

2013

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

COMMUNITY HOUSING PROVIDERS NATIONAL LAW (ACT) BILL 2013

REVISED EXPLANATORY STATEMENT

**Presented by
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Introduction

This explanatory statement relates to the Community Housing National Law (ACT) Bill 2013 (the Bill) as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The Statement is to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Overview

Policy Objectives of the Bill

The principal objective of the Bill is to provide a national approach to the regulation and assessment of and engagement with community housing providers. The reforms within the Bill focus on reducing the regulatory burden on providers and ensuring that community housing is a viable, well governed, well run housing option for those on low to moderate incomes; capable of attracting investment for growth.

Reasons for the Bill

In recent years, the Australian Government has provided over \$6 billion in funding for the construction of new social housing under the Nation Building and Jobs Plan and the National Affordable Rental Assistance Scheme. The funding has been augmented by land and other contributions from the States and Territories. This funding has enabled the rapid growth of a number of social housing providers, including expansion beyond their jurisdiction of origin.

The development of a National Regulatory System for housing providers is an agreed reform direction under the National Affordable Housing Agreement and the Nation Building and Jobs Plan.

In 2012, the ACT became a signatory to an Intergovernmental Agreement to implement a national regulatory system.

There is a desire to ensure the robustness and good reputation of the sector in order to give confidence to potential investors. Lack of a national and consistent system of regulatory oversight puts Government investment and vulnerable tenants at risk. Regulation by each jurisdiction with different registration and legislative requirements is also seen to create barriers to providers expanding across jurisdictions to be viable and independent of government.

This Bill establishes the *Community Housing Providers National Law*. It provides for a role for a Registrar in each jurisdiction in approving organisations that provide community housing; monitoring compliance with the national law; and assessing providers against a new National Regulatory Code.

The Bill will enact legislation applying the *Community Housing Providers National Law*, to enable the national system to be established; and repeal the ACT Regulatory Framework established by Part 4A of the *Housing Assistance Act 2007*.

The objects of this Act are to:

- (a) apply as a territory law a national law for the registration and regulation of community housing providers under a national system of registration; and
- (b) facilitate investment in the community housing sector and ensure the protection of that investment; and
- (c) ensure that registered community housing is developed as a viable and diversified component of the ACT social housing sector; and
- (d) support the provision of registered community housing for people on a very low, low or moderate income.

The regulatory powers will be vested in the Registrar, who will be the Director General responsible for administering the Act.

The *Community Housing Providers National Law* empowers the Registrar to register, monitor the activities of, and de-register housing providers and undertake enforcement actions. The consequence of de-registration would be the loss of any tied government assistance and publicly funded assets.

The intent of the National Regulatory System is to encourage the development of social and affordable housing by providing for:

- (a) the registration of housing agencies; and
- (b) the regulation and monitoring of registered housing agencies against standards known as the National Regulatory Code.

The National Regulatory Code sets out the performance outcomes and requirements that must be met by registered community housing providers under the National Regulatory System. The performance outcomes are:

- **Tenant and Housing Services** – the community housing provider is fair, transparent and responsive in delivering housing assistance to tenants, residents and other clients.
- **Housing Assets** – the community housing provider manages its community housing assets in a manner that ensures suitable properties are available at present and in the future.
- **Community Engagement** – the community housing provider works in partnership with relevant organisations to promote community housing and to contribute to socially inclusive communities.
- **Governance** – the community housing provider is well governed to support the aims and intended outcomes of its business.

- **Probity** – the community housing provider maintains high standards of probity relating to the business of the provider.
- **Management** – the community housing provider manages its resources to the achieve the intended outcomes of its business in a cost effective manner.
- **Financial Viability** – the community housing provider is financially viable at all times

Regulatory Principles

The National Regulatory System will be implemented to ensure that the regulation of community housing providers is:

1. Proportionate

Assessment and monitoring will reflect the scale and scope of related activities and the related level of risk. Intervention occurs only when necessary

2. Accountable

Regulatory assessments and decisions are explained and justifiable through evidence and data. These assessments and decisions are subject to scrutiny where appropriate. Practices and policies are open.

3. Consistency

Based on standardised information and processes, decisions and actions will be applied in a predictable and consistent manner.

