

**DL CFP 2009**



**Australian Government**  
**Australian Taxation Office**

Mr Michael Myers  
368 Montague Road  
West End  
BRISBANE QLD 4001

Our reference: S&M/ALB/6312421  
Receipt Number:  
Contact officer: Pat Nichols  
Telephone: 13 28 69  
Facsimile: 02-60587646  
Your reference:  
E-Mail: Pat.Nichols@ato.gov.au

28 August 2009

Dear Sir

On 27 July 2009, you applied for a private ruling on behalf of QUEENSLAND AFFORDABLE HOUSING CONSORTIUM LTD relating to whether multiple non-entity joint ventures exist. This is our response, which contains:

- your *Notice of private ruling*
- the reasons for our decision
- fact sheet(s) giving information about private rulings including how to have the decision reviewed by objecting
- an edited version of your ruling that we will publish on our website.

You have:

- 60 days to object to the private ruling if you disagree with it and have not had an assessment for the relevant period, and
- 28 days to comment on the edited version.

Please see *Private rulings* fact sheet(s) for more information.

## **Notice of private ruling**

**This ruling applies to:**

QUEENSLAND AFFORDABLE HOUSING  
CONSORTIUM LTD (QAHC)

TFN: 886562949

**Issue 1:**

**Questions:**

If the entity (QAHC) enters into more than one identical "The Affordable Housing Consortium – Head Lease" with the same or different owners of Approved Rental Dwellings, does this arrangement constitute only one "non-entity Joint Venture" as defined in subsection 995-1(1) of the *Income Tax Assessment Act 1997*?

**Answers:**

If the entity (QAHC) enters into more than one identical "The Affordable Housing Consortium – Head Lease" with the same or different owners of Approved Rental Dwellings, does this arrangement constitute only one "non-entity Joint Venture" as defined in subsection 995-1(1) of the *Income Tax Assessment Act 1997*?

No

**This ruling applies for the following period(s):**

Year ended 30 June 2010  
Year ended 30 June 2011  
Year ended 30 June 2012

**The scheme commences on:**

1 July 2009

**Relevant facts and circumstances**

*This ruling is based on the facts stated in the description of the scheme that is set out below. If your circumstances are materially different from these facts, this ruling has no effect and you cannot rely on it. The fact sheet has more information about relying on your private ruling.*

The Queensland Affordable Housing Consortium (QAHC) is a not for profit company limited by guarantee.

It has been established to deliver affordable housing.

Its Board of Directors has been nominated by the Company's principal stakeholders:

- The Urban Development Institute of Australia (Qld)
- The Local Government Association of Queensland
- Queensland Community Housing Coalition Ltd

QAHC has been endorsed as a charity.

Membership of the Consortium is based on the partnership Model.

The key features that the model illustrates are:

- Private development and ownership of NRAS stock
- A Headlease agreement between the owner and consortium
- The passing through of rent payments to the owner of the NRA dwelling

- The output arrangements for the refundable tax offset to reflect the ownership and derived rent arrangements [meaning in practice that the consortium partnership arrangement creates the necessary entitlement for owner/investors access to the refundable tax offset].
- The provision of housing management services through a third party.

#### **Main terms of Headlease supplied 4 August 2009**

Definitions – Consortium means Queensland Affordable Housing Consortium Ltd and each administrator, successor.....

Clause 3.1 - The Owner leases to the Consortium the Approved Rental Dwelling together with the right to the use of the Common Property for the Term of the Lease and in accordance with the provisions of the Lease.

Clause 3.2 - The Owner acknowledges that the Lease is granted to the Consortium pursuant to the Act and the Scheme with the understanding that the Consortium will sublease the Approved Rental Dwelling to an NRAS approved Residential Tenant under a Residential Tenancy Agreement. The Owner hereby authorizes the Consortium to provide a sublease of the Approved Rental Dwelling to any Residential Tenant on such terms as the Consortium may, in its absolute discretion, see fit.

Clause 4.1 - The parties agree that it is their intention to together constitute a Non-Entity Joint Venture. The Owner irrevocably authorises the Consortium to apply on behalf of the Non-Entity Joint Venture, to which the Owner is a party, for an allocation and otherwise to do all things incidental to the application. The Owner releases the Consortium from any obligation it may have for breach of fiduciary duty including any conflict of interest.

