

PROPOSAL FOR A NATIONAL REGULATORY FRAMEWORK FOR AFFORDABLE HOUSING

Final report

17 July 2007

1 Introduction

1.1 Not-for-profit housing sector

Ministers nationally have endorsed work to consider how the Australian and State/ Territory Governments can support the emergence of a larger, more independent and more effective not-for-profit housing sector to supplement the existing social housing system and make a significant contribution to the provision of affordable housing.

Over the last twenty years, governments have increasingly funded the not-for-profit community housing sector to manage affordable housing stock developed by government. An estimated 1,700 not-for-profit housing providers now manage some 50,000 affordable housing properties ranging from large, specific-purpose housing companies, through Indigenous community housing organisations, to small tenant-managed housing cooperatives.

The current Commonwealth-State Housing Agreement, which expires in June 2008, has as one of its key priorities the delivery of innovations to leverage additional resources into affordable housing, through community, private sector and other partnerships.

1.2 National Sector Development Plan

Housing Ministers nationally have endorsed a *Framework for National Action on Affordable Housing*, (HMC / LGPMC, 2005) which includes a commitment to a National Sector Development Plan for NFP Growth providers.

The Framework refers to NFP Growth providers as organisations that aspire to operate at a significantly increased scale and to actively leverage their holdings and investments to increase affordable housing outcomes. These organisations are distinguished from the multitude of existing, and typically very small, community housing providers who, because of their scale, are not well placed to capture private investment or to achieve economies of scale.

Phase 1 of the National Sector Development Plan was developed by the PRWG Not for Profit Housing Development Sub Group and endorsed by HMC in September 2006. The focus of the Phase 1 Plan is on two priority outputs that need to be delivered to underpin and fast-track the development of the NFP Growth sector. A report will be prepared for the Housing Ministers' Conference in September 2007 documenting the delivery of the agreed output and a revised Plan for Phase 2.

The priority outputs for Phase 1 are:

1. A National Regulatory Framework that sets out the requirements and leading practices for NFP Growth organisations – focusing on:
 - Core national performance standards and principles of good regulation
 - Specifications for instruments for delivering regulation and different approaches to implementation (including monitoring and reporting against core standards).
2. Foundation elements for building sector capacity by facilitating the development of the skills (and drawing out skills from related areas) to support large-scale affordable housing initiatives – focusing on:
 - Mechanisms and structures to support NFP Growth organisations
 - A nationally-agreed set of organisational capability requirements
 - National corporate governance guidelines for NFP Growth organisations.

For the purposes of this work, the focus of the NFP Growth sector is broadly defined in terms of growth in affordable housing. This potentially covers:

- new housing developments that target low to moderate income clients facing significant affordability barriers in the private rental market
- large-scale housing development that target clients with complex housing needs (that have traditionally been managed by public, community and Indigenous housing providers).

While no targets or growth strategies have been agreed to by Housing Ministers, it is implicit in the National Sector Development Plan that an increasing proportion of affordable housing properties will be delivered and managed by the NFP Growth sector over the next 5 years. Currently, there are less than 10 NFP Growth providers with more than 1,000 properties under management - representing around 2.5% of all affordable housing stock. Growth to 25% of stock could be achieved through 25 NFP Growth providers each managing 4,000 properties.

1.3 National Regulatory Framework for Affordable Housing

There is currently significant diversity across Australian jurisdictions in the scope and focus of regulatory arrangements for community housing providers in general, and NFP Growth organisations in particular. More broadly, there is a wide array of regulatory approaches for the affordable housing sector in international contexts.

The development of a National Regulatory Framework is intended to build on a comparative analysis of current practices both in Australia and internationally, focussed on identifying:

- **Principles of good regulation** - to guide regulatory activities involving the NFP Growth sector
- **A national regulatory code** - linked to the key risks to major stakeholders of NFP Growth activity
- **Mechanisms for delivering regulation** - the range of instruments and approaches that could be used by jurisdictions to regulate NFP Growth activities
- **Guidelines for implementation** - to support jurisdictions to implement the National Regulatory Framework.

1.4 Proposal

This report outlines a proposal which could form the basis of a national regulatory framework for NFP Growth providers.