4. Transparent

Clear and open processes and decisions, including communication of those decisions and processes

5. Flexible

Avoiding unnecessary prescriptions and impositions on how housing providers organise their business and demonstrate compliance with performance requirements

6. Targeted

Focused on the core purposes of improved tenant outcomes and protection for vulnerable tenants; protecting government funding and equity and ensuring investor and partner confidence.

The National Regulatory System guiding principles include;

- (a) a minimum set of rules, requirements and powers necessary to appropriately manage those risks and opportunities that can not be effectively dealt with;
- (b) a clear separation between regulatory activities and policy and funding activities; and
- (c) staged, proportionate step-in provisions for the regulator sufficient to ensure that government and finance partners can protect their interest

in tenants and assets in the event of provider distress, default or failure.

The National Regulatory System includes three tiers of registration; a risk management approach; powers to register, monitor, intervene (referred to as 'enforcement' powers); and de-register any housing providers.

The powers of the Registrar and the regulatory requirements are almost the same as those under the ACT's current regulatory system, established by Part 4A of the *Housing Assistance Act 2007*, amended in 2008.

There will be a Registrar in each State and Territory. The Registrar will exercise the functions under the Act subject to the control and direction of their State/Territory Minister.

Consultation

There has been broad consultation nationally and in the ACT on the National Regulatory System and the National Law during development.

Workshops were held in the ACT on 30 November 2011, 9 December 2011 and 28 August 2012 with key stakeholders, including housing providers and peak bodies. The ACT had a further meeting with providers on 27 November 2012. There is broad support for the introduction of the National Regulatory System.

Revenue/Cost Implications

The Australian Government will meet the additional costs of implementation including a National Information Technology System and other infrastructure. The ongoing costs of the system will be met within existing financial resources. A National Regulatory Impact Statement was developed after consultation with key stakeholders, including housing providers, peak bodies and government agencies in all jurisdictions which demonstrated an advantage for the ACT in the introduction of the *Community Housing Providers National Law*. There will be significant regulatory benefits flowing from the national regulatory system including enabling social housing providers to operate in the ACT and interstate without having to separately register in each jurisdiction.

Human Rights

The Bill does not limit any rights protected by the *Human Rights Act 2004*. Primarily the Bill relates to the regulation of housing providers, incorporated entities, rather than individuals.

Incidental implications from the Bill for individuals will only engage positively with protected rights. The Bill can also be characterised as positively engaging the right to housing recognised by the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Under the National Law the community housing provider is required to be fair, transparent and responsive in delivering housing assistance to tenants, residents and other clients. An improved regulatory framework for housing providers will assist the increased provision of well-sited social housing, providing the stable platform

required for access to health and well-being services; education and training; public transport; information and communication technology facilities; access to community space and facilities; and improved workforce participation.

The Human Rights Act applies to the operation and interpretation of the Bill.

Delegation of Legislative Power

Amending the National Law

The Bill delegates legislative power to the Select Council on Housing and Homelessness both for making changes to the law (subsequently applied through the NSW Parliament) and for making guidelines for the Act. As with any national law these delegations are different from the typical delegation that occurs in ACT Acts.

In relation to any changes to the law, one of the key objectives of the Community Housing Providers National Law is to ensure that regulatory requirements for community housing providers are consistent across Australia. The approach to making and amending the National Law is intended to ensure that the National Law is universally applied across all participating jurisdictions and that any future amendments are agreed by participating jurisdictions and adopted and implemented consistently.

The governance arrangements described in the Intergovernmental Agreement to establish a National Regulatory System for Community Housing require that any amendments to the National Law are agreed by the Ministerial Council prior to submission to the Parliament of the host jurisdiction. This Council is currently the Select Council on Housing and Homelessness, on which the ACT is represented by the ACT Minister for Housing.

In effect the current provisions of the Bill whilst ultimately ensuring that any change in the law is supported by the Assembly does create the potential for an amendment to the law to be in force for a period before the Assembly can disallow the law.

There is a difficult balance between these competing issues, at this point it is considered that the ‘ordinary’ disallowance provisions are appropriate and provide the right balance between local oversight and national consistency.

