

Community Land Trusts: Legal Frequently Asked Questions (“FAQs”)

Why we have prepared this FAQ?

We prepared this FAQ in response to numerous inquiries throughout Australia regarding Community Land Trusts (“CLTs”). CLTs were developed in the USA in the 1970’s. In the last 2 years’ interest in CLTs has gained momentum here in Australia.

We decided to prepare this FAQ to answer some major questions and to clarify some common misconceptions about CLTs.

Who we are

We are a boutique law firm that specialises in the law relating to not-for-profit organisations and charities. Principal of the firm, Derek Mortimer, commenced his legal career with a study tour in 1993 of CLTs and revolving loan funds in the USA. At that time CLTs were practically unheard of in Australia.

FAQs

Isn’t ownership of land better than leasing?

It depends. When we talk of “owning land”, it is more legally correct to say that what we “own” is the freehold title. A freehold title entitles its owner to use of land over which the freehold title applies, for an *indefinite* term of years (ie effectively in perpetuity).

However it also makes sense to say that we can “own” a lease. A lease entitles the owner to use the land over which the leasehold title applies, for a *fixed* term of years (eg 99 years).

CLT proponents might say it is more appropriate for a body corporate that can exist in perpetuity to own the freehold, and that a lease is all we mortals who only have a fixed term of years really need.

Can fixtures be separated from the land?

Yes. The common law presumes fixtures (eg houses) are part of the land and hence, part of the freehold title to the land. However lease agreements can be drafted to provide that ownership of the fixtures is to remain with the lessee and not the landlord. Courts will look at the intention of the parties to a lease to determine who owns the fixtures.

Didn't they have to change laws overseas to recognise CLTs?

Yes, the UK *Housing and Regeneration Act* (2008) has given explicit recognition to CLTs. The main purpose of this recognition has been to regulate CLTs and make them eligible for government funding. The laws were not made to ensure that CLTs can separate fixtures from the land (see above).

Are CLTs like unit trusts?

There is a significant difference. Since the High Court case *Charles v Federal Commissioner of Taxation* (1954) Australian law regards the unit holder in a unit trust as having a proprietary interest in all the unit trust property (such as a proprietary interest in the land held by a unit trust).

CLTs lessees on the other hand have an interest in the fixtures (as determined by the lease agreement) on the land, but do not have an interest in the land. (This can sometimes be a problem for CLT lessees because they cannot use the land as security for a mortgage).

Can a "Public Benevolent Institution" be a CLT?

Yes. Public Benevolent Institutions ("PBIs") have the benefit of endorsement by the Australian Tax Office as Deductible Gift Recipients (meaning they can receive tax deductible donations) and other tax concessions. PBIs can and do provide affordable housing for persons regarded by the Tax Office as being in "benevolent need". Whether a CLT can be a PBI depends on whether a CLT primarily wants to assist persons in benevolent need.

Further action

DF Mortimer & Associates is currently involved with community organisations, academics and others with an interest in CLTs with the mutual view of developing a national Australian *CLT Legal Manual*. This manual is intended to provide documentation and advice on CLT structures, and CLT lease and mortgage agreements. The intention is to make the manual available for free or at a modest cost to assist CLTs to develop in Australia.

For further information on the *CLT Legal Manual* project, please contact Derek Mortimer.

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Disclaimer

The information presented on CLTs in this FAQ is of a general nature only and does not constitute legal advice. If you require legal advice on CLTs relating to your particular circumstances, please contact Derek Mortimer.