principal Purpose is charitable.

### 1.5 Application of income and property

- (a) The income and property of the Company must be applied solely towards the Principal Purpose.
- (b) No portion of the profits, income or property of the Company may be paid or transferred directly or indirectly to Members or Directors by way of dividend, bonus or otherwise.
- (c) Payment may be made in good faith to any Member:
  - (i) in return for any services actually rendered to the Company;
  - (ii) for goods supplied in the ordinary and usual way of business;
  - (iii) by way of interest on money borrowed from any Member at a rate not exceeding the rate for the time being fixed by the Board; and
  - (iv) of reasonable and proper rent for premises demised or let by any Member.

- (d) A Director may not be paid directors fees for serving as a director but payments may be made to directors in the following circumstances:
  - (i) for the payment of out-of-pocket expenses incurred in carrying out the duties of a director where the payments do not exceed an amount previously approved by the Board; or
  - (ii) for any service rendered to the Company in a professional or technical capacity where the provision of that service has the prior approval of the Board and the amount payable is approved by a resolution of the Board and is on reasonable commercial terms; or
  - (iii) as an employee of the Company where the terms of employment have been approved by a resolution of the Board.

#### **1.6 Liability of Members**

The liability of the Members is limited to the Guaranteed Amount being \$50.

#### **1.7 Contribution of Members on winding up**

Every Member undertakes to contribute to the assets of the Company in the event of the Company being wound up while he or she is a Member, or within one year of ceasing to be a Member such amount as may be required not exceeding the Guaranteed Amount, for:

- (a) the payment of the debts and liabilities of the Company contracted whilst the Member or past Member as the case may be was a Member;
- (b) the costs charges and expenses of winding up; and
- (c) the adjustment of the rights of the contributors or Members amongst themselves.

#### **1.8 Distribution of assets on revocation of endorsement**

- (a) Where the endorsement of the Company as a deductible gift recipient is revoked by the Commissioner of Taxation, the following assets remaining after satisfying the Company's liabilities and expenses must be transferred to such other institution or institutions in Australia to which income tax deductible gifts may be made:
  - (i) Gifts of money or property for the Principal Purpose;
  - (ii) Contributions made to an eligible fundraising event for the Principal Purpose; and

- (iii) Money received by the Company as a consequence of those Gifts or Contributions.
- (b) The identity of the institution or institutions will be decided by the Members by ordinary resolution as near as practicable following receipt of a notice of revocation from the Commissioner of Taxation. If the Members fail to decide, the institution shall be determined by application to the Supreme Court in the State of incorporation.

### 1.9 Distribution of assets on winding up

- (a) Where on the winding up or dissolution of the Company, there is a surplus of assets after satisfying all the Company's liabilities and expenses, the surplus:
  - (i) must not be paid or distributed to Members; and
  - (ii) will be given or transferred to such other institution in Australia to which income tax deductible gifts may be made which:
  - (iii) has similar objects to those of the Company as described in this Constitution, and
  - (iv) prohibits the distribution of income, profit or assets to its Members.
- (b) The identity of the institution or institutions will be decided by the Members by ordinary resolution on or before the time of such winding up or dissolution. If the Members fail to decide, the institution shall be determined by application to the Supreme Court in the State of incorporation.

## 2. MEMBERSHIP

### 2.1 Lessee Member entitled to Membership upon execution of a lease

- (a) A Resident Member becomes a Member upon:
  - (i) executing a [##insert whether a lease or co-ownership deed] with the Company;
  - (ii) agreeing in writing to provide a guarantee of not less than the Guaranteed Amount to defray such liabilities and expenses of the Company upon its winding up or dissolution; and
  - (iii) The name of the Resident Member has been entered in the Register of Members.

## 2.2 Eligibility, application and admission

- (a) With the exception of the Resident Members, any natural person committed to the Principal Purpose may apply to become a Member provided:
  - (i) Application for membership is made on the prescribed Application Form in Appendix 1 and the determined fee has been paid;
  - (ii) The person agrees in writing to provide a guarantee of not less than the Guaranteed Amount to defray such liabilities and expenses of the Company upon its winding up or dissolution;
  - (iii) The Application for Membership has been accepted by the Board and such acceptance may be determined by the Board using any criteria as the Board alone may determine; and
  - (iv) The name of the Member has been entered in the Register of Members.
- (b) The Board may decline any application for membership and is not bound to give reasons why the application was not accepted.
- (c) When an applicant has been accepted for membership the Secretary must send to the applicant written notice of their acceptance.
- (d) The first Member shall be the subscriber to this Constitution who shall not be required to apply for membership.
- (e) The minimum number of Members is 1.

## 2.3 Register of Members

- (a) The Secretary must maintain the Register at the Company's registered office.
- (b) When a person has been accepted for membership either as Lessee Member or as a General Member, the Secretary must cause that Member's name to be entered in the Register and will send to the Member written notice of the acceptance.
- (c) The address of a Member in the Register will be the address of the Member for the purpose of service of any notices to Members.
- (d) The rights of any Member are not transferable.

## 2.4 Discipline of members

- (a) The Directors may by resolution suspend for a fixed term or expel a Member from the Company if, in their absolute discretion, the Directors decide it is not in the interests of the Company for the person to remain a Member.
- (b) If the Directors intend to consider a resolution under clause 2.4(a), at least one week before the meeting at which the resolution is to be considered, they must give the Member written notice:
  - stating the date, place and time of the meeting;
  - setting out the intended resolution and the grounds on which it is based; and
  - informing the Member that the Member may attend the meeting and may give an oral or written explanation or submission before the resolution is put to the vote.
- (c) Any Member expelled from the Company may at any time apply to the Board to be readmitted as a Member.
- (d) A Member who has been expelled from the Company or during their term of suspension as a Member, may not cast a vote at general meetings of the Company and may not serve as a Director.

## 2.5 Cessation of membership

- (a) A Lessee Member ceases to be a Member at the expiration of their **##insert whether a lease or co-ownership deed** with the Company.
- (b) A Member (including a Resident Member) ceases to be a Member on:
  - (i) resignation; or
  - (ii) expulsion or suspension in accordance with this Constitution.
- (c) A Member whose membership is terminated will be liable for all moneys due by that Member to the Company in addition to any sum not exceeding the Guaranteed Amount for which the Member is liable under clause 2.1 of this Constitution.
- (d) Except as a creditor, a Member whose membership is terminated will not make any claim, monetary or otherwise, on the Company, its funds or property.
- (e) Any person who for any reason ceases to be a Member shall no longer represent themselves in any manner as being a Member.

### **3. PATRON**

The Company may from time to time at any general meeting appoint a person, not necessarily a member of the company, to be Patron of the Company until the next Annual General Meeting. A Patron shall not, as Patron, have any rights or obligations in relation to the Company.

### **4. MEETINGS OF MEMBERS**

#### **4.1 Annual general meeting**

- (a) Subject to the Act, a general meeting must be held at least once in every calendar year and within the period of five (5) months after the end of the financial year at such time and place as may be determined by the Directors to be called the “Annual General Meeting”;
- (b) Meetings of the Company other than the Annual General Meeting shall be called “general meetings”.
- (c) The business of the Annual General Meeting may include any of the following, even if not referred to on the notice of meeting:
  - (i) the consideration of the Annual Financial Statements, Directors’ Declaration and Directors’ Report and Auditor’s Report;
  - (ii) the election of Directors;
  - (iii) the appointment of the auditor; and
  - (iv) the fixing of the auditor’s remuneration.

#### **4.2 Convening general meetings**

- (a) A general meeting may only be called:
  - (i) by a Directors’ resolution; or
  - (ii) in accordance with a Members’ requisition under the Act; or
  - (iii) as otherwise provided in the Act.
- (b) The Directors may change the venue for, postpone or cancel a general meeting, provided that if the general meeting was not called by a Directors’ resolution or was called in accordance with a Members’ requisition under the Act, then it may not be postponed or cancelled without the prior written consent of the persons who called or requisitioned the meeting.

#### **4.3 Notice of general meetings**

- (a) A notice of meeting of Members shall specify:

- (i) the place, the day and the time of the meeting (and, if the meeting is to be held in two or more places, the technology that will be used to facilitate this);
  - (ii) the general nature of the business to be transacted at the meeting; and
  - (iii) such other information as is required by clause 249L of the Act.
- (b) The Company may hold a meeting of its Members at two or more venues using any technology that gives the Members as a whole a reasonable opportunity to participate.
- (c) Subject to the provisions of the Act relating to agreements for shorter notice, at least 21 days notice must be given of a meeting of Members.
- (d) Notice of every meeting of Members shall be given in the manner authorised by clause 6.10 to:
  - (i) every Member and to every Director; and
  - (ii) the auditor for the time being of the Company.
- (e) No other person is entitled to receive notices of meetings of Members.