Guideline making power

A suite of national guidelines have been developed to assist the overall operation of the National Regulatory System in accordance with the National Law. There are currently three guidelines in place,¹ they describe the national regulatory principles and approach and provide examples of actions to be taken in the range of circumstances that may arise in implementing the National Law, In relation to the power to make guidelines these are not binding except to the extent provided by clause 10 of the National Law. This issue is discussed below in the relevant notes on clauses.

¹ Evidence Guidelines, Tiers Guidelines and Enforcement Guidelines, all are available at <http://www.nrsch.gov.au/>

Notes on Clauses

PART 1 - PRELIMINARY

This part includes the introductory information relating to the Act.

Clause 1 explains that the name of this Act is the *Community Housing Providers National Law (ACT) 2013*.

Clause 2 states that the Act will commence on a day set by the Minister in writing. It goes on to say that, if the Act has not commenced within a year of the day the Act is notified on the Legislation Register, it will automatically commence a year and one day after it has been notified. Finally, it states that Section 79 of the Legislation Act 2001, which sets a time frame of six months after the notification date, will not apply to this Act due to some uncertainty regarding whether the National Regulatory System will commence on the intended date of 1 July 2013 or at a later date.

Clauses 3 – 6

These clauses provide that the Dictionary is part of the Act; that terms used in this Act and the Community Housing Providers National Law have the same meaning in both; and that Notes throughout the Act are for explanatory purposes, but are not part of the Act.

PART 2 – APPLICATION OF COMMUNITY HOUSING PROVIDERS NATIONAL LAW

Clauses 7 – 15

These clauses adopt the *Community Housing Providers National Law* as a law of the ACT.

Clause 7(1) of the Bill applies the Community Housing Providers National Law as a law of the ACT **except** for Section 24 of the National Law which is excluded because it may be inconsistent with the *Australian Capital Territory (Self-Government) Act 1988* (Cwlth), section 23(1)(a) which provides that the ACT legislative Assembly cannot make a law that is an acquisition of property otherwise than on just terms. While it is possible that section 24 may operate to an extent where it doesn't offend the Self-Government Act, any residual operation was not seen as appropriate in this jurisdiction.

Section 7(1) adopts the National Law, as in force from time to time. This means that amendments to the National Law automatically become a Territory law when the amendments to the National Law take effect. However subclauses 7(2), (3) and (4) require that any amendments made to the National Law by the NSW Parliament must come before the Assembly within 6 sitting days to give the Assembly the opportunity to disallow their application in the ACT if it chooses. The Government considers that this approach gives the appropriate balance between full participation in the national law and local Assembly oversight.

Clauses 8, 9, 10 and 11 provide that the appeal tribunal for the ACT will be the ACT Civil and Appeals Tribunal (ACAT); that the housing commissioner or another Territory entity providing assets is a Housing Agency; and that the relevant Minister

is the Minister responsible for administering this Act while the Registrar will be the Director-General responsible for the administration of this Act.

Clause 12 establishes that a public servant is considered a declared person for the purpose of Section 11(1)(b) of the Community Housing Providers National Law (ACT).

Clause 13 provides that, although the Legislation Act applies to the Bill, it will **not** apply to the Community Housing Providers National Law (ACT) because clause 4 (3) of the National Law provides that it is to be interpreted in accordance with the *Interpretation Act 1987* (NSW).

Clauses 14 and 15 allow the Registrar to set fees and to approve forms.

PART 3 MISCELLANEOUS

Clause 16 gives the Executive the power to make regulations for this Act which must be notified and presented to the Assembly

PART 4 CONSEQUENTIAL AMENDMENTS

Clause 17 states that any legislation referred to in schedule 1 will be amended by this Act.

PART 5 – TRANSITIONAL

Clause 18 – 20

Clause 18 describes the transitional arrangements for entities registered under Part 4A of the *Housing Assistance Act 2007*, which will be repealed by this Act. It provides for the provisions of Part 4A to be saved for those entities registered under Part 4A so that it remains in force for those entities until either they are registered under the *Community Housing Providers National Law (ACT)* or 18 months has passed since the repeal day, whichever is sooner.

