

# Enforcement guidelines for Registrars



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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) agencies<sup>1</sup>.

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 Community Housing Providers National Law (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.

<sup>1</sup> 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 according to section 10 (2) of 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.

## Registrars

Each participating state and territory has a Registrar or appoints a Registrar from another jurisdiction to apply the National Law and regulate providers within its jurisdiction.

Registrars have the power to register providers, monitor provider performance, to intervene when non-compliance occurs, and to cancel the registration of non-compliant providers. Where a provider operates across multiple jurisdictions, a Primary Registrar will be appointed so the housing provider only has to deal with one Registrar.

Registrars will be appointed under the National Law as it is enacted in each jurisdiction.

## Enforcement powers

The National Law gives Registrars the power to take enforcement action if the Registrar reasonably believes a provider is not complying with the community housing legislation of a participating jurisdiction (section 17 of the National Law).

Under the National Law, Registrars have a range of enforcement powers, including:

- issuing a Notice of Non-Compliance
- giving Binding Instructions
- issuing a Notice of Intent to Cancel Registration
- appointing a statutory manager.

In exercising these powers under the National Law, a Registrar is required to comply with these Enforcement Guidelines.

The purpose of these Enforcement Guidelines is to ensure that the use of enforcement powers is:

- nationally consistent under the National Law
- nationally consistent with the principles of good regulation.

The National Law gives Registrars the power to take 'enforcement action' if the Registrar reasonably believes a provider is not complying with the community housing legislation of a participating jurisdiction

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### 3. Enforcement principles and approach

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#### Principles

Registrars have enforcement powers to ensure that tenants and community housing property are protected in the event that a provider does not comply with the National Law (including the National Regulatory Code).

The enforcement approach is based on a spirit of encouraging providers to remedy non-compliance, before a Registrar takes enforcement action. Providers self-assessing and Registrars identifying potential non-compliance early will be encouraged to promote a culture of compliance as industry best practice.

Providers are responsible for demonstrating and maintaining compliance with the National Law and will be expected to be proactive in reviewing, disclosing and addressing issues of non-compliance as they arise.

Where there are issues of non-compliance, the National Law gives Registrars a range of enforcement powers based on the following principles of good regulation:

- Proportionate – enforcement powers will be used only when necessary and in a way that is appropriate to the assessed level of risk
- Accountable – able to justify regulatory assessments and be subject to scrutiny
- Consistent – enforcement will be consistent regardless of the jurisdiction in which the provider operates
- Transparent – there will be clear and open communication with providers about enforcement processes and decisions
- Flexible – enforcement will avoid unnecessary rules about how providers organise their business and demonstrate compliance
- Targeted – enforcement will be focused on the core purposes of improving tenant outcomes and protecting vulnerable tenants, protecting government funding and equity, and ensuring investor and partner confidence.

#### Enforcement approach

Registrars encourage compliance by providing guidance on the performance and legal requirements that providers must meet under the National Law and the National Regulatory Code.

Performance and assessment data is used to inform a risk-based assessment of all registered providers to determine compliance with the National Law and the National Regulatory Code. This determines the nature of regulatory engagement and, where necessary, action.

Risk-based engagement recognises:

- the impact of complex business structures, for instance with multi-jurisdictional providers
- potential or actual problems from providers taking on risky activities
- potential or actual problems due to weaknesses in management or governance.

For providers with a simple business model, engagement will be minimal.

All providers will generally be informed of the expected level of engagement. This engagement will be regularly reviewed in light of changing business focus and complexity and performance.

Regulation will be responsive, proportionate and consistently applied.

The enforcement approach is based on a spirit of encouraging providers to remedy non-compliance, prior to the taking of enforcement action.

In broad terms risk-based engagement will allow Registrars to:

- maintain a minimum level of regulatory engagement for consistently well-performing providers (for these providers more reliance is placed on monitoring basic data and health checks and on the provider advising the regulator of any change of circumstances)
- develop a new approach for multi-jurisdictional providers where there is an increased level of risk arising from size or the amount of money they receive for development
- engage with providers more intensively where higher levels of risk are identified, in ways that reflect their particular circumstances.

When a risk or series of risks result in non-compliance, a Registrar will use a staged and escalated approach to bringing the provider back to compliance, where the Registrar considers this approach to be appropriate. This recognises that early, open and cooperative enforcement can bring about the quickest and most effective return to compliance in the majority of cases, and is least intrusive into the affairs of independent providers.