#### 4.4 **Chair of general meetings**

- (a) The Chair shall preside as chair at every General Meeting.
- (b) If there is no Chair or the Chair is not present within fifteen (15) minutes after the time appointed for the holding of the meeting or is unwilling to act for all or part of the meeting, the Deputy Chair will chair the meeting.
- (c) If the Deputy Chair is not present or is present but is unwilling to act for all or part of the meeting, the Members present shall elect one of their number to chair the meeting (or part of it).

#### 4.5 **Quorum for general meetings**

- (a) No business shall be transacted at any meeting of Members unless a quorum of Members is present at the time when the meeting proceeds to business.
- (b) A quorum of Members for a meeting is:
  - (i) If there is only one Member, that Member; or

- (ii) a number equal to half of the Members plus one and if that number is not a whole number then the nearest whole number above shall be the quorum.
- (c) For the purpose of determining whether a quorum is present, a person attending as a proxy, shall be deemed to be a Member.

#### 4.6 **Adjournment of general meetings**

- (a) If a quorum is not present within fifteen (15) minutes from the time appointed for the meeting:
  - (i) where the meeting was convened upon the request of Members - the meeting shall be dissolved; or
  - (ii) in any other case:
    - (A) the meeting stands adjourned to such day, and at such time and place, as the Directors determine or, if no determination is made by the Directors, to the same day in the next week at the same time and place; and
    - (B) if at the adjourned meeting a quorum is not present within fifteen (15) minutes from the time appointed for the meeting, then the meeting shall be dissolved.
- (b) The chair shall adjourn a meeting of Members from time to time and from place to place if the Members present with a majority of votes that may be cast at that meeting agree or direct the chair to do so. No business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.
- (c) When a meeting of Members is adjourned for thirty (30) days or more, notice of the adjourned meeting shall be given as in the case of an original meeting.
- (d) Except as provided by the preceding paragraph, it is not necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting.

#### 4.7 **Voting at general meetings**

- (a) At any meeting of Members a resolution put to the vote of the meeting shall be decided on a show of hands unless a poll is demanded (before a vote is taken or immediately after the declaration of the result of the show of hands) by at least two thirds of the Members present in person or by proxy.
- (b) Unless a poll is so demanded, a declaration by the chair that a resolution has on a show of hands been carried or carried

unanimously, or by a particular majority, or lost, and an entry to that effect in the book containing the minutes of the proceedings of the Company, is conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

- (c) The demand for a poll may be withdrawn.
- (d) If a poll is duly demanded, it shall be taken in such a manner as the chair directs and unless the meeting is adjourned, the result of the poll will be deemed to be the resolution of the meeting at which the poll was demanded.
- (e) A poll demanded on the election of the chair or on a question of adjournment shall be taken immediately.
- (f) In the case of an equality of votes, whether on a show of hands or on a poll, the chair of the meeting of Members at which the show of hands takes place or at which the poll is demanded will have a casting vote in addition to any vote the chair may have in the capacity as a Member.
- (g) Subject to any rights or restrictions for the time being attached to any Member:
  - (i) at meetings of Members or classes of Members each Member entitled to vote may vote in person or by proxy or attorney or representative; and
  - (ii) on a show of hands every person present who is a Member or a proxy or representative of a Member has one vote, and on a poll every person present in person or by proxy or attorney or representative has one vote.
- (h) If the membership is held jointly and more than one such joint Member votes, only the vote of the Member whose name appears first in the Register counts.
- (i) If a Member is of unsound mind or is a person whose person or estate is liable to be dealt with in any way under the law relating to mental health, his or her committee or trustee or such other person as properly has the management of his or her estate may exercise any rights of the Member in relation to a meeting of Members as if the committee, trustee or other person were the Member.
- (j) A Member is not entitled to vote at a meeting of Members unless all sums presently payable by the Member in respect of the Company have been paid.
- (k) An objection may be raised to the qualification of a voter only at the meeting or adjourned meeting at which the vote objected to is given or tendered.

- (l) Any such objection shall be referred to the chair of the meeting of Members, whose decision is final.
- (m) A vote not disallowed pursuant to such an objection is valid for all purposes.

#### 4.8 Proxies

A Member who is entitled to attend and cast a vote at a meeting of Members may appoint a person (whether or not a Member) as the Member's proxy to attend and vote for the Member at the meeting.

- (a) An instrument appointing a proxy shall be in writing under the hand of the appointor or of his or her attorney duly authorised in writing or, if the appointor is a corporation, either under seal or executed in accordance with the Act or under the hand of an officer or attorney duly authorised.
- (b) An instrument appointing a proxy may specify the manner in which the proxy is to vote in respect of a particular resolution and, where an instrument of proxy so provides, the proxy is not entitled to vote in the resolution except as specified in the instrument.
- (c) An instrument appointing a proxy shall be deemed to confer authority to demand or join in demanding a poll.
- (d) An instrument appointing a proxy shall be in the form or in a form that is as similar to the form in Appendix 2, as the circumstances allow:
- (e) An instrument appointing a proxy must be deposited at the registered office of the Company:
  - (i) not less than forty-eight (48) hours before the time for holding the meeting or adjourned meeting at which the person named in the instrument proposes to vote; or
  - (ii) in the case of a poll, not less than twenty-four (24) hours before the time appointed for the taking of the poll,
- (f) A vote given in accordance with the terms of an instrument of proxy is valid despite the death or unsoundness of mind of the principal, the revocation of the instrument (or of the authority under which the instrument was executed), providing no intimation in writing of the death, unsoundness of mind or revocation was made before the commencement of the meeting or adjourned meeting at which the instrument is used or the power is exercised.

## 5. DIRECTORS

### 5.1 Appointment and removal of Directors

- (a) The number of the Directors must be not less than 12.

- (b) The Board must comprise the following categories of Directors, each consisting of four Directors, or in the event of there being more than 12 Directors, one third of the total Board:
  - (i) “Resident Directors” nominated and appointed by Lessee Members;
  - (ii) “General Directors” nominated and appointed by General Members; and
  - (iii) “Public Directors” nominated and appointed by Lessee Members and General Members.
- (c) The Members may by resolution passed at a general meeting:
  - (i) determine the method for electing a Director;
  - (ii) fix the number of Directors or increase or reduce the number of Directors (but so that the number shall be not less than 12); and
  - (iii) determine in what rotation a Director is to go out of office.
- (d) Subject to clause 5.1(c)(i), Members may appoint a person to be a Director by resolution passed at a general meeting. The resolution may specify the period during which the Director is to hold office and if it does so specify the Director will cease to hold office at the expiration of that period but will be eligible for reappointment. If the Members' resolution does not specify the term of the Director's appointment, the Director will hold office in accordance with clause 5.4.
- (e) A Director must have suitable qualifications, skills and experience (as determined by the Board) to discharge the function of a Director.
- (f) A Director need not be a Member but is entitled to receive notices of and attend and speak at meetings of Members.
- (g) No person (not being a retiring Director) is eligible for election to the office of Director unless:
  - (i) Such person has, at least 28 days before the meeting, left at the registered office of the Company a duly signed notice in writing giving such persons consent to their nomination; and
  - (ii) Notice of every candidate for the position of Director is served by the Board on Members at least 14 days before the meeting at which the election is to take place.
- (h) Subject to the Act, the Company in general meeting may at any time by ordinary resolution remove any appointed or elected

Director before the expiration of that Director's period of office and, if so desired, elect another person in that Director's stead. The person so elected shall hold office during such time only as the Director in whose place such person is elected would have held office if such Director had not been removed.

## 5.2 Vacancies

(a) In the event of a vacancy in the office of a Director, and the number of remaining Directors is not sufficient to constitute a quorum at a meeting of Directors, they must act only for the purpose of increasing the number of Directors to a number sufficient to constitute such a quorum or of convening a meeting of Members for that purpose.

(b) The Directors have power to:

- (i) appoint a new Director to fill any casual vacancy; and
- (ii) appoint additional Directors.

where such appointment maintains the ratio of Resident Directors, General Directors and Public Directors as described at 5.1(b).

(c) Any Director so appointed may hold office only until the next following Annual General Meeting of the Company and shall then be eligible for election but a term filling a casual vacancy or as a co-opted additional Director must not then be taken into account in determining the number of Directors who are to retire by rotation at such meeting.