Clause 4.2 - The Consortium, as the entity administering the Non-Entity Joint Venture, has received an allocation for the Approved Rental Dwelling for the respective incentive period listed at Item 3 of Schedule 2 which allocation is subject to the conditions listed at Schedule 1A and Schedule 1B;

Clause 4.3 - The Owner recognises that the Registration of this Lease under the *Land Titles Act 1994 (Qld)* is a condition of the allocation and the Owner must do all things necessary to enable the Lease to be registered.

Clause 5.4 (a) - If the Owner wishes to sell the Approved Rental Dwelling subject to the terms of the Lease it must:

- i. Notify the Consortium in writing six months prior to proposed sale date that it wishes to sell the Approved Rental Dwelling.
- ii. Obtain the consent of the Consortium. The Consortium's consent will not be withheld where the transferee owner has undertaken to perform all of the obligations of the Owner in respect of the Approved Rental Dwelling. Such undertaking will include the Owner's obligations pursuant to the Property Management Agreement and shall be to the absolute satisfaction of the Consortium.
- iii. Comply with the Act ; and

- iv. Upon execution, the Owner must deliver upon the Consortium the terms of any contract of sale detailing the Owner as transferor and the Incoming owner, as transferee.

Clause 11 - The Owner must at its own expense, and to the satisfaction of the Consortium, throughout the Term maintain the insurance policy offered by the Consortium's nominated insurer, in the name of the Consortium, with the Owner noted as an interested party (for the Owner's respective interests), which insurance policy may vary from time to time, and may include the following insurances: (types listed)

Clause 12.1 - The Owner appoints irrevocably for the term of this Lease the Consortium as its agent for the purpose of:

- (a) exercising the right to vary or terminate any Property Management Agreement with a Property Manager.
- (b) exclusively dealing with the Australian Government and Queensland State Government in respect of all matters concerning the Approved Rental Dwelling, the Non-Entity Joint Venture constituted by this Lease, the allocation and the Act; and
- (c) exercising all of the rights that may be exercised by the Owner at law, in equity or by statute in respect of the Approved Rental Dwelling.

Clause 13 (e) - The Consortium is not responsible for the repair, whether structural or otherwise, or maintenance of the Approved Rental Dwelling and is not responsible for ensuring the Property Manager accords with its obligations pursuant to the Property Management Agreement.

Clause 15.1 - The Owner permits the Consortium to occupy and use the Approved rental Dwelling throughout the Term without any interruption or disturbance by the Owner, except where the Owner is required by common law, equity or statute to interrupt the Consortium's quiet enjoyment.

Clause 15.2 - The Owner must ensure:

- (a) the Approved Rental Dwelling and inclusions are clean;
- (b) the Approved Rental Dwelling is fit for the Residential Tenant to live in;
- (c) the Approved Rental Dwelling and inclusions are in good repair;
- (d) the Owner is not in breach of a law dealing with issues about the health or safety of persons using or entering the Approved Rental Dwelling; and
- (e) that both it and the Approved Rental Dwelling meet all building requirements of the local and state authorities.

Clause 15.4 - The Owner must use reasonable endeavours to keep the Approved Rental Dwelling in good repair, including structural repair, and attend to any repair and maintenance in

accordance with the Legislative Requirements and otherwise at common law, in equity and by statute.

Clause 16.1 - The Owner acknowledges that it has reached a separate agreement with the Property Manager in respect of repairs (including structural repairs), maintenance and damage to the Approved Rental Dwelling in the form of the Property Management Agreement and shall hold the Consortium fully indemnified in respect of such repairs, maintenance and damage. To the extent permissible at law, the Consortium shall not be required to effect any repairs (including structural repairs) or maintenance to the Approved Rental Dwelling, which repairs and maintenance shall remain the sole responsibility of the Owner and the Property Manager and the lessee's covenants to repair imposed pursuant to the *Property Law Act 1974* are herein displaced. The Consortium may, but is not obliged to, undertake any repairs or maintenance to the Approved Rental Dwelling that the Consortium, in its absolute discretion, considers necessary to offer a sublease of the Approved Rental Dwelling to a Residential Tenant or to otherwise comply with the Act.

