



## **Industry positioning paper: an appropriate regulatory framework for the not-for-profit housing sector**

21 May 2010

### **Introduction**

This document has been prepared in response to the recent discussion paper released by the Department of Families, Housing, Communities and Indigenous Affairs (FaHCSIA), *Regulation and Growth of the Not-For-Profit Housing Sector* (April 2010). Its purpose is to stimulate discussion amongst CHFA's members, community housing providers, and other stakeholders that might be interested in participating in the submission process. It is not intended as a set of definitive and rigid policy positions that should be adopted by other organisations. The majority of the positions outlined below do, however, reflect previous work that CHFA has conducted over many years, and which has been endorsed by CHFA's Board and membership.

This document has been developed in consultation with CHFA's members with a view to fostering convergence on a number of key issues. CHFA hopes that this positioning paper will inform the content of submissions that other organisations provide to FaHCSIA on the *Regulation and Growth* discussion paper. Submissions responding to the discussion paper will have a significant impact on the potential development—and shape—of any national regulatory system that might arise as a result. Further, wide scale engagement from the sector in the form of written submissions, and the consistency across these submissions, will likely have a significant bearing on the direction that the Commonwealth takes in pursuing the development of a national regulatory system.

This document is arranged into four sections. The first of these outlines a set of key points that CHFA believes should form the overarching basis of a national regulatory framework. The next section briefly outlines why certain existing models might or might not provide a basis on which a new national regulatory system could be developed. The third proposes a three pronged strategy for a regulatory framework. The fourth and final section discusses appropriate safeguards for stock transfers from public management to community housing providers.

## **Key points for a national regulatory framework**

The purpose of regulation must be clear for the government/s and policy makers responsible for its development and implementation, and made clear to the people subject to the regulation. A regulatory system should have at its core the goal of enabling both the community housing sector and governments to achieve their policy goals, including growth targets.

From a government perspective, a key reason for instituting a regulatory framework for affordable housing providers is to protect government investment. Policy makers must remain mindful, however, that the community housing sector does not exist only as custodians of government investment, and who need to practice good financial management: any new framework, and the philosophy behind its development, must also acknowledge that community housing organisations operate to serve the public good and foster improved outcomes for the tenants that they house. This philosophy should be reflected in the scope and structure of any new national regulatory framework.

CHFA believes that a single national regulatory framework will provide clarity and consistency for all organisations managing and developing affordable housing programs in Australia. It will have a number of other advantages over the current patchwork of multiple state-based regulatory systems. These include facilitating organisations that operate across jurisdictions, and providing a single system for other stakeholders involved with the provision of affordable housing, such as financial institutions and investors, to work within. A national system which takes a risk-adjusted approach to regulation will also benefit smaller organisations, whose compliance costs with the system would be considerably lower than those organisations conducting more complex business activities.

### **Outlined below are 12 key points that CHFA believes are essential for the development of a sound and sustainable national regulatory framework for community housing providers.**

1. CHFA is calling for the development of a single, national regulatory system.
2. The regulatory system must separate the roles of regulator, funder, and competitor.
  - For this reason the oversight of the system should be situated within an autonomous body.
3. The administration of the system at the provider level must be conducted at the jurisdictional or regional level, not centrally.
  - This could be done by:
    - An arm of state government that is separate from the SHA, and reporting directly to the Housing Minister in that state (or another Minister or government agency, such as P and C).
    - Branches of the national regulator. One advantage of this would be that branches could theoretically operate cross-border (e.g. ACT/SE NSW, SEQ/northern rivers NSW, north QLD/NT).

4. The regulatory system would need to be underpinned by a legislative framework at the national level. This would stipulate the standards and reporting requirements of the regulatory system.
5. These standards and reporting requirements should be monitored nationally by an independent advisory council comprising representatives from the Commonwealth, state and territory governments, the sector, and financial institutions/institutional investors.<sup>1</sup> This council would report directly to the appropriate Minister.<sup>2</sup>
6. The system will need to be designed to reduce the risk of 'regulation by contract' by including elements that minimise the scope of contractual obligations that can be placed on organisations in receipt of funding from state and territory governments. CHFA envisages that the focus here would primarily in the financial realm.
7. To reduce compliance costs for organisations, it will be important to ensure that, where possible, the regulatory framework is consistent with other regulatory frameworks that organisations will have to deal with, e.g. aged care regulation.
8. The regulatory system should cover all providers: small, large, government, and for-profit?<sup>3</sup>
  - o It is not practical to have a 'twin track' system, with some providers regulated by state and territory governments and others regulated through a national system, as suggested in Option 2 in *Regulation and Growth* (pp18-19).
9. The system's focus needs to be primarily on regulating financial and market risk rather than on QA standards.