If the matter is not serious or urgent, a registrar will endeavour to work cooperatively with the provider to address issues of non-compliance in the first instance; that is, through regulatory measures.

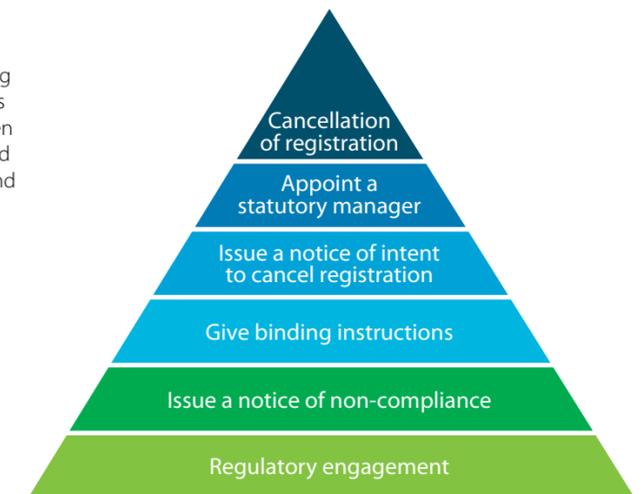
Where a provider is unable or unwilling to sufficiently address issues of non-compliance, or where the non-compliance is significant, a Registrar may use enforcement powers to bring the provider back to compliance or to cancel its registration.

The preferred approach is for a Registrar to progressively escalate the Registrar's responses until a provider returns to compliance. While this is the preferred response, a Registrar may move to any level of enforcement response permitted by the National Law, if the circumstances warrant it.

For example, there may be situations where it is appropriate for the Registrar to move straight to a notice of intent to cancel the provider's registration.

The escalating approach to non-compliance is depicted in Figure 1.

**Figure 1: Escalating approach to non-compliance**



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## 4. Guidance on enforcement action

A Registrar will not require information that identifies anyone who lives in a residential premises, or require entry to a residential premises, unless the person gives consent.

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#### Information and inspection powers

Under a provider's conditions of registration set out in section 15 (2) of the National Law, a Registrar may require the provider to do any or all of the following:

- produce information about the provider's affairs or the exercise of its functions, including information about arrangements with others regarding the exercise of its functions, and including copies of documents or records
- ensure that a suitably qualified officer of the provider attends a meeting with the Registrar to answer questions about the affairs of the provider,
- allow the Registrar to carry out an inspection of the provider's premises or records, at any reasonable time.

A Registrar will not require information that identifies anyone who lives in residential premises, or require entry to residential premises occupied by a person, unless that person consents.

A Registrar will ensure all information is collected and handled in accordance with applicable information and privacy laws.

A Registrar will ensure that requests to a provider to supply information, or to inspect records or premises, relate to its assessment of whether the provider is complying with the National Law. In making such requests, a Registrar will document or refer to published reasons as to why the Registrar needs the information to make an assessment of compliance.

#### Enforcement action

A Registrar can take the following enforcement actions under the National Law:

- *Issuing a Notice of Non-Compliance* (section 18 of the National Law). A Registrar may issue a notice in writing to the provider identifying the matters it must address in order to avoid cancellation of its registration.
- *Giving Binding Instructions* (section 19 of the National Law). A Registrar may give written instructions to the provider about the manner in which the provider is to address any matter that is the subject of a notice of non-compliance.
- *Issuing a Notice of Intent to Cancel Registration* (section 20 of the National Law). A Registrar may issue a written notice of intent to cancel registration to the provider if the Registrar is of the opinion that either:
  - o the provider has not addressed the matters identified in a notice of non-compliance within the specified period
  - o the provider has not complied with Binding Instructions within the specified period, or
  - o the provider's failure to comply with the community housing legislation is serious and requires urgent action.
- *Appointing a statutory manager* (section 21 of the National Law). A Registrar may appoint a statutory manager to conduct such of the affairs and activities of the provider as relate to the community housing assets of the provider, only if either of the following occurs:
  - o a Notice of Intent to Cancel Registration has been issued to the provider, or
  - o the Registrar forms the opinion that the provider has failed to comply with community housing legislation or Binding Instructions and the provider's failure to comply is serious and requires urgent action.

#### General considerations in deciding whether to take enforcement action

Registrars generally take enforcement action if non-compliance is significant and requires more than regulatory engagement to ensure change is made and compliance is achieved. The sections following outline how Registrars will make decisions about enforcement actions.