(d) In addition to the circumstances in which the office of a Director becomes vacant by virtue of the Act, the office of a Director becomes vacant if the Director:

- (i) becomes of unsound mind;
- (ii) resigns his or her office by notice in writing to the Company;
- (iii) is absent without the consent of Directors from 3 consecutive meetings of the Board;
- (iv) is directly or indirectly interested in any contract or proposed contract with the Company and fails to declare the nature of his or her interest as required by clause 5.15; or
- (v) is expelled or suspended as a Member in accordance with clause 2.5.

### 5.3 Defects in appointment of directors

All acts done by a meeting of the Directors or by any person acting as a Director are valid, despite that it is afterwards discovered that there was a defect in the appointment of a person to be a Director, or to act as a Director, or that person so appointed was disqualified.

### 5.4 Rotation of directors

Subject to clause 5.1(c)(iii), the following provisions shall apply to all Directors:

- (a) At every Annual General Meeting those Directors who have been in office for three years or until the third Annual General Meeting following such Directors' appointment (whichever is the longer) must retire.
- (b) The Directors or Director to retire under clause 5.4(a) must be the Directors or Director longest in office since last being elected but as between Directors who were elected on the same day, the Director or Directors to retire must (in default of agreement between them) be determined by lot.
- (c) The Company at any general meeting at which any Directors retire may fill up the vacated office by electing a like number of persons to be Directors and may fill up any other vacancies.
- (d) If, at any Annual General Meeting at which an election of Directors ought to take place, the places of the retiring Directors are not filled up, the retiring Directors, or such of them as have not had their places filled up, may (if willing to act) be re-appointed and continue in office until the third Annual General Meeting following such Directors' re-appointment.
- (e) A Director or Directors reappointed under clause 5.4(d) must not continue in office beyond the third Annual General Meeting following such Directors' re-appointment unless such continuation is approved by a special resolution of members.

### 5.5 Powers and duties of directors

- (a) Subject to the Act and to any other provision of this Constitution, the business of the Company must be managed by the Directors, who may pay all expenses incurred.
- (b) Without limiting the generality of the preceding paragraph, the Directors may exercise all the powers of the Company in furtherance of the Principle Purpose to:
  - (i) acquire such parcels of land, with or without buildings and other improvements, through donation, purchase or otherwise as the Board shall determine is prudent to acquire; and

- (ii) convey the right to use land, through leases or other limited conveyances in accordance with this Constitution.
- (c) The Directors may borrow money, to charge any property or business of the Company or give any other security for a debt, liability or obligation of the Company or of any other person.
- (d) The Directors may, by power of attorney, appoint any person (either by name or by reference to position or office held) to be the attorney of the Company for such purposes, with such powers, authorities and discretions (being powers, authorities and discretions vested in or exercisable by the Directors), for such period and subject to such conditions as they think fit.
- (e) Any such power of attorney may contain provisions for the protection and convenience of persons dealing with the attorney as the Directors think fit and may also authorise the attorney to delegate all or any of the powers, authorities and discretions vested in him or her.
- (f) All cheques, promissory notes, bankers drafts, bills of exchange and other negotiable instruments, and all receipts for money paid to the Company, must be signed, drawn, accepted, endorsed, executed, as the case may be in such manner as the Directors determine.

#### **5.6 Limitation on powers of the Board**

- (a) The Board must seek by special resolution, the approval of the Members in general meeting before the following decisions become effective;
  - (i) the sale of land held by the Company;
  - (ii) the mortgage of land held by the Company;
  - (iii) the establishment or alteration of the “resale formula” as further described at clause 6.8; or
  - (iv) alteration of the categories of Membership.

#### **5.7 Meetings of directors**

- (a) Subject to this clause, the Board may meet together for the dispatch of business and adjourn and otherwise regulate its meetings as it thinks fit.
- (b) All meetings of the Board must be open to any Member, except when the Board has voted during such an open meeting to go into executive session.
- (c) The Board must not vote to hold an executive session except to consider one or more of the following matters:

- (i) Contracts, labour relation agreements with employees, arbitration, grievances or litigation involving the Company;
- (ii) Real estate purchase offers and the negotiating or securing of real estate purchase options or contracts;
- (iii) The consideration of applications from persons seeking to lease land or housing, purchase housing or other improvements, or arrange finance from the Company; or
- (iv) Relationships between the Company and any party who may be harmed by a public discussion of matters relating to the relationship.

#### 5.8 Convening meetings of directors

The Board may at any time, and a Secretary must on the requisition of a Director, convene a meeting of the Directors.

#### 5.9 Quorum for directors' meetings

- (a) A quorum must consist of an equal amount of Resident Directors, General Directors and Public Directors.
- (b) Subject to clause 5.9(a) a quorum consists of:
  - (i) If the Directors have fixed a number for the quorum greater than 3, that number of Directors present at the meeting; or
  - (ii) In any other case, 3 Directors present at the meeting.

#### 5.10 Chair and office bearers

- (a) At the first Directors' meeting following each Annual General Meeting the Directors shall elect one of their number as Chair by a simple majority for an annual term of office.
- (b) A retiring Chair is eligible for re-election to that office.
- (c) Where a meeting of the Directors is held and:
  - (i) a Chair has not been elected as provided by the preceding two paragraphs; or
  - (ii) the person so elected is not present within ten (10) minutes after the time appointed for the holding of the meeting or is unwilling to act for all or part of the meeting,

the Directors present shall elect one of their number to chair such meeting or part of it.

- (d) At the first Directors' meeting following each Annual General Meeting the Directors shall appoint the Secretary and other Office Bearers other than the Chair, as they see fit.
- (e) The duties of the Office Bearers shall be determined by the Board.
- (f) An Office Bearer, including the Chair, may be elected for more than one successive term.

#### 5.11 **Voting at directors' meetings**

- (a) Subject to this Constitution, questions arising at a meeting of Directors shall be decided by a majority of votes of Directors present and voting and any such decision shall for all purposes be deemed a decision of the Directors.
- (b) A Director may not appoint a proxy for the purpose of voting at directors' meetings.
- (c) In a case of an equality of votes, the Chair of the meeting shall have a casting vote in addition to any vote the Chair may have in the capacity as a Director.

#### 5.12 **Delegation of powers**

- (a) Directors may delegate any of their powers to a committee or committees consisting of such of their number and such other qualified persons as they think fit.
- (b) A committee to which any powers have been so delegated must exercise the powers delegated in accordance with any directions of the Directors and a power so exercised shall be deemed to have been exercised by the Directors.
- (c) The Members of such a committee may elect 1 of their number as Chair of their meetings.
- (d) Where such a meeting is held and:
  - (i) a Chair has not been elected as provided by the preceding paragraph; or
  - (ii) the person so elected is not present within 10 minutes after the time appointed for the holding of the meeting or is unwilling to act for all or part of the meeting,

Members present may elect one of their number to be Chair of the meeting or part of it.

- (e) A committee may meet and adjourn as it thinks proper.
- (f) Questions arising at a meeting of a committee must be determined by a majority of votes of Members present and voting.

- (g) In the case of an equality of votes, the Chair must not have a casting vote in addition to any vote the Chair may have in the capacity as a committee Member.

#### 5.13 **Electronic meetings of Directors**

- (a) A meeting of Directors may be called or held using any technology consented to by all the Directors. Consent of a Director for the purposes of this clause may be standing one. A Director may only withdraw his or her consent within a reasonable time before the meeting of Directors.
- (b) A minute of the proceedings at a meeting held using technology is sufficient evidence of such proceedings and of the observance of all necessary formalities if certified as a correct minute by the Chair of the meeting.

#### 5.14 **Circulating resolutions**

- (a) A resolution of Directors is deemed to have been passed at a meeting of the Directors at the time at which a document containing the resolution is last signed by a Director.
- (b) For the purposes of the preceding clause, two or more separate documents containing statements in identical terms each of which is signed by one or more Directors shall together be deemed to constitute one document containing a statement in those terms signed by those Directors on the respective days on which they signed the separate document.

#### 5.15 **Directors' conflicts of interest**

- (a) Subject to the Act, no Director shall be disqualified by his or her office or of the fiduciary relation thereby established, from contracting or entering into any arrangement with the Company, nor shall any such contract or arrangement entered into by or on behalf of the Company in which any Director shall be in any way interested be avoided, nor shall any Director so contracting or being so interested be liable to account to the Company for any profit realised by any such contract or agreement.
- (b) Every Director shall observe the provisions of Clause 191 of the Act relating to the disclosure of the interest of Directors which might create duties or interests in conflict with their duties or interests as Directors as if the Company were a proprietary company.
- (c) Subject to the Act, a Director shall not as a Director be present at a meeting of Directors or vote in respect of any contract or arrangement in which such Director is interested in the manner described in the preceding clause being considered at that meeting.
- (d) A Director who is interested in any contract or arrangement may despite such interest attest the affixing of the Seal of the Company

to any document evidencing or otherwise connected with such contract or arrangement.