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<sup>1</sup> It is possible that other options will be put forward by government. These may include for the relevant Commonwealth department (in this case FaHCSIA) or COAG/HMAC to perform this function. CHFA believes that former would overly centralise decision making, and the latter would be complex and unwieldy.

<sup>2</sup> In this case Minister Plibersek.

<sup>3</sup> The regulatory system will need to be able to allow organisations to separate their housing activities out from their other activities, and only report against these. This will be especially important for church-based, aged care, local government, and for-profit providers that conduct a wide range of activities, not just housing. CHFA does not believe that organisations should be forced to set up subsidiary companies to conduct their housing operations. Rather, the regulatory system should work around this, as happens in Queensland when regulating the housing activities of local governments.

10. The regulatory system needs to be tiered based on the activities of an organisation, not the size of its portfolio. Accordingly, CHFA supports a three tiered approach:
  - Property and tenancy management status—organisations that wish to grow or continue operating at their present scale using their tenancy management expertise;
  - Commissioning and project managing status—organisations with the capacity to commission development processes<sup>4</sup>, secure title to properties, and benefit from GST and other concessions associated with these activities; and
  - Development and management status—organisations that have their own development capacity. This capacity includes sophisticated procurement, project management, and financial capabilities and experience. Additionally, many organisations in this category have a range of professionals, such as architects, on their staff.
  
11. The system needs to accommodate consortia arrangements.
  - This would be best achieved by regulating the consortia or umbrella organisation as a whole (to focus on its financial probity), as well as the members of a consortia responsible for property and tenancy management (to focus on all other aspects covered by the regulations).
  
12. Once there is agreement on the fundamental principles and basic framework for the system, there will need to be a clear process of engagement (not consultation) with all stakeholders—including the sector—to negotiate the details of the model.

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<sup>4</sup> One issue that will need to be given consideration in the development of a new national regulatory framework will be how to cover developers. There are not currently any standards or definitions about exactly what constitutes a 'developer'. The regulation or accreditation of developers carrying out work for managers of affordable housing programs (to protect the risk carried by organisations commissioning property development) is a matter that will require further consideration.