The proposal is based on an analysis of affordable housing regulation both in Australia and internationally (Attachment 3), and consultations with each jurisdictions and members of an Expert Reference Panel. The evidence basis of the proposal is reinforced by the findings of the Cave Review of Social Housing Regulation in the UK that was published in June 2007 (Attachment 4).

A number of findings from the review reinforced the core proposal for a national regulatory framework for NFP growth providers.

If the proposal is endorsed by Housing Ministers, then detailed development work will be undertaken by each jurisdiction to implement State/Territory-based regulatory arrangements consistent with the National Framework. An implementation strategy for each jurisdiction is presented in Attachment 2.

2 Proposed National Regulatory Framework

2.1 Scope

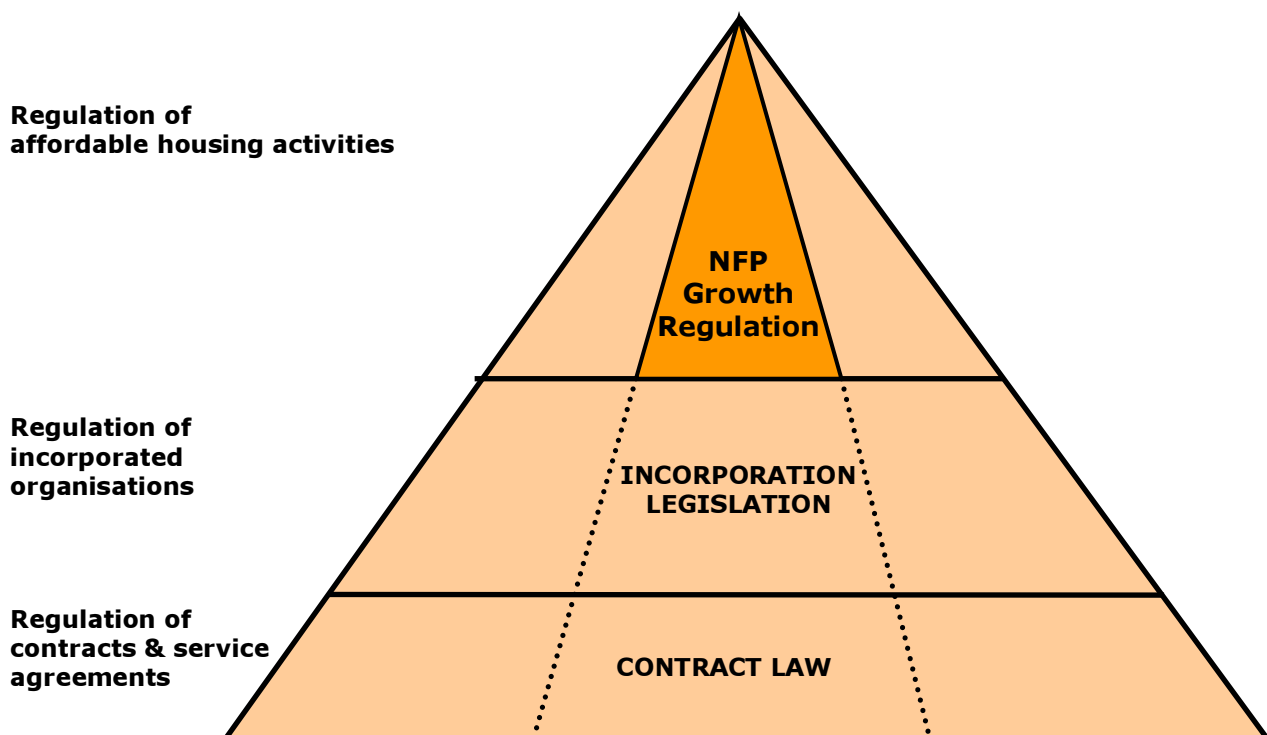
The National Regulatory Framework for Affordable Housing refers to the nationally consistent system of legislative and administrative controls adopted by jurisdictions to manage risk and support the achievement of affordable housing outcomes in the NFP Growth sector.

Under the framework, the focus of these controls is based on the registration of providers that fully meet the outcomes specified in a national code and the associated intervention powers to ensure ongoing compliance with the code (see below). These controls are intended to be limited to those risks that can not be adequately dealt with through contracts with providers and the broader regulatory controls available through the legislation under which providers are incorporated.

