

Tier Guidelines



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1. About the National Regulatory System for Community Housing



The National Regulatory System for Community Housing (NRSCH) is a regulatory system designed to contribute to a well governed and managed community housing sector, and provide a platform for the ongoing development and viability of the community housing sector across Australia.

Community housing providers are organisations that deliver social or affordable housing and associated services to people on very low, low or moderate incomes. These services are covered by the social and affordable housing policies of government housing (policy/funding) agencies¹.

The key objectives of the NRSCH are to:

- provide a consistent regulatory environment to support the growth and development of the community housing sector
- pave the way for future housing product development
- reduce the regulatory burden on housing providers working across jurisdictions
- provide a level playing field for providers seeking to enter new jurisdictions.

The governance arrangements are set out in an Inter-Government Agreement (IGA) for a National Regulatory System for Community Housing and provide for the establishment of the National Regulatory Council (NRC) as an independent advisory committee.

A suite of Operational Guidelines guides the overall operation of the NRSCH in accordance with the National Law.

The scope of a Registrar's functions under the NRSCH is limited to regulatory activities. State and territory housing agencies, depending on the arrangements in each jurisdiction, will continue to have responsibility for policy and funding decisions.

¹ Policy and funding agencies are usually, but not always, the housing agency in the particular jurisdiction. For the purposes of this document, the term 'housing agency' will be used, but it is acknowledged that this will include policy and funding agencies for those jurisdictions where relevant.

2. Purpose of this document

These guidelines are made jointly by the relevant ministers of each participating jurisdiction and are published on the New South Wales legislation website in accordance with section 10(2) of the Community Housing Providers National Law (the National Law).

These guidelines should be read in conjunction with:

- the National Law
- the National Regulatory Code (schedule 1 of the National Law)
- any other guidelines made under section 10(2) of the National Law.

Registration tiers

The registration Tier Guidelines help interpret the following sections of the National Law:

- 12 (2) (b) The National Register is to record the category of registration of the entity
- *category of registration* means a category of registration under this Law for which provision is made in the guidelines under section 10 (2)
- 12 (3) The Registrars may agree to divide the National Register into different parts to assist in the administration of the National Register

- 12 (4) The primary Registrar for an entity may at any time, by notice in writing to the entity, vary the category of registration of the entity and move the registration of the entity to any other part of the National Register.
- 14 (2) A Registrar must, as soon as is practicable after making a determination under this section, notify the applicant in writing of:
 - a) the determination, and
 - b) if the application is not approved, the reasons for the determination, and
 - c) if the application is approved, the category of the registration including whether the entity has been registered in a particular part on the National Register and any conditions to which the registration is subject.

These guidelines use the term *registration tiers* to refer to categories of registration in the National Law and dividing the National Register into different parts.

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3. Principles

The principles of good regulation that underpin the NRSCH are that it be applied in ways that are:

- Proportionate – reflecting the scale and scope of regulated activities
- Accountable – able to justify regulatory assessments and be subject to scrutiny
- Consistent – based on standardised information and methods
- Transparent – clear and open processes and decisions
- Flexible – avoiding unnecessary rules about how housing providers organise their business and demonstrate compliance
- Targeted – focused on the core purposes of improve tenant outcomes and protecting vulnerable tenants, protecting government funding and equity, and ensuring investor and partner confidence.

4. Purpose

The policy intent of these guidelines is to ensure proportionality through the use of a tiered registration system based on risk – whereby different levels of regulatory monitoring apply to providers based on the scale and scope of their community housing activities.

For example, organisations involved in activities that require management of a higher level of risk (e.g. property development) will be subject to a higher level of regulatory scrutiny and engagement than organisations involved in activities that require them to manage lower-level risks (e.g. small-scale tenancy management).

Registration in any particular tier is therefore determined by an organisation's level of risk due to the scale and scope of its activities.

It is important to note that a Registrar's decision about the appropriate tier of registration of an entity is different from the Registrar's assessment of the risks associated with the provider's capacity and compliance with the National Law. Within any tier, Registrars will vary the amount of regulatory engagement depending on actual compliance and the risks of non-compliance.