**5.16 Chief Executive Officer**

- (a) The Directors may, upon such terms and conditions and with such restrictions and as they think fit, confer upon the Chief Executive Officer any of the powers exercisable by them.
- (b) Any powers so conferred may be concurrent with, or be to the exclusion of, the powers of the Directors.
- (c) The Directors may at any time withdraw or vary any of the powers so conferred on the Chief Executive Officer.

**6. ADMINISTRATION**

**6.1 Minutes**

- (a) Directors must cause minutes of:
  - (i) all proceedings and resolutions of meetings of Members;
  - (ii) all proceedings and resolutions of meetings of the Directors, including meetings of a committee of Directors;
  - (iii) resolutions passed by Members without a meeting;
  - (iv) resolutions passed by Directors without a meeting,to be duly entered into the books kept for that purpose in accordance with the Act.
- (b) A minute recorded and signed in accordance with the Act is evidence of the proceeding, resolution or declaration to which it relates, unless the contrary is proved.
- (c) Books containing the minutes of meetings of Members and resolutions passed by Members without a meeting will be open for inspection by a Member free of charge.

**6.2 Accounts**

- (a) Directors must keep true and complete books of accounts of the transactions of the Company.
- (b) The Financial Year will begin on the first day of July and ends on the thirtieth day of June.
- (c) The accounts must be held at the registered office or any other place as Directors think fit.
- (d) The accounts must always be open to inspection by the Directors.

- (e) Directors must arrange for the financial report, the Directors' report and the Auditors' report (if required by the Act) to be made out and laid before the Annual General Meeting.

### 6.3 Audit

- (a) A registered company auditor must be appointed.
- (b) The remuneration of the auditor must be fixed and the auditor's duties regulated in accordance with the Act.

### 6.4 Inspection of records

- (a) Subject to the Act, the Directors must determine whether and to what extent, and at what time and places and under what conditions, the accounting records and other documents of the Company or any of them will be open to the inspection of Members other than Directors.
- (b) A Member other than a Director does not have the right to inspect any document of the Company except as provided by law or authorised by the Directors or by the Company in a meeting of Members.

### 6.5 Execution of documents

- (a) The Company may have a Seal, known as the common seal, on which its name, its Australian Company Number and the words "Common Seal" are engraved.
- (b) If the Company has a seal the Directors shall provide for the safe custody of the Seal.
- (c) The Seal shall be used only by the authority of the Directors, or of a committee of the Directors authorised by the Directors to authorise the use of the Seal.
- (d) The Company may execute a document by affixing the Seal to the document where the fixing of the Seal is witnessed by:
  - (i) two Directors; or
  - (ii) one Director and one Secretary; or
  - (iii) one Director and another person appointed by the Directors for that purpose.

The signature of such persons may be affixed to the document by manual, autographic or mechanical means.

- (e) The Company may execute a document without using a seal if the document is signed by:

- (i) two Directors; or
  - (ii) one Director and one Secretary; or
  - (iii) one Director and another person appointed by Directors for that purpose.
- (f) A facsimile signature may not be affixed to a document unless the auditors, internal auditors or bankers of the Company have reported to the Board in writing that the document may be sealed in that manner.

#### 6.6 **By Laws**

Subject to the Act and this Constitution, the Board has power to make by-laws concerning membership application and qualification for membership of the Company and any other matter which the Board believes suitable for including in such by-laws.

#### 6.7 **Stewardship of Land**

- (a) Before the Board may make a decision regarding use of land owned by the Company, including use of such land by Resident Members, the Board must take into account the following principles:
- (i) The Board must consider the needs of potential Resident Members and attempt to give effect to just distribution of land use rights;
  - (ii) The Board must convey land use rights to Resident Members on terms that will preserve the affordable access to land and housing for future Lessee Members; and
  - (iii) The Board must convey land use rights that will promote the long term wellbeing of the community and long term health of the environment.
- (b) The Board must approve a decision to mortgage or otherwise encumber land owned by the Company (in addition to approval of Members in general meeting at clause 5.6(a) ).
- (c) Property owned by the Company must not be sold except in extraordinary circumstances and only in accordance with the following:
- (i) No less than two thirds of the entire Board at a Board meeting approves the sale, provided that written notice of such meeting is provided to Directors describing the proposed sale and its reasons for sale; and
  - (ii) No less than 75% of the Members present at meeting of Members approves the sale, provided that written notice

of the meeting is provided to Members and description of the proposed sale and reasons for the proposal are given.

- (iii) Despite sub clauses 6.7(c)(i) and (ii) above, property may not be sold by the Company whilst it remains subject to a **[[insert whether a lease or co-ownership deed]]** with a Resident Member.

#### 6.8 Reversion Formula

- (a) The Board must restrict the price that a Resident Member may receive when they sell housing and other improvements located on land owned by the Company. The Board must establish such restrictions in the form of a reversion formula adopted by the Board as a by-law and with consent of the Members in accord with the following principles:
  - (i) The reversion formula must allow the seller to receive a price based on the value that the seller has invested in the property being sold;
  - (ii) The reversion formula must limit the price of the property to an amount that will be affordable for the Resident Member purchasing the housing.
- (b) The Board must ensure that as a condition of any **[[insert whether a lease or co-ownership deed]]** of Company property with a Resident Member, the Resident's interest in Company property may be re-sold to the Company at a price limited by a reversion formula.

#### 6.9 Alteration of constitution

The Company may only alter this Constitution by special resolution passed at a general meeting of Members.

#### 6.10 Notices

- (a) A notice may be given by the Company to any Member either:
  - (i) by serving it on the Member;
  - (ii) by sending it by post to the Member at the member's address, including any email address, as shown in the Register of Members or the address supplied by the Member to the Company for the giving of notices to that Member; or
  - (iii) by sending it by facsimile transmission to a facsimile number supplied by the Member to the Company for the giving of notices to the Member.

- (iv) by sending it by email to an email address supplied by the Member to the Company for the giving of notices to the Member.
- (b) Where a notice is sent by post, service of the notice is deemed to be effective by properly addressing, prepaying and posting a letter containing the notice, and to have been effected, in the case of a notice to a Member, on the day after the date of its posting and, in any other case, at the time at which the letter would be delivered in the ordinary course of post.
- (c) Where a notice is sent by facsimile, service of the notice shall be deemed to be effected on receipt by the Company of a transmission report confirming successful transmission.
- (d) Where a notice is sent by email, service of the notice is deemed to be effected 24 hours after the transmission of the email unless the person transmitting the email is notified at any time that the email was undelivered or undeliverable.
- (e) A notice may be given by the Company to joint members by giving notice to the joint member first named in the Register of Members.

#### 6.11 **Officers: indemnities and insurance**

- (a) To the extent permitted by the Act:
  - (i) the Company indemnifies every person who is or has been an Officer against any liability for costs and expenses incurred by that person in defending any proceedings in which judgement is given in that person's favour, or in which the person is acquitted, or in connection with an application in relation to any proceedings in which the Court grants relief to the person under the Act; and
  - (ii) the Company indemnifies every person who is or has been an Officer against any liability incurred by that person, as an Officer to another person, unless the liability arises out of conduct involving a lack of good faith.
- (b) The Company may pay, or agree to pay, a premium in respect of a contract insuring a person who is or has been an Officer against a liability:
  - (i) incurred by the person in his or her capacity as an Officer or in the course of acting in connection with the affairs of the Company except where the liability arises out of conduct involving a wilful breach of duty in relation to the Company or a contravention of Clauses 182 and 183 of the Act; or

- (ii) for costs and expenses incurred by that person in defending proceedings, whatever their outcome.
- (c) In the two preceding clauses:
  - (i) the term “proceedings” means any proceedings whether civil or criminal, being proceedings in which it is alleged that the person has done or omitted to do some act, matter or thing in his or her capacity as such an Officer or in the course of acting in connection with the affairs of the Company or otherwise arising out of the Officer’s holding such office (including proceedings alleging that he or she was guilty of negligence, default, breach of trust or breach of duty in relation to the Company).

**6.12 Winding up**

- (a) Subject to clause 1.7, the Company may be dissolved by a special resolution of Members at a meeting of Members.