## **Could current regulatory systems be built on at the national level?**

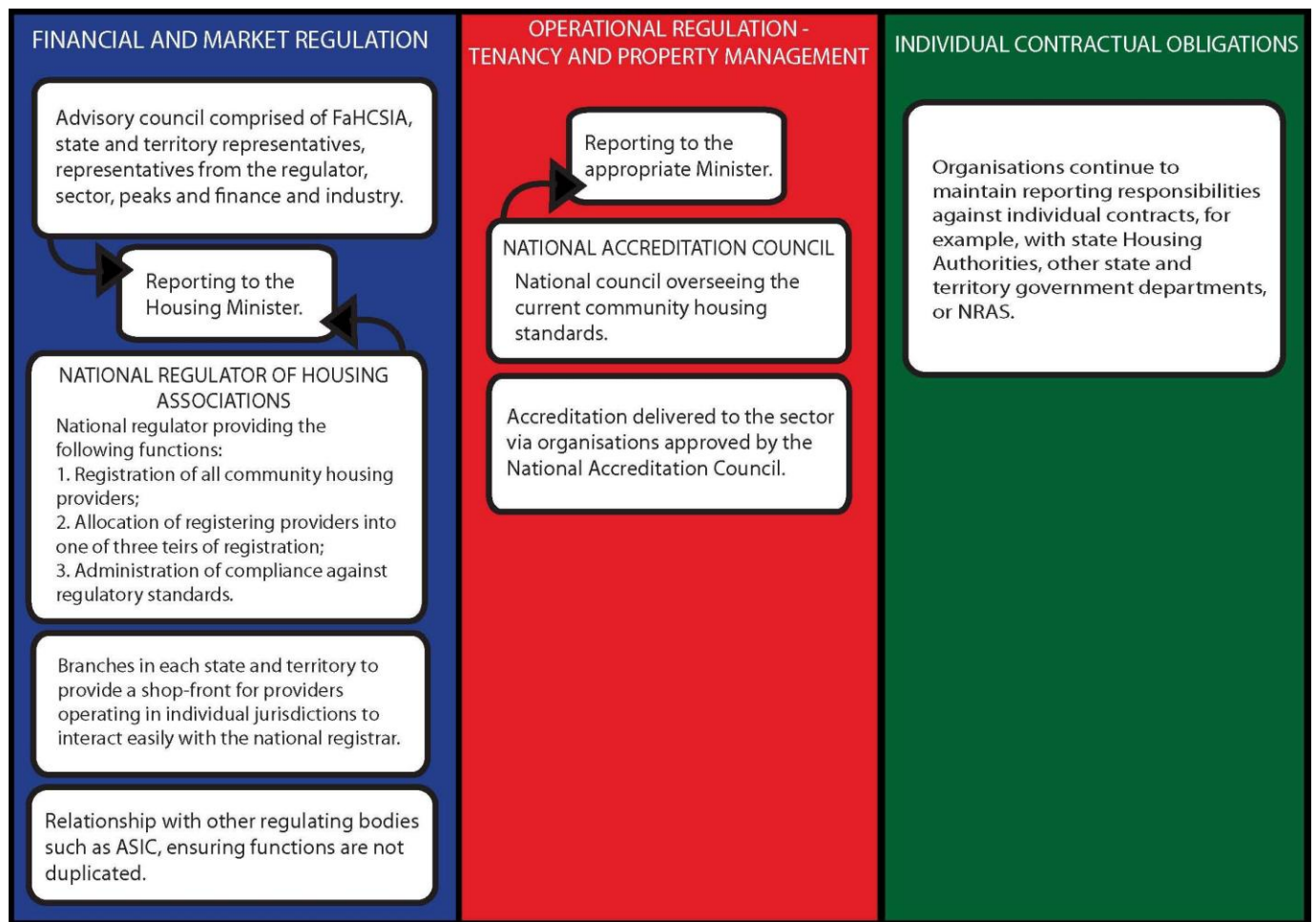
At present CHFA does not believe that there are any regulatory systems in Australia whose could be directly transferred to a national level. Outlined below are a number of models that CHFA believes do not provide a good basis to build on.

| <u>Jurisdiction</u> | <u>Concern with existing model</u>   |
|---------------------|--|
| Victoria            | Too 'black letter' and onerous, and its focus is primarily on 'growth providers'.  |
| Queensland          | Based on minimum standards, rather than risk.  |
| Western Australia   | Based on the draft national framework which attempted to harmonise models and which still needs improving, particularly regarding organisation governance. |

At present, the NSW regulatory model is the only one in Australia that comes close to meeting all of the components of an ideal national regulatory system, as outlined above. One of the primary reasons for this is because it is a tiered system, a core feature that CHFA believes must be included in any new national regulatory system.

## A three pronged approach to a national regulatory system

One of the key considerations regarding the move to a national regulatory framework is whether, and how, funding and regulation should be separated from service provision. If the 'money and market' and 'tenancy and property management' components of regulatory oversight are separated, then who should have responsibility for the latter? To help conceptualise how a new framework might 'look', CHFA has developed an indicative model. This model consists of three parallel components: a national regulator of affordable housing providers; a national accreditation council; and reporting and compliance obligations to individual contracts. Each of these elements is described in further detail below.



**Indicative model of a three pronged approach to compliance and reporting requirements for managers and developers of affordable housing programs**

## **National Regulator of affordable housing providers**

The National Regulator would have three main functions.

- 1 Maintain a register of all providers of not-for-profit rental housing or for-profit managers of affordable rental housing funded in part or whole by government (e.g. NRAS), including Indigenous Community Housing Organisations.
- 2 Allocate a 'tier' for each organisation to be regulated within.<sup>5</sup>
- 3 Administer compliance against regulatory standards.

The National Regulator would be primarily concerned about prudential matters, and have a focus on matters such as growth and leverage, as well as other areas that are not directly covered by other regulatory regimes, such as ASIC. Accordingly, the National Regulator will need to articulate its relationship with these regimes.