Within any tier, Registrars will vary the amount of regulatory engagement depending on actual compliance and the risks of non-compliance.

5. Registration tiers

The National Register will be divided into parts specifying three categories of registration referred to as Tier 1, Tier 2 and Tier 3.

The National Regulatory Code within the National Law sets out the performance outcomes that must be demonstrated by all tiers of registration.

To be registered in a particular tier, an entity must:

- meet the incorporation requirements for the particular tier
- demonstrate it meets the evidence requirements for the particular tier
- demonstrate that if it has affiliated entity arrangements it maintains control over activities and decisions that impact on its compliance with the National Law.

The registration tier is determined by a community housing provider's level of assessed risk, by reference to the scale and scope of the provider's community housing activities. The tier of registration in turn determines the performance requirements and intensity of regulatory engagement. Risk is not static and may change over time; this in turn may lead to a change in registration tier.

The registration tier is the first level of risk stratification to support a risk-based approach to regulating community housing providers. It predominantly deals with the consequences of risk associated with the scale and scope of a provider's community housing business.

Assessing performance data is the second level of risk stratification, which predominantly deals with the nature and intensity of regulatory engagement and, where necessary, action. This engagement will be regularly reviewed in light of changing business focus and complexity and performance.

The registration tier is determined by a community housing provider's level of assessed risk

6. Eligibility requirements

Tier 1

A Registrar may only place an entity in registration Tier 1 if the entity:

- is incorporated as either a company limited by shares or a company limited by guarantee under the Corporations Act
- demonstrates that if it has affiliated entity arrangements it maintains control over activities and decisions that impact on its compliance with the National Law (see section 8 of these guidelines)
- demonstrates it meets the evidence requirements for a Tier 1 provider as specified in the Evidence Guidelines.

Tier 1 providers face the highest level of performance requirements and regulatory engagement – reflecting the fact that Tier 1 providers are involved in activities that mean they manage a higher level of risk based on:

- operating at large scale, meaning any serious non-compliance has the potential to impact on a large numbers of tenants and assets
- ongoing development activities at scale, meaning any serious non-compliance has the potential to affect the viability of the provider.

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6. Eligibility requirements

Tier 2

A Registrar may only place a community housing provider in registration Tier 2 if the entity:

- is a body corporate created through state/territory or Australian government legislation, which are
 - companies limited by shares under the Corporations Act
 - companies limited by guarantee under the Corporations Act
 - corporations incorporated under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)
 - co-operatives or incorporated associations under state/territory legislation
 - other bodies corporate created through other state/territory or national legislation (eg a trust which legislation declares to be a body corporate).
- demonstrates that if it has affiliated entity arrangements it maintains control over activities and decisions that impact on its compliance with the National Law (see section 8 of these guidelines)
- demonstrates it meets the evidence requirements for a Tier 2 provider – as specified in the Evidence Guidelines.

Tier 2 providers face an intermediate level of performance requirements and regulatory engagement – reflecting the fact that Tier 2 providers are involved in activities that mean they manage a level of risk that is lower than Tier 1 providers but higher than Tier 3 providers based on:

- operating at moderate scale, meaning any serious non-compliance has the potential to impact on a moderate number of tenants and assets
- small-scale development activities, meaning any serious non-compliance has the potential to affect the viability of the provider.

Tier 3

A Registrar may only place a community housing provider in registration Tier 3 if the entity:

- is a body corporate created through state/territory or Australian government legislation, which are
 - companies limited by shares under the Corporations Act
 - companies limited by guarantee under the Corporations Act
 - corporations incorporated under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)
 - co-operatives or incorporated associations under state/territory legislation
 - other bodies corporate (e.g. trusts created through other state/territory or national legislation)
- demonstrates that if it has affiliated entity arrangements it maintains control over activities and decisions that impact on its compliance with the National Law (section 7 of these guidelines)
- demonstrates it meets the evidence requirements for a Tier 3 provider as specified in the Evidence Guidelines.