We, the persons specified in the application of the Company’s registration as persons who consent to become Members, agree to the terms of the foregoing Constitution:

Full names of Subscriber	Signatures of Subscriber
[insert name]	

Dated:

**APPENDIX 1**

Application for Membership of  
[insert name of company] Community Land

I, ..... of .....  
*(name and occupation)* *(address)*

desire to become a Member of [insert name of company] (“the company”).

In the event of my admission as a Member, I agree to be bound by the constitution of the company for the time being in force.

Signature of Applicant

Date

I, ..... , a member of the company,  
*(name)*

nominate the applicant, who is personally known to me, for Membership.

Signature of Proposer

Date

**APPENDIX 2**

**PROXY FORM**

[insert name of company] Community Land

I..... being a Member hereby appoint  
..... of ..... or, in his or her  
absence, ..... of ..... as my  
proxy to vote for me on my behalf at the meeting of the Members to be held on the  
..... day of ....., 20.. and at any adjournment of  
that meeting.

# This form is to be used \* in favour of / \* against the resolution

.....

SIGNED this ..... day of ....., 2....

\* Strike out whichever is not desired

# To be inserted if desired.



## 17.1 Commentary on model constitution

This commentary refers to the model constitution (“the constitution”) for a company limited by guarantee. The constitution forms the CLT’s governing rules and statement of the CLTs purpose or reason for existence.

The constitution is drafted with reference to:

- the particular requirements of Community Land Trusts (CLTs) based on the Model Classic Bylaws in the *2011 CLT Technical Manual*<sup>228</sup>,
- the *Corporations Act 2001* (Cth) (the Act)
- Australian Tax Office (ATO) requirements for income tax exempt charitable entities
- ATO requirements for entities as a whole, to be endorsed as Deductible Gift Recipients (DGRs) in order to accept tax deductible donations
- comments from the CLT Manual Project Steering Committee and others.

Particular constitution clauses are explained below. We have not discussed all constitution clauses as we believe they are straightforward or could be explained by CLT proponents’ own retained legal advisors.

It is important for CLT proponents to understand that the constitution is not a “locked in concrete” prescription for the governing rules of a CLT; rather the constitution serves as a basis and guide for development of CLTs. With this in mind, the commentary will raise some policy issues that CLT proponents may wish to discuss as they move towards developing their own constitution.

CLT proponents should be able to adapt the precedent constitution to fit the requirements of co-operatives or associations. We recommend however, CLT proponents consider seeking legal assistance with this task.

For convenience, the numbers and headings below are cross-referenced to clauses in the precedent constitution.

### Company name

CLT proponents may wish to use the word “Trust” as part of the company name. The term “trust” in popular understanding can mean something (such

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<sup>228</sup> See for particular requirements, National Community Land Trust Network (2011c).

as land) that is entrusted to the person as a duty to manage.<sup>229</sup> Understandably, use of the word “trust” may help to convey the idea that a CLT and its Board are entrusted with holding land for the benefit of present and future generations of persons who use the land.

In Australia, debate continues in academic circles as to whether a company limited by guarantee, or other body corporate which is established for a particular charitable purpose, holds its assets in trust.<sup>230</sup> It appears that a gift given to such a company limited by guarantee for a specific purpose may create a trust in the legal sense of the term, whereas a gift to the company limited by guarantee for its general purposes (even if those purposes are charitable) does not necessarily create a trust.

In any event, the Act prevents the term “trust” (and certain other names) from being used in a company’s name, other than by express ministerial consent. A major policy reason for the restriction is because the word “trust” may be likely to mislead persons dealing with the company about the legal nature of the company’s activities.<sup>231</sup>

Where a company limited by guarantee is in fact a trustee of a trust ministerial consent is likely to be given. There is currently a fee of \$1,063.00 that must accompany such an application.

Without ministerial consent, a CLT subject to the Act must not use the word “Trust” in its name.

CLTs intending to incorporate as a company limited by guarantee may like to consider alternative names to “Trust” that convey the wishes that land is to be held for the benefit of present and future generations. For example, the word “Stewardship” and “Custodian” are not names that require ministerial consent. For present purposes we have assumed that the company name in the precedent constitution is “XXX Community Land”.

A company limited by guarantee is entitled under the Act to have the word “Limited” deleted from its name under certain circumstances. See comments above.

For present purposes we will assume that the word “Limited” is not intended to form part of the name.

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<sup>229</sup> Butler (1997); see also discussion on “trusterty” in International Independence Institute (1972).

<sup>230</sup> See for example Dal Pont (2010, pp 476 – 486).

<sup>231</sup> ASIC provides an *Information Guide* to assist applicants to request consent for registration of a company name that would otherwise be unavailable without ministerial consent.

## 1.1 Replaceable rules and constitution

The Act provides for “replaceable rules”. Replaceable rules in effect act as a default rule in the absence of a mandatory rule in a company’s constitution. A company’s constitution can displace some of the replaceable rules.<sup>232</sup>

Effectively, the constitution at clause 1.1 is expressed to be the rules of the CLT; the replaceable rules do not apply.

## 1.2 Definitions and interpretation

You will see that the definition of “Member” comprises both “Resident Members” and “General Members”. These membership categories are further defined as being a person who resides in housing owned or co-owned by the company, and a person who is admitted by the normal application in an admission process respectively.

Practice in the US is to use a General Member category to bring skills to the Board of a CLT that may not be present with the Resident Members. The General Members also help the CLT to engage with the community beyond those persons using its land.

CLTs that are “charitable institutions” will need to demonstrate that they act for the “public benefit”. This requirement is taken to mean the charitable institution does not act for the benefit of its members only.<sup>233</sup>

A General Membership category may help to bring wider community expectations to the CLT and prevent the CLT from being in existence only for present Lessee Members.

On the other hand there is an understandable concern that Lessee Members would not want their use of the land to be circumscribed by persons who have become General Members and were not sympathetic to the aims of the CLT. These are issues that developers of CLTs may need to address depending on the communities in which they operate.

It is worth bearing in mind that General Members must apply for admission to the CLT and gain approval of the CLT Board. It is conceivable the CLT Board could create a membership selection criterion that for example, requires a prospective General Member to make a “statement of commitment” or to undertake a training course in CLTs.

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<sup>232</sup> *Corporations Act 2001* (Cth) ss125 and 135.

<sup>233</sup> See Chapter 6 “Tax treatment” under the heading “Charitable Institutions” for discussion.

### 1.3 Principal Purpose

The Act does not require a company limited by guarantee constitution to include an “objects” clause however in practice, an object clause will be needed. The objects clause states the reason for the existence of the company limited by guarantee.<sup>234</sup> The clause will be required if CLT proponents wish to apply to the ATO for tax concessions or DGR endorsement.

It is worth giving some consideration to describing the “true, main, dominant or paramount purpose”<sup>235</sup> of the CLT in its objects. We call this paramount purpose the “Principal Purpose” in the constitution.

The Principal Purpose is in effect the reason for the existence of the CLT. This section may involve much discussion and brainstorming amongst CLT proponents.

Care is needed in drafting the Principal Purpose to ensure that it meets:

- the wishes of CLT proponents
- the requirements of persons who may use land owned by the CLT
- ATO requirements for income tax exemption and (if necessary) potential DGR endorsement.

Please refer to Chapter 6 in relation to tax exemptions for further information.

It may be useful to also involve a qualified person with experience in ATO requirements for income tax exemption and DGR endorsement in discussions.

It is useful to specify separately from the Principal Purpose, the activities that the CLT may undertake in furtherance of that Principal Purpose. This will give the CLT board and members and supporters an indication of what the Community Limited by Guarantee (CLG) actually does and help keep focus. Importantly it will also give the ATO and other government agencies

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<sup>234</sup> See definitions of “objects” and “purpose” in ATO Tax Ruling TR 2011/4; “Objects” are written statements of purpose in a company constitution and “purposes” are the purposes of the company in reality, as judged by relevant circumstances. Ideally the “purposes” should be consistent with the “objects”. We use the ATO definitions in this commentary.

<sup>235</sup> *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited* (2008) 236 CLR 204 at [18]; see also *HA Stevenson & Son Ltd (in liq) v Gillanders, Arbuthnot & CO* [1931] HCA 4.

an understanding of the CLTs activities to help assess its entitlement to tax concessions.

#### **1.4 The Principal Purpose is Charitable**

This clause is necessary to comply with requirements to have the word “Limited” deleted from the CLT name. Once again it is important that the Principal Purpose is defined in a way which corresponds to the law relating to charitable entities.