Clause 17.4 The Owner releases and indemnifies the Consortium and keeps the Consortium released and indemnified, in respect of and against any Claim or Costs arising directly or indirectly from any circumstances, for which the Consortium, its officers, agents or employees may be or become liable whether in contract, tort, by statute or otherwise, in respect of this Lease and whether during or after the Term, including in respect of any loss or damage to property, or injury or death to any person, caused by:

- i. Any act or omission on the part of the Owner, its agents, licensees, employees or contractor (including the Property Manager and contractors of the Property Manager), others under the Owner control, any Residential Tenant, or any invitee of any Residential Tenant; or
- ii. the Consortium's use or occupation of the Approved Rental Dwelling pursuant to this Lease;
- iii. the Property Manager's use of the Approved Rental Dwelling pursuant to the Property Management Agreement;
- iv. the Property Manager's performance under the Property Management Agreement;
- v. any Residential Tenant's use or occupation of the Approved Rental Dwelling;
- vi. any successful claim by any third party in respect of any matter arising from the management of the Building and Approved Rental Dwelling;
- vii. the inability of the Property Manager to let the Approved Rental Dwelling to an Eligible Residential Tenant; or
- viii. for any Costs or Claim the Consortium incurs as a result of any breach of this Lease by the Owner, and for any costs arising as a result of any request for the Owner's consent pursuant to this Lease;

**Assumptions:** None

### **Relevant legislative provisions**

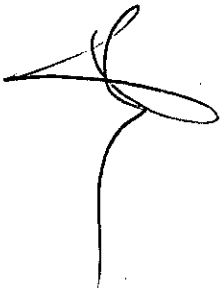
*Income Tax Assessment Act 1997* Subsection 995-1(1)

**More information**

If you have any questions or want to discuss your ruling, please phone **13 28 69** between 8.00am and 5.00pm, Monday to Friday, and ask for Patrick Nichols on extension 87488.

Please have your reference number 6312421 ready to help us to access your case details more quickly.

Yours faithfully  
Mark Konza  
Deputy Commissioner of Taxation

A handwritten signature in black ink, appearing to be 'Mark Konza', written over a horizontal line.

Per  
(Patrick Nichols)

Authorisation Number: 94277  
Authorising Officer: Gregory Tagliabue.

## Reasons for decision

These reasons for decision accompany the Notice of private ruling for QUEENSLAND AFFORDABLE HOUSING CONSORTIUM LTD.

*While these reasons are not part of the private ruling, we provide them to help you to understand how we reached our decision.*

### Issue 1:

#### The Affordable Housing Consortium – Head Lease

A non-entity joint venture is defined in sub-section 995-1(1) Income Tax Assessment Act 1997 (ITAA 1997) as follows:

**non-entity joint venture** means an

arrangement that the Commissioner is satisfied is a contractual arrangement:

(a) under which 2 or more parties undertake an economic activity that is subject to the joint control of the parties; and

(b) that is entered into to obtain individual benefits for the parties, in the form of a share of the output of the arrangement rather than joint or collective profits for all the parties.

The first question is whether the "Affordable Housing Consortium – Head Lease" is a contractual arrangement under which two or more parties undertake an economic activity that is subject to the joint control of the parties.

The Head Lease is a contractual arrangement between two parties when signed by both parties and, in this case, the two parties are the QAHC and an owner of a property.

An economic activity is being undertaken when the owner gives QAHC the right to grant a residential lease to NRAS Eligible Tenants or to be subleased to NRAS Eligible Tenants. This constitutes an economic activity.

Goods and Services Tax Ruling GSTR 2004/2: Goods and services tax: What is a joint venture for GST purposes? gives guidance as to whether there is joint control of this economic activity.

Specifically, the Ruling states:

#### **Joint control**

38. Joint control by the participants is a feature of joint ventures. However, the extent to which each participant can influence the strategy and operations of the venture can vary. The joint venture agreement will specify the nature and extent of the joint control e.g. unanimous consent of the participants. Responsibility for the day to day management of the venture may rest with a manager/operator appointed by the participants. The manager/operator may be one of the participants, or a management company formed by the participants, or a third party.