The clause defines *repeal day* and *repealed Part 4A*. It also defines the *saved repealed provisions* as sections 25C to 25 G; sections 25 I to 25 U; schedule 1, items 5 to 7; and the dictionary definitions of *company limited by guarantee*, *company limited by shares*, *housing provider*, *monitoring guidelines* and *standards*.

Clause 19 provides for any matters relating to transitional arrangements under this Act to be prescribed by regulation if seen as necessary or convenient including modifying Part 5 if the Executive is of the opinion that a matter is not adequately or appropriately dealt with.

This clause contains a Henry VIII clause providing that the transitional regulations will have effect despite anything else in this Act or another Territory law. The scope of the transitional regulation making power is limited to transitional matters. Allowing it to prevail over other parts of the Act is necessary to ensure that in the transition to the national scheme from the current arrangements any unforeseen circumstances can be accommodated to ensure that housing providers are properly regulated but that the regulation is effective and efficient.

Clause 20 causes the transitional arrangements to expire 18 months after the day the legislation commences.

Schedule 1 - Consequential Amendments

This schedule lists the legislation that will be repealed or amended by this Act to give effect to the *Community Housing Providers National Law (ACT)*. These amendments are minor or technical in nature, primarily creating new definitions of terms used in the Bill and National Law and do no more than facilitate the operation of the National Law in the ACT.

COMMUNITY HOUSING PROVIDERS NATIONAL LAW

Because the *Community Housing Providers National Law* is an applied law, it was passed by a host jurisdiction, New South Wales. What follows is the New South Wales Explanatory Note for the *Community Housing Providers National Law* which has been provided to ensure that the explanation of the National Law is consistent with other jurisdictions

Additional explanatory notes relevant to the operation of the national law in the ACT have been added in parentheses.

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the National Law.

Clause 2 provides for the commencement of the National Law in a participating jurisdiction to be as provided for by an Act of that jurisdiction.

Clause 3 provides for the objects of the National Law.

Clause 4 defines certain terms for the purposes of the National Law, including *community housing* which means housing for people on a very low, low or moderate income or for people with additional needs that is delivered by non-government organisations. *Primary Registrar*, in relation to a particular unregistered entity or registered community housing provider, is defined as the Registrar for the primary jurisdiction of the entity or provider.

{Subclause (3) provides that the National Law is to be interpreted in accordance with the *Interpretation Act 1987* (NSW). It is important to note that the *Human Rights Act 2004* also applies to the operation and interpretation of the National Law in the ACT.}

Clause 5 defines *primary jurisdiction* in relation to an unregistered entity or a registered community housing provider. Generally, this will be the participating jurisdiction in which the unregistered entity or registered community housing provider provides (or intends to provide) the majority of its community housing. The Registrars of the participating jurisdictions may agree to a different primary jurisdiction in relation to a particular unregistered entity or registered community housing provider.

Clause 6 provides for the Register established under the National Law to operate as

a single National Register.

Clause 7 provides for the extraterritorial operation of the National Law.

Clause 8 provides that the National Law binds the Crown in right of a participating jurisdiction.

Part 2 The Registrar

Clause 9 requires there to be a Registrar appointed for each participating jurisdiction.

Clause 10 sets out the functions of the Registrar which include maintaining the Register of community housing providers, registering entities as community housing providers and monitoring compliance of registered community housing providers with the National Law and the other provisions of the jurisdiction declared to be community housing legislation.

{Subclause (2) requires that the Registrar, in exercising the functions given under the Act must comply with any guidelines made by the Council.

While there is provision for binding guidelines governing the exercise of the functions to be made by the Council, the scope of these guidelines for the exercise of the Registrar's functions are of course limited by the substantive provisions of the Act (including the code in schedule 1).

This is intended to provide a universal approach to avoid a lack of consistency in the implementation of the scheme that could impede a harmonised national system.

The ordinary mechanisms for notification and disallowance are not applied to the Guidelines, in this circumstance given the nature of the particular power and the practical reality that the guidelines will have a relatively limited impact on the operation of the scheme and the need for a multi jurisdictional approach, it is appropriate that the capacity to make binding guidelines be delegated to the Council.