#### **1.5 Application of Income and Property**

This clause (colloquially known as the “non profit clause”) combines requirements of the ATO and ASIC to ensure that the CLT is not established to provide profit to its members. This clause incorporates the standard ATO non profit clause which is:

“The assets and income of the organisation shall be applied solely in furtherance of its above mentioned objects and no portion shall be distributed directly or indirectly to the members of the organisation except as bone fide compensation for services rendered or expenses incurred on behalf of the organisation.”<sup>236</sup>

The constitution clause also permits payment to members and directors for reimbursement of out of pocket expenses and services rendered in a professional capacity to the CLT. In Australia there is a growing practice of not for profit companies to pay directors for their services as directors of companies limited by guarantee. If a CLT does want to remunerate directors it will not be able to dispense with the word “Limited” in the company name.

#### **1.6 Liability of Members**

Clause 1.6 defines the “guaranteed amount” which for present purposes is \$50.00. Otherwise this clause should be self explanatory.

#### **1.7 Contribution of Members on Winding Up**

Members of a company limited by guarantee must undertake to pay a certain sum in the event that the CLT is unable to meet claims of its creditors.<sup>237</sup> The liability to pay the guaranteed amount rests with:

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<sup>236</sup> Australian Tax Office (2007, p6).

<sup>237</sup> *Corporations Act 2001* (Cth), s517.

- persons who are members at the commencement of the winding up (“the present members”); and
- (where the present members are unable to meet the CLT’s liabilities), persons who have been members within a year before commencement of the winding up.<sup>238</sup>

In practice the amount of the guarantee is nominal such as \$50.00. Given the insistence by financial institutions for directors to provide personal guarantees for a loan to a CLG, it may be worth considering increasing the members guarantee to a more substantial amount.

It is important to note also that the guarantee applies only to persons in their capacity as a Member (and not for example in their capacity as a lessee.)

### **1.8 Distribution of Assets of Revocation of Endorsement**

This clause is drafted based on the assumption that the company limited by guarantee will be seeking tax deductible donations by becoming endorsed as a DGR. Not all CLTs may meet or possibly even want DGR endorsement. For further information on DGR endorsement, see Chapter 6 of this Manual “Tax treatment”.

Clause 1.8 incorporates standard ATO requirements<sup>239</sup> for DGR endorsement of an organisation as a whole. The clause applies where the company limited by guarantee may continue to exist but its DGR endorsement is revoked. At this point the company limited by guarantee must distribute its gifts and contributions to a similarly endorsed organisation.

### **1.9 Distribution of assets on winding up**

This clause is also drafted primarily with the requirements of the ATO in mind.<sup>240</sup> It effectively prevents assets of the company limited by guarantee from being distributed to members should the company be wound up. Instead assets must be distributed to a similar organisation that is endorsed by the ATO.

Arguably this clause may also prevent action by a Lessee Member seeking to wind up the CLT as a means to gain access and eventual ownership of land upon which the Lessee Member’s lease applies.

## **2 Membership**

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<sup>238</sup> See *Corporations Act 2001* (Cth), part 5.6 division 2.

<sup>239</sup> Australian Tax Office (2011, p60).

<sup>240</sup> Australian Tax Office (2011, p60).

A common practice for CLTs in the US is to encourage a wide community support base by specifying different membership classes. Such classes for example include “Lessee Member” and “General Member”.

You will see from clause 2.1 that a Lessee Member is automatically a member of the CLT upon executing a lease of land or housing with the company. In other words, a Lessee Member need not formally apply to the CLT for admission as a member. However as a “member” a Lessee Member must abide by terms of this constitution.

It is important to distinguish between rights of the Lessee Member as a member and rights of a Lessee under the terms of their lease. For example a Lessee Member subject to the disciplinary process described at clause 2.4 of the constitution may need to follow that process, as distinct from a process under the lease.<sup>241</sup>

On the other hand a Lessee Member with a grievance with the Company arising under the lease would need to pursue any grievance process available to it under that lease or other rights as a lessee available at law.

## **2.2 Eligibility, Application and Admission**

This clause applies to General Members only. Any person may apply to become a General Member of the CLT. The words “any natural person committed to...” indicate that the Board may choose to decline an application where in their discretion they believe a person is not committed to the Principal Purpose.

## **2.3 Register of Members**

Note that both a Lessee Member and a General Member must have their names entered on the register of members by the secretary. Whilst this may appear a troublesome formality, it is important to ensure all Members are properly recorded on the Member Register. It is the Member Register to which one turns to determine a person’s eligibility to vote and for the address for Member notices.

## **2.4 Discipline of Members**

This clause describes how CLT members may be disciplined. Importantly at section 2.4(b) are the words “intend to consider a resolution”. These words convey the idea that CLT directors have not yet decided to expel or suspend

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<sup>241</sup> See generally Chapter 7 “The CLT lease”.

a member prior to the member having an opportunity to explain their case. The reason for this is to prevent perceived bias in the CLT directors against the member subject to a complaint.

CLT proponents may wish to discuss how grievances and discipline of members is to be addressed.

## **2.5 Cessation of Membership**

A Lessee Member automatically ceases their entitlement to be a member of the CLT when their lease expires. However it is conceivable that a person who had been a Lessee Member may choose to apply to be a General Member if they so chose.

A potential issue arises that a Lessee Member could be expelled or suspended as a Member of the CLT under the disciplinary process, yet still remain a lessee under the lease. Whilst this may create difficulties it seems preferable to the situation where a Lessee Member remains entitled to automatic CLT membership for the duration of their lease, regardless of their behaviour as a Member.

We think the following clauses are straightforward:

- 3.0 Patron**
- 4.1 Annual General Meeting**
- 4.2 Convening General Meetings**
- 4.3 Notice of General Meetings**
- 4.4 Chair of General Meetings**
- 4.5 Quorum for General Meetings**
- 4.6 Adjournment of General Meetings**
- 4.7 Voting at General Meetings**
- 4.8 Proxies**

Regarding a quorum, CLT proponents may wish to consider whether a certain percentage of each membership class needs to be present eg. a certain number of Lessee Members and a certain number of General Members.

## **5 Directors**

Without wishing to deter persons from sitting on a CLT Board it is worth considering a director's responsibilities. A useful publication is that produced by ASIC entitled *Your company and the law*. The case below also lists helpfully Directors responsibilities regarding financial reporting.

**Directors’ responsibilities: Australian Securities and Investments Commission v Healey<sup>242</sup>**

This case concerned action against certain directors of a for profit company under section 180(1) of the *Corporations Act 2001*. This section of the Act requires directors or other officers of a company including a CLG to discharge their duties with the degree of care and diligence that a “reasonable person” would exercise.

Justice Middleton summarised that director’s duties include:

- having a rudimentary understanding of the company business and its business fundamentals;
- keeping informed about company activities; whilst not required to have a detailed awareness of day-to-day activities, a director should monitor company affairs and policies;
- being familiar with company financial status by regular review and understanding of financial statements;
- having a questioning mind.

The 2007 annual reports of the companies in which the directors served failed to disclose significant matters. In summing up, Justice Middleton stated that he considered the directors to be intelligent, experienced and conscientious people. His Honour further stated that there was no suggestion that each director did not honestly carry out his responsibilities as a director. Despite His Honour’s observations, Justice Middleton found that the directors had contravened section 180(1).

## 5.1 Appointment and Removal of Directors

The number of directors is stated to be not less than 12. This is the “standard” board size for CLTs in the United States. The reason for this size is to permit three separate categories of directors. Under the Act there must be at least three directors.

At clause 5.1 (b) there are 12 directors each comprising four Lessee Directors, four General Directors and four Public Directors. The Lessee Directors are appointed only by Lessee Members, the General Directors are appointed only by General Members. The Public Directors are appointed by both Lessee Members and General Members.

It is important for CLT proponents to note that persons appointed to the Board are required under the Act to act “in the best interests of the company as a whole”. That is Directors do not sit on the Board in a representative capacity to serve the interests of a particular group of

<sup>242</sup> [2011] FCA 717.

members. The intention of the three separate categories of Directors accordingly cannot be to gain representation on the Board for a particular membership class.

Despite this it remains useful for many (possibly divergent) views to be expressed at Board level. Ultimately though, all Board directors when called to make a decision will need to do so with the interests of the CLG generally in mind, rather than the interests of a particular class of member.

The US 2011 CLT Technical Manual precedent constitution contains in effect, a position description for the Chair, Vice Chair, Treasurer and Secretary. Whilst it is important for the Board members to understand their roles this position description need not be placed within the constitution.

Instead a position description can be prepared and approved by the Board itself. The advantage of this latter approach is that the position descriptions can be amended from time to time by the Board without amending the entire constitution. Ideally the position descriptions should be provided to director nominees so they may give informed consent to taking a place on the Board.