In the context of the framework, the NFP Growth sector refers to organisations that aspire to operate at scale (relatively to the scale of the social housing portfolios within different jurisdictions) and to actively leverage their holdings and investments to increase affordable housing outcomes.

These organisations are distinguished from the typically very small, community housing providers who will continue to deliver housing services but, because of their scale, are not well placed to capture private investment or to achieve economies of scale. They are also distinguished from organisations (including private developers and investors) that enter into commercial arrangements with government for specific affordable housing projects but whose core business is not centred on the achievement of social and charitable objectives.

In this way, the scope of the National Regulatory Framework for Affordable Housing is specifically limited to NFP Growth providers and to the specific risks that can not be managed through contracts and incorporation legislation. Outside of this scope, individual jurisdictions will have autonomy to decide how to manage the risks associated with all other affordable housing activities they are involved in.



2.2 Objectives

The proposed objectives of the National Regulatory Framework are:

- to secure the **reputation** of the NFP Growth affordable housing sector as incorporating organisations with the skills and experience to manage large-scale affordable housing portfolios and to actively leverage their holdings and investments to participate in large-scale affordable housing developments
- to secure for **vulnerable households** appropriate and affordable housing which meets community standards
- to secure for **taxpayers** proper assurance that the resources that government makes available for affordable housing go to those organisations who can make the best use of them to deliver value for money housing for priority populations identified by government
- to reduce barriers to **operating at scale** by ensuring there are not unnecessary restrictions on the type of organisation that can be part of the NFP Growth sector, and by allowing NFP Growth organisations and their private sector partners to operate nationally and across jurisdictions
- to reduce the **cost** of the regulatory systems to NFP Growth organisations and government by adopting nationally consistent approaches that apply across all jurisdictions.

2.3 Principles

The proposed principles of good regulation that guide the National Regulatory Framework for the NFP Growth sector are that regulation should be:

- **Proportionate:** Regulators should only intervene when necessary. Remedies should be appropriate to the risk posed, and costs identified and minimised
- **Accountable:** Regulators must be able to justify decisions, and be subject to public scrutiny
- **Consistent:** Government rules and standards must be joined up and implemented fairly
- **Transparent:** Regulators should be open, and keep regulations simple and user friendly
- **Targeted:** Regulation should be focused on the problem, and minimise side effects.

The specific attributes of adopting these principles for the National Regulatory Framework are that:

- Regulatory requirements will be defined in terms of clear **outcomes** for affordable housing clients (tenants and applicants), taxpayers and the reputation of the NFP Growth sector, rather than the processes that the sector should use to achieve these outcomes
- Regulatory requirements will only be specified in those areas where there are significant **risks** to the achievement of the intended outcomes and the risks cannot be cost-effectively managed through contracts with providers or the broader regulatory controls available through the legislation under which providers are incorporated.

- Regulatory controls will include both meaningful **incentives** to reward the achievement of the outcomes, and proportionate **sanctions** where the outcomes are not achieved. Where organisations fail to meet the regulatory requirements, the regulator needs to be able to intervene quickly
- Regulatory controls for the NFP Growth sector will be more **stringent** than those for the broader community housing sector, reflecting the higher risks associated with the scale and profile of these new growth activities. There will be a scaling back of regulatory engagement for activities that fall into the low risk category
- Regulatory controls will be consistent with Australian and State/ Territory legislation governing the corporate rules under which organisations in the NFP Growth sector operate - in particular, recognising the **independence of NFP Growth organisations** which operate at arms-length from government
- Regulatory controls will be subject to appropriate arrangements to ensure transparency of decision-making and **procedural fairness**
- The regulatory framework will be **regularly reviewed** to formally assess whether the risks being managed remain relevant and whether there are other alternative mechanisms for managing them - particularly through consumer- or industry-led approaches.