Before taking enforcement action, the Registrar should consider, and balance, the interests of:

- tenants of the provider
- the provider, in respect of the community housing portion of its business activities
- secured creditors and government housing agencies, to the extent required by the community housing legislation of a participating jurisdiction
- other relevant interests, consistent with the object of the National Law to promote confidence in the good governance of registered community housing providers so as to facilitate greater investment in that sector.

Consistent with the principles of good regulation, a Registrar will not take enforcement action that is likely to leave the provider less able to comply with the National Law or less able to remedy the compliance issues identified by the Registrar.

A Registrar will not take enforcement action that materially damages the interests of tenants, the business of the provider, or the contractual or statutory interests of secured creditors and government housing agencies, unless the risk of non-compliance is serious and urgent and all reasonable steps are taken to mitigate that damage.

In deciding whether to take enforcement action, a Registrar should consider relevant information in order to form a judgement about whether a provider is complying with the community housing legislation, including but not limited to:

- any information or reports provided by the community housing provider (or a failure to provide adequate information or reports)
- information obtained from any information request or inspection carried out by the Registrar or authorised officer
- any relevant information provided by a tenant, another body that regulates the provider, creditors or government housing agencies of the provider.



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## Serious and urgent matters

A matter will be serious and requires urgent action where the provider's failure to comply creates a risk that is likely or certain to crystallise and is significant or severe in its consequences for community housing tenants or assets.

A serious and urgent matter requires the Registrar to take enforcement action to ensure that tenants and community housing assets are appropriately protected.

A matter that is serious and requires urgent action includes, but is not limited to:

- an act, omission or event that endangers the safety or security of tenants
- a significant threat to the financial viability of the provider
- a significant fraud, theft, corruption or dishonesty by an employee or member of the board of the provider.

A Registrar may also consider other matters are serious and urgent based on a risk assessment that considers the consequences of failing to take enforcement action.

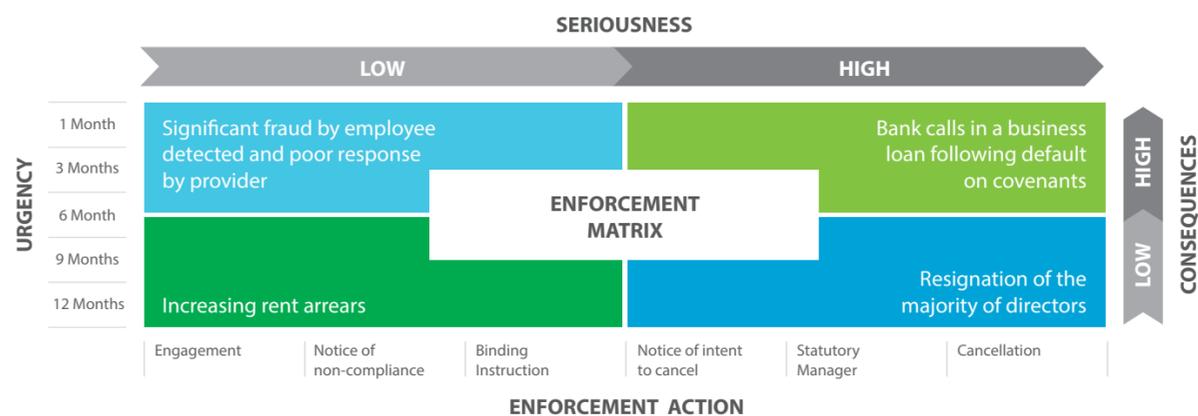
The seriousness and urgency of non-compliance is considered according to a risk matrix to determine the appropriate enforcement action, as illustrated in Figure 2.

## Triggers and scope of enforcement action

The enforcement powers in the National Law are framed broadly to allow Registrars to undertake proportionate and targeted action based on their judgement of the consequences of a provider's non-compliance with the National Law.

The triggers and scope of enforcement action described in the following section are intended to be illustrative of how the principles of good regulation are applied but are not exhaustive because it is not possible to identify all possible situations where enforcement action may be justified.

**Figure 2: Enforcement matrix demonstrating possible financial and governance scenarios and possible actions**



## Notice of non-compliance

The situations in which a Registrar could consider issuing a notice of non-compliance include, but are not limited to, situations where the provider has failed to comply with the community housing legislation and either:

- the non-compliance is not trivial or administrative in nature
- the non-compliance is repeated
- the non-compliance is wilful, systemic in nature, or involves dishonesty, or
- the provider has a history of non-compliance and/or a poor response to rectifying non-compliance.