Tier 3 providers face a lower level of performance requirements and engagement – reflecting the fact that Tier 3 providers are involved in activities that means they manage a lower level of risk based on:

- operating at smaller scale, meaning any serious non-compliance has the potential to impact on a smaller numbers of tenants and assets
- no ongoing development activities or one-off and/or very small scale development activities.

7. Registration decisions about tiers

An entity or a registered community housing provider may apply to be registered in any tier, regardless of its past, current or planned scale and type of community housing activities.

However, the onus will be on the applicant to be able to fully demonstrate that it meets the requirements for that particular tier of registration both on application and as part of ongoing compliance assessments.

In assessing an application for registration or a change to registration, a Registrar will make an assessment of the overall level of risk in the entity's delivery of community housing activities and make a determination of the required level of regulatory oversight.

Registrars from participating jurisdictions will develop and apply common definitions to ensure consistent determinations are made regarding the required level of regulatory oversight. The framework underpinning these determinations is presented in Table A1 and additional information is set out in the Registration Return Guidance.

Within each tier, Registrars will also make assessments of the actual risks associated with a provider's compliance with the National Law and will use this assessment to determine the required level of regulatory engagement appropriate to these risks. This is separate to decisions about registration tiers that relate to eligibility criteria and the scale and scope of community housing activities.

A Registrar may reject an application for Tier 3 registration if the Registrar makes a determination that Tier 1 or 2 regulatory oversight is required based on the entity's community housing activities. A Registrar may reject an application for Tier 2 registration if the Registrar makes a determination that Tier 1 regulatory oversight is required based on the entity's community housing activities.

If an application for registration is approved, a Registrar's determination about the registration tier of an entity under section 14 (2) (c) of the National Law will be based on:

- evidence provided by the entity about its incorporation status
- evidence provided by the entity about affiliated entity arrangements and its ability to maintain control over activities and decisions that impact on its compliance with the National Law
- evidence provided by the entity to demonstrate that it meets the evidence requirements for a particular registration tier.

As the Evidence Guidelines are cumulative (i.e. Tier 1 evidence requirements encompass Tier 2 and 3 requirements; Tier 2 evidence requirements encompass Tier 3 requirements), the Registrar can determine that an entity should be registered in a lower tier than it applied for as long as this is consistent with the Registrar's determination of the appropriate level of regulatory oversight. For example, an entity applying for Tier 2 registration may be registered as a Tier 3 provider as long as the Registrar determines that its activities only require Tier 3 regulatory oversight.

A change to the registration tier of a registered community housing provider may be initiated by either:

- an application from the provider to change tiers
- a compliance assessment by the registrar that identifies a change to the scale or scope of operations of the provider, or
- an advice or notification to the Registrar that indicates a change in scale or scope of operations of the provider.

The onus will be on the applicant to be able to fully demonstrate that it meets the requirements for that particular tier of registration

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A Registrar's determination about the registration tier is an appealable decision

When making a determination to change the registration tier of an entity under section 12 (4) of the National Law, the Registrar will:

- provide a notice in writing to the entity stating their reasons for the change and any requirements that will need to be met for a different registration tier
- give the entity the opportunity to submit additional information or documents to demonstrate that the requirements for the new tier have been fully met.

In determining the registration tier as part of an application for registration or varying an existing registration under section 13 of the National Law, the Registrar will consider:

- information or documents the entity submits with the application form and further information or documents requested by the Registrar for the purposes of determining the application
- whether the information or documents submitted or requested unambiguously demonstrate that the requirements for a particular tier have been fully met.

A Registrar is not obliged to change the registration tier of an entity under section 12 (4) of the National Law if a provider becomes non-compliant – that is, they may proceed to use other enforcement powers including issuing a notice of non-compliance.

A Registrar's decision to change a provider's registration tier or to refuse a provider's application to change its registration tier is an appealable decision under section 25 (1) (a) and (d) of the National Law.

A housing agency may make it a requirement of receiving and keeping housing assistance (funding or assets) that an entity is registered in a particular registration tier.