The guidelines are published on the NSW legislation website to assist in accessibility. The ACT Parliamentary Counsel's Office will include a link on the Legislation Register to the Legislation website of the host jurisdiction as is their common practice.}

Clause 11 enables the Registrar of a jurisdiction to delegate the Registrar's functions under the National Law to other Registrars or to persons specified in the community housing legislation of the jurisdiction.

Part 3 Registration

Clause 12 establishes the National Register of Community Housing Providers and specifies the information that is to be recorded on it.

Clause 13 enables an entity that provides or intends to provide community housing to apply to the primary Registrar for registration as a community housing provider

under the National Law or a variation of registration. If the application is made to a Registrar who is not the primary Registrar, the Registrar to whom the application has been made must refer it to the primary Registrar.

Clause 14 requires the primary Registrar to approve an application for registration if satisfied that the application has been duly made and the requirements of the National Law and the community housing legislation of participating jurisdictions (including the conditions of registration) will be complied with.

Clause 15 requires a registered community housing provider to comply with the conditions of registration and sets out those conditions. The conditions include that the provider must comply with any applicable requirements of the community housing legislation of a participating jurisdiction in relation to the transfer of, or other dealing with, any community housing assets of the provider and that the provider must have provision in its constitution for all its remaining community housing assets in a participating jurisdiction on its winding up to be transferred to another registered community housing provider or to a Housing Agency in the jurisdiction in which the assets are located. There are also conditions relating to the provision of information to a Registrar, compliance with certain provisions of the National Regulatory Code set out in Schedule 1 to the National Law and the keeping of a list of all of the community housing provider's community housing assets.

{It is not intended for any provision relating to the provision of information under section 15 (2) to displace the common law privileges against self-incrimination and exposure to the imposition of a civil penalty or the common law privilege in relation to client legal privilege}.

Clause 16 enables the primary Registrar for a registered community housing provider to cancel the provider's registration if the provider applies for cancellation or it has been wound up or has otherwise ceased to exist. The primary Registrar may also cancel the registration of a registered community housing provider if the primary Registrar has issued a notice of intent to cancel registration, has not been satisfied by the provider that the registration should not be cancelled and has notified the provider of the proposed cancellation.

Part 4 Enforcement powers of Registrar

Clause 17 provides that action may be taken under the proposed Part by a primary Registrar for a registered community housing provider if the Registrar reasonably believes that the provider is not complying with the community housing legislation of a participating jurisdiction.

Clause 18 enables the primary Registrar for a registered community housing provider to issue a notice of non-compliance to the provider identifying the matters that are to be addressed and the period for doing so to avoid cancellation of the provider's registration.

Clause 19 enables the primary Registrar for a registered community housing provider to issue written instructions to the provider specifying the manner in which the provider is to address any matters that are the subject of a notice of non-compliance.

Clause 20 enables the primary Registrar for a registered community housing provider to issue a notice of intent to cancel registration if the provider has not addressed the matters identified in a notice of non-compliance or in the written instructions within the required period or if the failure to comply is serious and requires urgent action.

Clause 21 provides that the primary Registrar may appoint a statutory manager of a registered community housing provider to conduct specified affairs and activities of the provider that relate to the community housing assets of the provider. That action may be taken only after the issue of a notice of intent to cancel registration or if the Registrar forms the opinion that the failure to comply is serious and requires urgent action.

Clause 22 contains provisions relating to the appointment of, and exercise of functions by, a statutory manager.

Clause 23 declares proposed sections 19 and 21 to be Corporations legislation displacement provisions for the purposes of section 5G of the *Corporations Act 2001* of the Commonwealth. The effect of the declaration is to enable those proposed sections to prevail despite any inconsistencies with the Commonwealth Act.

Clause 24 This clause is excluded from operation in the ACT by Clause 7(1) of the Community Housing Providers National Law (ACT) Bill 2013.

Part 5 Miscellaneous

Clause 25 provides a right of appeal against certain decisions of a Registrar under the National Law.

Clause 26 imposes a duty on a Registrar and any delegate of a Registrar not to disclose information obtained in the course of the administration of the National Law except in specified circumstances.

Schedule 1 National Regulatory Code

Schedule 1 contains certain requirements relating to the conduct and management of the affairs of a registered community housing provider.