When issuing a notice of non-compliance, a Registrar must:

- identify the matters required to be addressed in order to avoid cancellation of the provider's registration for not complying with the community housing legislation
- specify a reasonable period in which those matters are to be addressed
- provide a copy of the notice to the Registrar for each participating jurisdiction.

Where the provider is willing and able to remedy the non-compliance, the Registrar may issue subsequent notices of non-compliance providing an extended period to address the matters of non-compliance. The situations in which a Registrar could consider issuing subsequent notices of non-compliance include, but are not limited to, situations where remedial action by the provider is well underway but not complete, or where remedial action by the provider relies on the action of a third party that is underway but not complete.

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## Binding instructions

A Registrar may give written instructions to a provider about the way the provider should address any matter that is the subject of a notice of non-compliance issued to the provider.

The situations in which a Registrar could consider giving Binding Instructions include, but are not limited to, situations where either:

- the provider has not addressed a matter identified in a notice of non-compliance within the specified period and the Registrar has reasonable concerns about the willingness or capacity of the provider to identify an appropriate manner in which to address the matter, or
- the Registrar forms the opinion that the provider lacks the willingness or capacity to identify an appropriate manner in which to address a matter that is identified in a notice of non-compliance that has been issued, or will be issued at the same time as the Binding Instructions are given.

Binding Instruction require action to rectify a matter identified in a notice of non-compliance either previously given to the provider, or given to the provider at the same time as the Binding Instructions. For example, Binding Instructions may:

- require action to address significant deficits in the skills, experience and performance of a provider's board through changes to board membership (in response to a non-compliance related to performance outcome 4 of the National Regulatory Code)
- require action to remedy a serious breach of probity through changes to the provider's systems for preventing, detecting, reporting on and responding to instances of fraud, corruption and criminal conduct (in response to a non-compliance related to performance outcome 5 of the National Regulatory Code)

- requiring action to prevent a significant risk of insolvency (in response to a non-compliance related to performance outcome 7 of the National Regulatory Code)
- requiring action to ensure that tenants are housed to a reasonable standard (in response to a non-compliance related to performance outcome 1 of the National Regulatory Code).

Consistent with the principles of good regulation, a Registrar will try to avoid unnecessary prescriptions and impositions on how providers organise their business, provided that this does not limit the Registrar's ability to require action that will significantly improve the ability of the provider to rectify non-compliance.

## Notice of intent to cancel registration

A Registrar may issue a Notice of Intent to Cancel Registration where :

- the provider has not addressed the matters identified in a notice of non-compliance within the period specified in the notice
- the provider has not complied with Binding Instructions issued to the provider within the period specified in the instructions, or
- the provider's failure to comply with the community housing legislation is serious and requires urgent action.

When issuing a Notice of Intent to Cancel Registration, a Registrar must:

- specify the matters the Registrar considers warrant cancellation of registration, and
- specify a reasonable period of at least 14 days for the provider to satisfy the Registrar that its registration should not be cancelled.

A Registrar may extend a notice of intent to cancel, at the request of the provider, if there are good reasons for doing so. Good reasons may include situations where remedial action by the provider is well underway but not complete, and the provider has demonstrated the willingness and capacity to pursue the remedial action.

## Statutory manager

The situations in which a Registrar can appoint a statutory manager are where:

- a notice of intent to cancel registration has been issued to the provider, or
- the Registrar forms the opinion that the provider has failed to comply with the community housing legislation or binding instruction and the provider's failure to comply is serious and requires urgent action.

In appointing a statutory manager, a Registrar is attempting to protect tenants and/or community housing assets in circumstances where the provider lacks the willingness or capacity to bring itself back to compliance or to manage its affairs in an orderly way before its registration is cancelled. Examples of where a provider will be considered to lack this willingness or capacity are where:

- the provider lacks a properly constituted governing body, to put a governing body in place and hand back control of the provider to the new governing body
- the provider lacks the willingness or capacity to undertake actions necessary to transfer community housing assets to another registered provider following the issuing of a notice of intent to cancel their registration
- a bank triggers an agreement between itself, the provider and a government housing agency because of a default on a financial covenant and the provider lacks the willingness or capacity to undertake actions necessary to meet its obligations under the agreement
- the provider lacks the willingness or capacity to undertake actions necessary to protect tenants from eviction following a secured creditor or corporate regulator appointing a receiver or administrator.