We think the following clauses are straightforward:

**5.2 Vacancies**

**5.3 Defects in Appointment of Directors**

**5.4 Rotation of Directors**

## **5.5 Powers and Duties of Directors**

This clause specifically empowers the Board to acquire parcels of land with or without buildings and to enter into lease agreements where to do so will further the Principal Purpose of the company.

## **5.6 Limitation on Powers of the Board**

Major decisions regarding sale and mortgage of land owned by the CLG and establishment or alteration of the reversion formula must also be approved by members in general meeting. That is, without member approval, the Board cannot sell or mortgage land owned by the CLT even if the Board has itself made such a decision.

## **5.7 Meetings of Directors**

Meetings of the Board are open to all Members who wish to attend with the exception of meetings deemed to be “executive sessions”. Whilst it is

unusual practice in Australia for boards of not for profit organisations to hold their meetings openly for all Members to attend, the policy for CLTs in the US is different.

Part of the reason for having CLT Board meetings open to all Members is so that the Board is open to some scrutiny.

Also an open board meeting can help to demystify the operation of board meetings and possibly attract nominations from members to take a board seat at the next Annual General Meeting.

But just in case the board may feel it is under too much scrutiny it does have power to hold an executive session to the exclusion of members when they wish to consider the matters described at clause 5.7(c).

These matters include sensitive discussions on land acquisition and leases.

We think the following clauses are straightforward:

- 5.8 Convening Meetings of Directors**
- 5.9 Quorum for Directors Meetings**
- 5.10 Chair and Office Bearers**
- 5.11 Voting at Directors Meetings**
- 5.12 Delegation of Powers**
- 5.13 Electronic Meetings of Directors**
- 5.14 Circulating Resolutions**
- 5.15 Directors Conflicts of Interest**

It is worth considering section 191 of the Act relating to disclosure of interest by directors.

That disclosure should be recorded in minutes of the CLG board meetings, where payments may be made to directors or members for out of pocket expenses or for services rendered.

## **6 Administration**

We think the following clauses are straightforward:

- 6.1 Minutes**
- 6.2 Accounts**
- 6.3 Audit**
- 6.4 Inspection of Records**
- 6.5 Execution of Documents**

## 6.6 Bylaws

It is useful to state that directors have power to approve bylaws. This is to help avoid a contest that the bylaws do not form part of the statutory contract binding members to the company.<sup>243</sup>

The bylaws may be a means by which CLTs can refine their land acquisition and leasing eligibility policies. It is important for CLT proponents to bear in mind that any bylaws are not inconsistent with the constitution. An example of one by law may be to conform to government funding expectations.

In Western Australia for example the *Keystart* lending arm for the WA Government has certain eligibility criteria for making loans to provide affordable home ownership.<sup>244</sup> Whether a CLT needs to make bylaws of this nature may depend on negotiations with funding providers.

## 6.7 Stewardship of Land

This clause contains both a statement of principles that the board must take into account at sub section (a) and a mandatory process regarding decisions to mortgage or sell the property owned by the company limited by guarantee.

This mandatory process includes approval by two-thirds of the entire board and approval by 75 per cent of members entitled to vote in a general meeting. The requirement for a 75 per cent majority of members effectively makes the decision a “special resolution” under the *Corporations Act 2001*.<sup>245</sup>

This approval process regarding mortgage and sale of land may seem onerous. On the other hand, it may be seen as an essential safeguard to prevent hasty decisions that may affect the company limited by guarantee’s Principal Purpose.

## 6.8 Reversion Formula

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<sup>243</sup> The by-laws have been described as a “consensual compact” which do not create contractually binding rights and duties: *Wilcox v Kogarah Golf Club Ltd* (1996) 14 ACLC 415; but see *Carter v NSW Netball Association* [2004] NSWSC 737.

<sup>244</sup> Keystart Country (2010).

<sup>245</sup> *Corporations Act 2001* (Cth) s9 provides a definition and notice requirements for a “special resolution”.

Any lease or co-ownership document must include a reversion formula. This clause also sets out some principles upon which a reversion formula must be based. These two principles are that:

- the Resident receives a price based on the value that the Resident has invested in the housing and
- the Resident is limited to a price that is something less than that of full market value (in order to preserve affordability).

The reversion formula itself may be of several different options. These are discussed at Chapter 8 “Reversion formulas”. The setting of a reversion formula is expressed at clause 5.6 to be subject to approval of members in general meeting. Reflective of the seriousness of the decision, the members’ approval must be by special resolution (i.e. no less than 75 per cent of members entitled to vote must approve the resolution).

It is conceivable that a reversion formula could be explicitly specified in the constitution. The process to amend the constitution (see below) to change the reversion formula is similar to the reversion formula approval process under clause 5.6.

## **6.9 Alteration of Constitution**

The constitution cannot be altered except by a vote in favour of the amendments by no less than 75 per cent of members entitled to vote at a general meeting.

We think the following clauses are straightforward:

**6.10 Notices**

**6.11 Officers: Indemnities and Insurance**

**6.12 Winding up**

**Appendix 1 Membership Application**

**Appendix 2 Proxy form**

## **Other clauses**

Drafting a company limited by guarantee constitution may require additional clauses, depending on governance and membership requirements, or intended tax status. We recommend that CLT proponents consult with their legal advisors on additional clauses.

## 18 Appendix 8 – Exemptions to Residential Tenancy legislation for Australian jurisdictions

Louise Crabtree  
Hazel Blunden

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### 18.1 ACT

#### Residential Tenancies Act 1997

No reference to duration, so falls under Residential Tenancies Act (RTA). There are exemptions in the Act that could be favourably used by a CLT.

#### RESIDENTIAL TENANCIES ACT 1997 - SECT 4

##### Application of Act

This Act does not apply in relation to —

- a) a retirement village containing a complex of residential premises (whether or not including hostel units) established mainly for occupation by people who are at least 55 years old under a scheme in which a person makes a payment (including a gift) to the entity administering the scheme in consideration for being admitted as a resident of the complex; or
- b) a nursing home or hostel for aged or disabled people conducted by an eligible organisation under the *Aged or Disabled Persons Care Act 1954 (Cwlth)*; or
- c) premises prescribed by regulation.

##### Note 1

The Minister can grant exemptions to the Act for premises prescribed by regulation. In the ACT, the Crown can grant 99-year leases. However a landlord may not be able to.

**Conclusion: Legislative and regulatory change required if landlord is other than ACT Government.**

## 18.2 NSW

### Residential Tenancies Act 2010 No 42

Current version for 6 January 2012 to date (accessed 2 March 2012 at 16:07). There are exemptions in the Act that could be favourably used by a CLT.

#### Part 1 Division 2 Section 8

### 8 Agreements to which Act does not apply

- (1) This Act does not apply to the following agreements:
- a) occupation agreements to which the Holiday Parks (Long-term Casual Occupation) Act 2002 applies,
  - b) residence contracts within the meaning of the Retirement Villages Act 1999,
  - c) an agreement under which a person boards or lodges with another person,
  - d) an agreement under which a person resides in refuge or crisis accommodation of a kind prescribed by the regulations,
  - e) leases and licences under the Crown Lands Act 1989, the Western Lands Act 1901 or the Crown Lands (Continued Tenures) Act 1989,
  - f) an agreement for the sale of land that confers a right to occupy residential premises on a party to the agreement,
  - g) an agreement that arises under a term of a mortgage and confers a right to occupy residential premises on a party to the mortgage,
  - h) an agreement made for the purpose of giving a person the right to occupy residential premises for a period of not more than 3 months for the purpose of a holiday,
  - i) an agreement that arises under a company title scheme under which a group of adjoining or adjacent premises is owned or leased by a corporation each of whose shareholders has, by virtue of his or her shares, an exclusive right to occupy one or more of the residential premises,
  - j) an agreement having a term, together with the term of any further agreement that may be granted under an option in respect of it, that is equal to or exceeds 99 years.

A long term lease of 99 years plus is exempted from the operations of the RTA and would fall under the Conveyancing Act. The Conveyancing Act does mention leases and sets out implied terms where there is no provision in the lease such as the payment of rent, right for annual landlord inspection etc.

**Conclusion: Leases of 99+ years fall outside the RTA. No legislative change required.**

## **18.3 Northern Territory**

There are exemptions in the Act that could be favourably used by a CLT.