8. Affiliated entity arrangements

For the purposes of these guidelines, the affiliated entity arrangements of an entity refer to either:

- a body corporate that controls the entity (e.g. parent company) or
- a body corporate that controls or partly controls the community housing assets and activities of the entity (e.g. special purpose vehicle or joint venture company) or
- a body corporate that undertakes community housing or other activities and is controlled or partly controlled by the entity (e.g. community housing subsidiaries; other subsidiaries) or
- a body corporate or unincorporated body that undertakes community housing activities under contract or agreement on behalf of the entity (e.g. service agreements), or
- other arrangements that affect the ability of the entity to maintain control over activities and decisions that impact on complying with the National Law.

A Registrar is required to consider the affiliated entity arrangements of an entity in making a determination of the registration tier. Registrars from participating jurisdictions will develop and apply a common set of procedures for assessing affiliated entity arrangements to ensure consistent determinations are made.

An applicant for registration must make an initial disclosure of affiliated entity arrangements under section 13 (5) (a) of the National Law and must make ongoing disclosures under section 15 (2) (d).

If a provider fails to disclose affiliated entity arrangements, its grounds for rejecting an application. If a registered community housing provider fails to disclose affiliated entity arrangements, the provider has not complied with the conditions of its registration with section 15 of the National Law.

In order to be registered, an entity with affiliated entity arrangements must demonstrate that it can maintain control over activities that impact on its compliance with the National Law.

9. Tier attributes

The description of registration tiers refers to attributes of community housing activities such as operating at scale, involvement in development activities and finance and leverage arrangements.

This attachment provides guidance on the interpretation of these terms in the context of registration tiers. Importantly, the definitions are framed in qualitative terms to reflect that there is not a single 'black box' formula for registration tiers and an element of judgement is required to assess the risk associated with a provider's community housing activities.

To assist community housing providers to understand the likely registration tier under which they would need to seek registration, a matrix has been prepared (Table A1) to provide examples of registration tiers. In practice, a provider may choose to seek registration in a higher tier (if the provider can demonstrate that the provider meets the requirements) or a Registrar may require registration in a higher tier (if the Registrar assesses there is a higher level of regulatory oversight required).

Scale of community housing tenancy and property management activities

The scale of community housing tenancy and property management activities is typically classified as:

- small-scale or lower risk if the provider has responsibility for managing fewer than 100 tenancies
- moderate-scale or moderate risk if the provider has responsibility for managing between 50 and 500 tenancies
- large-scale or higher risk if the provider has responsibility for managing more than 350 tenancies.

The definitions are deliberately presented as a range to highlight that provider 'scale' is always considered relative to other attributes such as development activities and finance arrangements. In addition, it is recognised that a new entrant may initially have a zero base but a specific plan to operate at a certain scale.

The Registration Return Guide provides additional information about how tenancy and property management scale is defined. The numbers quoted in the document reflect sector characteristics at January 2014 and will be revised if and when necessary.

Development activities

Community housing development activities refer to property development involving the construction or major refurbishment of community housing assets. Development activities are classified as:

- lower risk if the provider is involved in no development activities or one-off and very small scale development activity
- moderate risk if the provider is involved in ongoing small-scale development activities
- higher risk if the provider is involved in ongoing development activities at scale.

Development scale is set relative to the national market, the size of which will be influenced by a range of factors, notably the economic outlook and funding opportunities. The assessment of development activity by registrars will take into account the number of units involved, the costs, financing arrangements and complexity of the development(s) in their tier assessment.

Registrars will also take into account whether a provider's development programme is 'ongoing'. This refers to the existence of a committed forward program. It does not necessarily require that particular schemes are 'shovel ready' but that for example:

- there is a contract or agreement to meet development targets
- there are well advanced plans for sites that have been acquired possibly with development approvals.

The Registration Return Guide provides additional information about how development activities are defined.