2.4 Mechanism for delivering regulation

Each state and territory that participates in the proposed National Regulatory Framework would commit to:

- operate a **multi-tiered registration** system within their jurisdiction which, as a minimum, included a specific category of registration for NFP Growth providers. Registration is a mechanism that involves formally recognising incorporated organisations that have demonstrated the achievement of specified outcomes, linked to intervention powers to ensure the ongoing achievement of these outcomes. The optimal approach would be for jurisdictions to enact legislation¹ to underpin the registration system but it would be acceptable for jurisdictions to operate administratively-based registration systems as an interim measure
- adopt the **National Regulatory Code** (Box 2) as the basis for defining and measuring the outcomes that registered NFP Growth providers are expected to meet
- appoint a **Registrar** (or assign the function to an officer) who has responsibility for making registration decisions and initiating actions allowed under the registration system
- maintain a **Register** that lists the organisations operating within the jurisdiction that the Registrar has recognised as meeting the National Regulatory Code
- require that registered NFP Growth providers are **companies** registered under the *Corporations Act*, are registered charities, and have a constitution that includes an appropriate social housing object and requires that, if wound up, its surplus assets must be distributed to another registered provider approved by the Registrar

¹ Attachment 2 of the Position Paper highlights the critical role of legislation in an effective regulatory system. At the same time, jurisdictions require flexibility in terms of the timing and scope of any legislation to reflect their local context.

- **advise other jurisdictions** of all NFP Growth registration decisions made by the Registrar and any changes in performance or risks associated with a particular registered NFP Growth providers that could impact on their registration status
- **mutual recognition** of registration decisions whereby an organisation seeking registration in a particular jurisdiction can simply use its registration in another jurisdiction as evidence to demonstrate it meets the National Regulatory Code. In a similar way, where an organisation is deregistered in another jurisdiction, the Registrar will take action to deregister them in their jurisdiction
- **work cooperatively across jurisdictions** to develop the tools and guidelines to support nationally-consistent registration systems including requirements for verification and reporting compliance with the Regulatory Code, and policy guidelines and standards referred to in the Regulatory Code.
- where appropriate, negotiate **bilateral arrangements** with other jurisdictions to share existing registration infrastructure (eg established registration assessment systems) in order to reduce the costs for smaller jurisdictions in duplicating infrastructure

Such a regulatory mechanism could be underpinned by legislation that includes, as a minimum, a mandate to register and deregister organisations as well as appropriate intervention powers. Given that each jurisdiction would register all NFP growth providers that operate in their jurisdiction, each jurisdiction will have autonomy to decide what intervention powers are appropriate to support their registration system.

An outline of sample registration legislation (Box 1) and the proposed National Regulatory Code (Box 2) are presented in Attachment 1.

3 Guidelines for implementation

3.1 Key elements for implementation

If the proposed National Regulatory Framework outlined in Section 2 is endorsed by Housing Ministers in September 2007, there would be a staged implementation of the Framework over a three to five year period.

The proposed key elements for implementation are:

- the establishment and development of a registration system in each jurisdiction in line with **Framework Implementation Strategies** prepared by each jurisdiction (Attachment 2). These strategies outline each jurisdiction's approach to participating in the proposed National Regulatory Framework reflecting the different starting points and contexts and the need to provide flexibility for smaller jurisdictions to adopt low-cost approaches. Low-cost approaches include simple administratively-based registration systems that utilise assessments undertaken by jurisdictions with established registration systems.
- the establishment of a **National Regulatory Forum** to oversee the development and implementation of the National Regulatory Framework. The Forum would be responsible for:
 - planning the development of specific tools and guidelines to support the consistent implementation of the Framework (see below)
 - resolving issues raised or escalated by jurisdictions regarding the implementation of the Framework
 - reviewing the operation of the Framework to ensure the achievement of the Framework objectives
 - advising Housing Ministers of the need for potential changes to the National Regulatory Code or other aspects Framework

It is proposed that the Forum consist of the Registrar (or nominated regulatory system contact officer) from each jurisdiction.

- the development of **specific tools and guidelines** to support the consistent implementation of the Framework including:
 - *Guidelines for assessment and verification* of compliance with the National Regulatory Code (based around acceptable evidence standards to verify that a NFP provider meets each of the nine outcomes in the Regulatory Code)
 - *Guidelines for reporting registration decisions* - including a standard template for documenting the evidence basis for registration decisions
 - *Guidelines for ongoing monitoring and reporting* to other jurisdictions about the activities of registered NFP Growth providers within the jurisdiction
 - *Guidelines on key parameters for the design and delivery of affordable housing* (that would inform detailed policy development work within individual jurisdictions)
- a **review of regulatory framework** within the first five years to assess whether:
 - the objectives of the framework are being achieved (particularly whether the National Regulatory Code has remained risk-based and outcomes-focused)
 - whether the benefits of regulation outweigh the costs to government and providers

3.2 Issues for implementation

A workshop was held with an Expert Reference Panel in Melbourne on 28 May 2007 to obtain feedback of the proposed national regulatory framework.