The regulations that the National Regulator will administer will include a set of basic minimum property and tenancy management standards covering all organisations that will provide protection to vulnerable tenants and ensure clear and consistent service quality to tenants of all housing providers. In addition to this, organisations in the 'developer and management' and 'commissioning and project management' tiers would be required to be accredited under the National Community Housing Standards.<sup>6</sup>

The regulatory system would need to be underpinned by a legislative framework at the national level. This would stipulate the standards and reporting requirements of the regulatory system. These standards and reporting requirements should be monitored nationally by an independent advisory council comprising representatives from the Commonwealth, state and territory governments, the sector, and financial institutions/institutional investors.<sup>7</sup> This council would report directly to the appropriate Minister.<sup>8</sup>

The National Regulator will have representation or branches in different jurisdictions, and will be able to operate and engage with providers at a local level. Under a branch model, these branches would be able to operate across borders. As with other regulators at the national level, the National Regulator will report directly to the appropriate Minister.<sup>9</sup>

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<sup>5</sup> See number 10 under 'key points' above.

<sup>6</sup> Consideration will need to be given as to whether large organisations in the first tier (property and tenancy management status) should also be required to be accredited.

<sup>7</sup> It is possible that other options will be put forward by government. These may include for the relevant Commonwealth department (in this case FaHCSIA) or COAG/HMAC to perform this function. CHFA believes that former would overly centralise decision making, and the latter would be complex and unwieldy.

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## **National Accreditation Council**

Tenancy and property management would be primarily covered by participation in the National Standards. CHFA envisages an independent council to oversee the Standards. This would have a similar make-up to the independent advisory council described above, and would likely have secretariat support within an auspicing national industry body.

Accreditation could be delivered to the sector via organisations approved by the National Accreditation Council. These could be state or territory governments, quality auditors, existing community housing peak bodies, or for-profit training and assessment organisations.

As noted above, accreditation would be mandatory for organisations in the 'developer and management' and 'commissioning and project management' tiers. Accreditation would be nationally recognised, allowing organisations to operate across borders without needing to be accredited in different jurisdictions.

This National Accreditation Council would need to be an independent organisation operating outside of government and the sector. This model is similar to that which presently exists in a number of other sectors, such as health.

## **Reporting and compliance obligations to individual contracts**

As already occurs, organisations managing and delivering affordable housing programs would maintain their reporting responsibilities for individual contracts, whether these are with state or territory housing authorities, NRAS, or through other Commonwealth, state, or territory departments (e.g. health, disability etc).

Crucially, the nationally regulatory standards would be designed to reduce red tape, as well as reduce 'regulation by contract', particularly for financial matters.<sup>10</sup> This would therefore have an impact on the design and content of contracts issued by other government departments at the state/territory or Commonwealth level, which would be obliged to be consistent with the national regulatory standards.

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<sup>10</sup> See number 6 under 'key points' above.

## **Issues concerning the growth of the sector**

The *Regulation and Growth* discussion paper details many areas that will impact on the ability of the sector to continue growing and meet the needs of governments and communities. Many of these measures will not necessarily best dealt with directly within the compliance-focused framework of a regulatory system. CHFA's submission to FaHCSIA will provide further detail of these. At this stage, however, it is worth flagging one important area worthy of consideration.

### **Stock transfers, caveats, and the conditions placed on organisations' funding**

Stock transfer from state housing authorities to community housing organisations will be a significant source of growth for the sector over the coming years. State and territory governments already place conditions on funding that they provide to community housing organisations. In addition to these, some jurisdictions have placed controls such as caveats, debentures, and secondary mortgages on properties that have been transferred to community housing organisations. Such measures are an important means of protecting government investment and ensuring that these investments are used appropriately over time.

CHFA believes, however, that this area is one that would benefit from some degree of consistency or minimum standards at the national level, and that oversight in this area through the NAHA would be the best mechanism to achieve this.

Any conditions placed on stock transfers should give community housing providers maximum flexibility to utilise these assets to increase the supply of affordable housing, as well as control over their tenancy management. There must be a balance between protecting governments' investment and maximising assets to achieve growth in affordable housing stock. Restrictive conditions and excessive encumbrances on the use of transferred stock will defeat the objective of leveraging stock for further growth.

The purpose of a regulatory system is to have a mechanism for accountability of providers' activities, and should assuage government concerns about the appropriate management of transferred stock. Further, for not-for-profit organisations, their constitutions provide a strong instrument for dealing with these issues.

CHFA believes that a sufficient degree of conditionality on transferred stock would be that this stock, along with other stock generated as a result of leveraging or the proceeds from selling transferred stock, remains as affordable rental housing in perpetuity. It is not necessary to be overly specific about ongoing levels of affordability, tenant profile, and the use of surpluses.