Finally, in coming to a decision about an appropriate tier, Registrars will also consider the scope of a provider's affiliated entity arrangements. Providers engaged in complex relationships and interdependencies with parent or subsidiary entities; contractual partnerships or some form of cross-guarantee may be determined to be in a different tier to another with the same number of tenancies, assets and development.

The Registration Return Guide provides additional information about how affiliated entity arrangements are applied in determining tier.

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Table A1: Example of the typical registration tier for different community housing activities

SCOPE	0		50		100		300		500		2,000	
Ongoing development activities at scale	Tier 1		Tier 1		Tier 1		Tier 1		Tier 1		Tier 1	
Ongoing small-scale development activities	Tier 2		Tier 2		Tier 2		Tier 2		Tier 1 or 2		Tier 1	
One-off and/or very small scale development activities	Tier 3		Tier 2 or 3		Tier 2		Tier 2		Tier 2		Tier 1 or 2	
No development activities	Tier 3		Tier 3		Tier 2 or 3		Tier 2		Tier 2		Tier 2	
Scale of community housing tenancy and property management activities Number of community housing tenancies / Number of community housing properties (whichever is larger)												

Glossary

Community housing

Housing for people on a very low, low or moderate income or for people with additional needs that is delivered by non-government organisations.

Community housing asset

- a) land vested in the provider by or under the community housing legislation of a participating jurisdiction, or
- b) land acquired by the provider wholly or partly with funding provided by a housing agency of a participating jurisdiction, or
- c) land vested in the provider on which a housing agency of a participating jurisdiction has constructed housing or made other improvements, or
- d) funds provided to the provider by a housing agency of a participating jurisdiction for the purposes of community housing, or
- e) any other asset of the provider that is of a class of assets declared by the community housing legislation of a participating jurisdiction as community housing assets for the purposes of the National Law.

Community housing legislation

The National Law as applied in or adopted by a jurisdiction, together with any other legislation declared to be community housing legislation by the law of that jurisdiction.

Community housing provider

An organisation that provides community housing.

Corporations Act

The Corporations Act 2001 (Cth)

Enforcement Guidelines

Guidelines setting out the enforcement actions available to Registrars under the National Law if they reasonably believe that a provider is not complying with the community housing legislation of a participating jurisdiction.

Evidence Guidelines

Guidelines that describe the performance indicators and evidence sources for the assessment of providers against the National Regulatory Code in respect of Tier 1, 2 and 3 providers.

Housing agency

A Commonwealth, state or territory government department or agency with responsibility for policy and funding decisions relating to community and other housing.

National Law

The state and territory based legislation through which the NRSCH is being introduced. The National Law is enacted in the host jurisdiction, New South Wales, and either applied or adopted by participating jurisdictions.

National Regulatory Code

The performance requirements that registered housing providers must meet and comply with in providing community housing.

National Regulatory Council (NRC)

An independent advisory committee to be appointed by housing ministers as an independent advisory committee to oversee the operation of the NRSCH with Secretariat support.

National Regulatory System for Community Housing (NRSCH)

A national system of registration, monitoring and regulation of community housing providers to encourage the development, viability and quality of community housing to promote confidence in the good governance of registered community housing providers so as to:

- facilitate greater investment in the sector
- make it easier for community housing providers to operate in more than one participating jurisdiction, and
- identify appropriate entities to which government funding for community housing might be provided under other legislation or policies of a jurisdiction.

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Operational Guidelines

The suite of guidelines that governs the operation of the NRSCH, including the Evidence Guidelines, these Tier Guidelines and the Enforcement Guidelines.

Participating jurisdictions

Commonwealth, states and territories whose governments have agreed to participate in the NRSCH, e.g. a jurisdiction that applies or adopts the National Law.

Primary Registrar

The Registrar for the primary jurisdiction in which the community housing provider operates; generally the Registrar in the state or territory in which the provider undertakes the majority of its community housing activity.

Please note: Some common terms may have slightly different definitions in different jurisdictions that reflect variations in their legislation and/or existing terminology.

For more information

For more information on the National Regulatory System for Community Housing, please visit: www.nrsch.gov.au



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