39. However, although a party may be involved in decision making, it may not necessarily be a joint venture participant. For example, a potential buyer of a building being developed by a joint venture may want to be part of the decision making, for example for quality control purposes and selection of fittings.

The Ruling gives an example of joint control, when 'unanimous consent' is required of the participants. At the other extreme, an example of joint control might include a situation where one party, as in the present case, seems to control all of the day-to-day decisions.

A 100% share of "joint (day-to-day) control", as compared to a 0% of control, is still a "share" (or proportion or fraction) of joint control: see the discussion on "sharing" in paras 16 and 17 of Case C36, 71 ATC 156; and, further, *Barnford v FCT* [2009] FCAFC 66 (subject to appeal); per Emmett J at para 42.

In any event, the owner still maintains some control in that the owner, under the Head Lease, keeps overall responsibility for conducting repairs and maintenance (Clause 13(e)), observing whether there is a need for repairs and maintenance (Clause 15.4), agreeing to the disclaimers of QAHC regarding those repairs and maintenance (Clause 16.1) and any liability for damages in a civil action (Clause 17.4).

The owner has agreed to relinquish its rights to the Consortium to act as the owner's exclusive agent for the term of the lease (Clause 12), provided it receives rental payments from the respective Residential Tenant (Clause 6).

GSTR 2004/2 provides some additional assistance for working out whether QAHC and an owner have entered into a partnership or a joint venture:

51. The following table summarises the common features of a partnership and joint venture to assist in distinguishing between them...

<b>Partnership</b>	<b>Joint Venture</b>
Joint entitlement to profit or income	Sharing of product or output in defined portions
A continuing business	Specific economic project
One partner's actions may bind all of the partners	Joint control of the venture
Partners have indirect undivided interests in the partnership assets (a partner can individually deal with its interest in the partnership but not the underlying partnership assets.)	Well-defined separation of interests, rather than a joint undivided interest, in assets contributed to the venture
Partners in a partnership are agents of the other partners and are ordinarily jointly and severally liable for the expenses of the partnership	Joint venture participants are usually liable for their own debts which they incur individually as principals

The facts overwhelmingly satisfy the elements for a joint venture that are indicated in this table. The owner keeps its ownership of the property that was subject to the lease, ie it is not assigned to anyone (where an assignment means the immediate transfer of an existing proprietary right, vested or contingent, from the assignor to the assignee: *Norman v Federal Commissioner of Taxation* (1962) 109 CLR 9 at 26 per Windeyer J), and when the lease ends, the leasehold should be returned to its owner in the same condition, ex-wear and tear (Clause 16.2). The terms of a properly executed Head Lease mean that QAHC gets a share of joint control in the joint venture.

However, QAHC must still obtain individual benefits from the Head Lease through a share of its output (that is, gross rent) rather than joint or collective profits. In this case, the Head Lease requires an owner of an Approved Rental Dwelling to pay the Consortium a service fee of \$12 each week, plus GST, from the rent that the Consortium remits to the owner. Clause 8.1

There are no joint or collective profits. The property owner must pay its own expenses under the lease without any right of indemnity against the Consortium.

QAHC therefore enters into a non-entity joint venture each time it enters an "Affordable Housing Consortium Head Lease."

The question that then must be considered is, if the entity (QAHC) enters into more than one identical "The Affordable Housing Consortium – Head Lease" with the same or different owners of Approved Rental Dwellings, does this arrangement constitute only one "non-entity Joint Venture" as defined in subsection 995-1(1) of the ITAA 1997?

Each "The Affordable Housing Consortium – Head Lease" entered into is an agreement between the QAHC and an owner of an Approved Rental Dwelling and is a non-entity joint venture. It contains specific terms and conditions. If another agreement containing identical terms and conditions is entered into by the same property owner with the QAHC in respect of another Approved Rental Dwelling it is a new contractual arrangement. It is therefore a new non-entity joint venture.

The same line of reasoning would apply to different owners of Approved Rental Dwellings entering into identical "The Affordable Housing Consortium – Head Lease" non-entity joint ventures. Each is a new contractual arrangement with specific terms and conditions, albeit identical between each agreement, but in the end they are a separate contractual arrangement each creating separate non-entity joint ventures.