All members of the panel expressed strong support for the proposed framework, from the perspective of providing certainty to providers and finance partners who may be involved in NFP Growth developments.

The panel also highlighted a number of critical factors for the successful implementation of the national framework. These factors covered three main themes:

- Success of the National Regulatory Framework was dependent on ensuring other elements of the Framework for National Action on Affordable Housing were put in place to ensure providers and partners were given the right policy and strategy signals about the scale, scope and focus of affordable housing developments. In particular, the policy intent in terms of:
 - the number of NFP growth organisations needed to respond to affordable housing development opportunities
 - assumptions about how these organisations would operate geographically
 - whether the focus is on “creating” new NFP Growth organisations from scratch or to let new providers evolve over time.
- The importance of striking the right balance between regulatory controls and foster innovative and entrepreneurial behaviour of NFP Growth providers. Key challenges are:
 - ensuring the role of the regulator remains focused on explicitly identified risks (particularly in relation to financial capacity to take on risk, governance arrangement to support prudent risk taking, and targeting assistance in line with government policy)
 - ensuring transparency of regulatory decisions
 - managing potential conflicts between the regulatory role of State Housing Authorities and their role of funded or provider of housing services.
 - ensuring the independence of the Registrar
 - ensuring regulation does not inappropriately restrict Company Director’s ability to take prudent risks
 - ensuring regulation does not impact on the charitable status of providers.
- The need to build capacity within State Housing Authorities to undertake regulatory functions - in particular:
 - shifting from historical relationships with providers based on contract management to new relationships based on the regulation of independent organisations
 - understanding the importance of prudent risk-taking by NFP Growth providers
 - developing the skills base in key areas - particularly financial expertise.

Attachment 1

Box 1: Sample registration legislation

1. Assistance

(1.1) The Department may give assistance to a registered NFP Growth provider, subject to appropriate conditions, to enable it to develop, provide and manage affordable housing, including, but not limited to:

- (a) making a monetary grant
- (b) making a secured loan
- (c) acting as a guarantor to facilitate the provider to secure private finance or leasing arrangements
- (d) transferring land or property to the provider
- (e) leasing of land or property to the provider for use as long-term affordable housing
- (f) entering into a commercial partnership or joint venture with the provider to provide affordable housing

(1.2) The Department is not required to give assistance to an entity solely because the entity is a registered NFP Growth provider

(1.3) The Department may make it a condition of any assistance that the registered NFP Growth provider maintains a specified registration category

(1.4) The Department may make it a condition of any assistance that the registered NFP Growth provider submits periodic performance data and participates in periodic inspections to verify that the provider is meeting the Regulatory Code

(1.5) The Department may terminate any assistance if the registered NFP Growth provider does not maintain a specified registration category

(1.6) The Department may, in order to secure the enforcement of conditions associated with any assistance, impose a statutory charge that details the Department's rights as a secured creditor

(1.7) In the event that an organisation is de-registered, the Department will withdraw any assistance provided to the organisation within a reasonable period of time following de-registration.

2. Registrar

(2.1) The Minister will appoint a Registrar of NFP Growth Housing

(2.2) The functions of the Registrar are:

- (a) to register NFP Growth providers
- (b) to establish and maintain the Register of NFP Growth Providers
- (c) to prepare and publish information about the NFP Growth Regulatory Code
- (d) to initiate interventions where the Regulatory Code is not being met by a registered provider.

3. NFP Growth Regulatory Code

(3.1) The Minister will establish a NFP Growth Regulatory Code that describes the requirements to be met by registered providers

(3.2) The Regulatory Code may include:

- (a) outcomes that are required to be achieved by registered providers
- (b) compliance requirements that are mandatory to meet in order to demonstrate the achievement of a particular outcome
- (c) other requirements relating to registered NFP Growth housing that are necessary to support the achievement of the outcomes

(3.3) The Minister may, by determination published in the Government Gazette, amend or revoke a requirement in the Regulatory Code.