Consistent with the principles of good regulation, and the National Law, appointing a statutory manager should avoid any unnecessary prescriptions and impositions on the affairs and activities of the provider that do not relate to the community housing activities and assets of the provider in undertaking functions necessary to protect tenants and community housing assets.

The Registrar will usually specify an initial period of appointment for the statutory manager. The Registrar can amend the period of appointment for the statutory manager. While there is discretion in the period of appointment, it is expected that in ordinary circumstances a statutory manager would be appointed for between three and six months, and in complex circumstances for no more than 12 months.

A statutory manager's expenses while conducting the affairs and activities of a registered community housing provider are payable by the provider.

## Notice of cancellation of registration

A Registrar may issue a Notice of Cancellation of Registration where:

- the provider has been wound up
- the provider has applied for cancellation, or
- the Registrar has issued a notice of intent to cancel registration and the provider has not, within the time specified in the notice, satisfied the registrar that its registration should not be cancelled.

If the notice of cancellation of registration follows a notice of intent to cancel registration, a Registrar will list the reasons for cancellation and the date of effect of cancellation.

A Registrar will only cancel the registration of a provider once all tenancies and each community housing asset of the entity in each participating jurisdiction has been transferred or otherwise dealt with in accordance with the community housing legislation of a participating jurisdiction that applies to the tenancies and asset.

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Registrars from participating jurisdictions will develop and apply a common set of operating procedures to ensure the consistent use of enforcement powers

### Publication of enforcement action

A Registrar must record on the publicly available National Register:

- a copy of any Binding Instruction issued to a provider
- a copy of any Notice of Intent to Cancel Registration
- details of any appointment of a statutory manager, including a copy of the relevant instrument of appointment, and
- whether a provider's registration has been cancelled, and details of any cancellation, including a copy of any Notice of Cancellation issued.

Except in prescribed circumstances, other forms of regulatory engagement and enforcement action between a Registrar and provider are subject to non-disclosure requirements.

### Consistency and transparency of enforcement action

Registrars will develop and apply a common set of operating procedures to ensure the consistent use of enforcement powers regardless of the jurisdiction in which they operate. For example, Registrars will use a standard form for issuing Binding Instructions and appointing a statutory manager.

Registrars will develop and apply a common set of communication procedures to ensure clear and open communication with providers about enforcement processes and decisions.

### Appeals

Providers may appeal to the Appeal Tribunal in relation to the following enforcement decisions of a Registrar:

- a decision to issue Binding Instructions
- a decision to appoint a statutory manager
- a decision to cancel the entity's registration.

The appeal process will follow the provisions of the National Law and the procedures of the Appeal Tribunal. It must be noted that the appeal process is not uniform throughout the participating jurisdictions.

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# Glossary

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### Appeal Tribunal

The tribunal specified as the Appeal Tribunal in the community housing legislation of the relevant jurisdiction.

### Binding Instructions

Written instructions given by a Primary Registrar to a provider to rectify the Provider's non-compliance.

### 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

- land vested in the provider by or under the community housing legislation of a participating jurisdiction, or
- land acquired by the provider wholly or partly with funding provided by a housing agency of a participating jurisdiction, or
- land vested in the provider on which a housing agency of a participating jurisdiction has constructed housing or made other improvements, or
- funds provided to the provider by a housing agency of a participating jurisdiction for the purposes of community housing, or
- 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.

### 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 body or officer declared to be a housing agency of a participating jurisdiction by the community housing legislation of that jurisdiction for the purposes of the provision of the National Law in which the expression occurs.

### 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 Register

A single national database with the details of all registered community housing providers that is made publicly available.

### National Regulatory Code

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

### National Regulatory Council

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.

### Operational Guidelines

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

### Participating jurisdiction

An Australian 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.

### Statutory manager

A Registrar-appointed manager to conduct the affairs and activities of the provider as they relate to the provider's community housing assets if:

- a notice of intent to cancel registration has been issued to the provider, or
- the registrar forms the opinion that the provider has failed to comply with community housing legislation or Binding Instructions and the provider's failure to comply is serious and requires urgent action.

### Tier Guidelines

Guidelines for the application of the three-tiered registration system based on risk, whereby different levels of regulatory oversight apply to providers based on the scale and scope of their community housing activities.

Please note:

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



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