### **RESIDENTIAL TENANCIES ACT – SECT 6**

#### **Agreements to which this Act does not apply**

This Act does not apply to an agreement:

- a) under which a person occupies, or it is intended a person will occupy, premises provided for the purposes of holiday accommodation;
- b) under which no rent is payable in return for the granting of a right to occupy premises for the purpose of residence;
- c) under which no rent is payable and services are provided in return for the granting of a right to occupy premises for the purpose of residence;
- d) for sale of premises granting to a party to the agreement a right to occupy the premises;
- e) arising under a scheme in which:
  - i. a complex of adjacent premises is owned by a company; and
  - ii. the premises are let by the company to persons who jointly have a controlling interest in the company;
- f) in respect of premises provided for the use of homeless, unemployed or disadvantaged persons for charitable purposes or for the purposes of providing emergency shelter or accommodation;
- g) made between family members or friends under which a nominal rent is charged if the parties do not intend to create a tenancy agreement to which this Act applies; or
- h) under which a person occupies or is intended to occupy a caravan, or a mobile home, that is in a caravan park.

### **RESIDENTIAL TENANCIES ACT – SECT 7**

#### **Exemptions**

- (1) The Minister may, by notice in the Gazette:
  - a) exempt tenancy agreements of a specified class from all or any of the provisions of this Act or the Regulations; or
  - b) modify specified provisions of this Act or the Regulations in their application to a specified class of tenancy agreements or a specified class of premises.

There seems to be two avenues to avoid the RTA NT – firstly, by not requiring payment of rental as per s.6 (b) and secondly, by providing housing to disadvantaged persons for the purpose of accommodation 6 (f). However in respect of 6 (b) if another charge was levied (a premium and an amount equivalent to ‘ground rent’) this would be found to be contracting outside the Act as section 24 prohibits extra costs other than rent and bond. In respect of section 6 (f), the wording may be interpreted to mean for emergency accommodation only.

Section 7 allows that exemptions for tenancies ‘of a certain class’ can be granted by the Minister via regulation (gazettal). This may however imply legislative change to create a class of tenancy called CLT tenancy.

**Conclusion: Legislative and regulatory change might be needed. Section 6(f) needs local legal opinion re possible charitable status of CLTs.**

## 18.4 Queensland

### RESIDENTIAL TENANCIES ACT 1994 Act No. 86 of 1994

No reference to duration, so falls under the RTA. However, there are exemptions in the Act that could be favourably used by a CLT. A regulation under section 20 may declare that this Act does not apply to an agreement. This would mean a Minister via gazettal could exempt certain tenancy agreement(s) from the Act.

In addition the Act does not apply to a lease given by the State under certain other Acts. Specifically under section 16 the South Bank Corporation is allowed to grant leases of 100 years or more that are not subject to the Act. Some leases can be governed by the Property Act.

### 17 Application of Property Law Act to agreements

(1) The Property Law Act 1974 does not apply to residential tenancy agreements.

(2) However, a regulation may declare that the Property Law Act 1974, or a provision of that Act, applies, or applies with prescribed changes, to residential tenancy agreements or a particular type of residential tenancy agreement.

(3) Nothing in subsection (1) affects the application of the Property Law Act 1974 to an agreement about a tenancy if the agreement is not a residential tenancy agreement.

Further:

## **20 Changes to Act's application**

A regulation may declare that this Act, or a provision of this Act, does not apply to, or applies with prescribed changes to, any of the following:

- a) residential tenancy agreements;
- b) residential premises;
- c) entities.

A regulation could specify that an entity such as a CLT be exempt from the Act and/or fall under the Property Act instead of the RTA.

**Conclusion: regulatory change needed.**

## **18.5 South Australia**

### **South Australia Residential Tenancies Act 1995**

No reference to duration, so falls under the RTA. However an exemption from the Act can be made for a prescribed agreement or an agreement of a prescribed class via change to regulation:

#### **118—Exemptions**

The Minister may, by order published in the Gazette—

- a) exempt agreements, or premises, of a specified class from the provisions, or specified provisions, of this Act; or
- b) modify specified provisions of this Act in their application to a specified class of agreements or a specified class of premises; or
- c) vary or revoke an order previously made by the Minister under this section.

**Conclusion: regulatory change needed.**

## **18.6 Tasmania**

### **RESIDENTIAL TENANCY ACT 1997**

Section 6 (2) allows certain exemptions:

(2) This Act does not apply to any of the following:

- a) any part of a hotel or motel that is not boarding premises;
- b) any premises ordinarily used for holiday purposes;
- c) any boarding premises located in a building containing less than 3 boarding premises where –
  - i. the owner occupies the same building as a principal place of residence; or
  - ii. the tenant occupies the building as a principal place of residence and sub-lets the boarding premises;
- d) any part of a hospital or nursing home;
- e) any part of a club;
- f) any premises used to provide residential care, within the meaning of the Aged Care Act 1997 of the Commonwealth;
- g) any premises in respect of which a memorandum of lease is registered under the Land Titles Act 1980.
- h) a residential tenancy agreement that is a residence contract within the meaning of the Retirement Villages Act 2004;

Section 6 (2) (g) refers to where there is a memorandum of lease registered under the Land Titles Act 1980. If we look at this Act, it states:

#### **Division 4 - Leases 64. Leases**

(1) The registered proprietor of land may lease it for any term exceeding 3 years by a memorandum of lease in an approved form.

Therefore leases of more than 3 year terms fall outside the Tasmanian RTA and are regulated by the Land Titles Act 1980. This Act discusses leases and imposes some minimum responsibilities of lessee to pay rent and remedy certain breaches but is much less prescriptive.

**Conclusion: Leases of 3+ years fall outside the RTA. No legislative change required.**

## **18.7 Victoria**

The Victorian RTA excludes leases of over 5 years where this is a fixed term and no termination is allowed within the first five years (other than for breach of agreement).

#### **Residential Tenancies Act 1997 – SECT 6**

Tenancy agreements exceeding 5 years

6. Tenancy agreements exceeding 5 years

(1) This Act does not apply to a tenancy agreement that is a fixed term tenancy agreement if -

- a) the fixed term exceeds 5 years; and
- b) the agreement does not include a provision enabling the landlord or the tenant to determine the agreement by notice (otherwise than on the grounds of a breach of the agreement) before the end of 5 years after the agreement is made.

In addition should any tenancy fall under the landlord and Tenant Act 1958, leases of three years or more are excluded:

**Landlord and Tenant Act 1958 – SECT 48**

Leases in writing for three years or more not to be subject to this Part

48. Leases in writing for three years or more not to be subject to this Part

(1) Where a lease in writing for a term of not less than three years is entered into in respect of any prescribed premises -

- a) the provisions of Divisions two, three and four of this Part (other than sections one hundred and one and one hundred and seventeen of this Act) shall not apply with respect to that lease of the premises; and
- b) except as hereinafter provided on the commencement in occupation of the term granted by the lease the premises shall cease to be prescribed premises and to be subject to the provisions of the said Divisions of this Part.

In Victoria a lease of 5+ years would appear to fall outside of the RTA. It would then fall under the Landlord and Tenant Act but not subject to Divisions 2, 3 or 4 of PART V – CONTROL OF RENTS AND RECOVERY OF POSSESSION. Such a lease may come under the Property Law Act 1958 and Transfer of Land Act 1958,s.67 both of which specify minimum implied terms of a lease (such as payment of rent, yearly inspections by landlord, duty of lessee to keep in good repair, etc).

**Conclusion: leases of 5+ years with restrictions on termination during the first five years fall outside of the RTA. No legislative change required unless the five year restriction is deemed inappropriate.**

## 18.8 Western Australia

### RESIDENTIAL TENANCIES ACT 1987

No reference to duration, so falls under RTA. However section 5 (3) allows certain exemptions:

- (3) This Act does not apply to or in relation to —
- a) any part of a hotel or motel;
  - b) any part of an educational institution, college, hospital or nursing home;
  - c) any premises used for the purposes of a club;
  - d) any premises used as a home for aged or disabled persons by an eligible organization within the meaning of the Aged or Disabled Persons Homes Act 1954 of the Commonwealth Parliament;
  - e) any prescribed premises or premises of a prescribed class.

5 (3) (e) suggests a regulation change may be required.

**Conclusion: requires legislative and regulatory change.**

## 18.9 Summary

**ACT:** Legislative and regulatory change required if landlord is other than ACT Government.

**NSW:** Leases of 99+ years fall outside the RTA. No legislative change required.

**NT:** Legislative and regulatory change needed.

**QLD:** Regulatory change needed.

**SA:** Regulatory change needed.

**TAS:** Leases of 3+ years fall outside the RTA. No legislative change required.

**VIC:** Leases of 5+ years fall outside the RTA. No legislative change required.

**WA:** Legislative and regulatory change needed.