4. Registration

(4.1) An eligible organisation may apply to the Registrar to be registered under this Part of the Act, in a form and manner of application determined by the Registrar

(4.2) Eligible organisations must:

(a) be a company registered under the Corporations Act; and

(b) have a constitution that:

(i) includes a social housing object - that is an object about providing access to affordable housing to persons in need, including members of low-moderate income households

(ii) requires that, if it is wound up, its surplus assets, if any, must be distributed to another registered provider approved by the Registrar

(4.3) The Registrar may use different categories of registration

(4.4) The Registrar may register an organisation under a specified category of registration, if the Registrar is satisfied that the organisation concerned:

(a) has demonstrated it is an eligible organisation

(b) has demonstrated it has met, or will meet within a period specified by the Registrar, the Regulatory Code requirements for the category of registration they are seeking.

(4.5) The Registrar may specify limitations that apply to registration, including, but not limited to, the extent of affordable housing activities covered by the registration

(4.6) The Registrar can choose not to register an organisation, subject to procedural fairness requirements in Division 6, if the Registrar has reasonable grounds for believing that the organisation concerned:

(a) is not an eligible organisation, or

(b) has not demonstrated it has met, or will meet within a period specified by the Registrar, the Regulatory Code requirements for the category of registration they are seeking

(4.7) The Registrar must keep a register containing a list of all registered community housing providers

(4.8) The Registrar may include in the register the information that the Registrar considers appropriate

(4.9) The Registrar must keep the register as a document that is accessible by members of the public.

5. Intervention

(5.1) The Registrar may undertake intervention action to:

(a) ensure all registered NFP Growth providers meet the Regulatory Code, or

(b) protect tenancies, support arrangements and affordable housing assets that are linked to assistance provided by the Department.

(5.2) The Registrar will undertake intervention action subject to procedural fairness requirements.

(5.3) The Registrar may issue a Notice of Concern if the Registrar has evidence that a registered provider:

(a) is contravening a Regulatory Code requirement for their category of registration, or

(b) has contravened a Regulatory Code requirement for their category of registration in circumstances that make it likely the contravention will continue or be repeated.

(5.4) The Registrar may issue a Notice of Deregistration, if a registered provider has failed to remedy the contravention identified in a Notice of Concern within the specified time

(5.5) Following the issue of a Notice of Deregistration, the Registrar may:

(a) remove the provider from the Register, and

(b) enforce a statutory charge related to assistance provided by the Department, and

(c) undertake the actions provided for under the statutory charge to:

(i) ensure the proper and efficient use of any assistance provided by the Department during the deregistration process

(ii) transfer any assistance provided by the Department to another registered provider in a manner that minimises the impact on affordable housing assets, tenancies or support arrangements

(iii) terminate any assistance provided by the Department to the provider.

Box 2: National Regulatory Code

<i>Outcomes</i>	<i>Risks associated with NFP Growth activities that are appropriately managed through the National Regulatory Framework</i>	<i>Risks with broader community housing that can be managed through individual jurisdiction regulatory arrangement [jurisdiction specific]</i>	<i>Risks that can be managed by the industry [possibly linked to the National Community Housing Standards]</i>
Outcomes for taxpayers and the community			
1. No loss of government assets invested in affordable housing	NFP Growth organisation insolvency or poor financial and investment management - as indicated by a lack of appropriate verification that NFP Growth organisations have: <ul style="list-style-type: none"> • adequate recourse to financial resources to meet current and future business and financial commitments • the expertise (Board and senior management) and governance arrangements to control large-scale investment and financial decision-making • a risk management plan that includes specific controls for mitigating the risk of government asset losses. 		
2. Expected affordable housing outputs are delivered on-time and on-budget	NFP Growth organisations failing to deliver contracted affordable housing outputs on-time and on-budget - as indicated by: <ul style="list-style-type: none"> • time delays or cost blow-outs in delivery of agreed affordable housing development projects • lack of appropriate verification that the organisation has the expertise (Board and senior management) and governance arrangements to control project decision-making • lack of an appropriate verification that the organisation has a risk management plan for each development project that includes specific controls for mitigating key risks. 		
3. Good value for money in delivering affordable housing with government assistance	NFP Growth organisations failing to operate efficiently or to leverage additional non-government resources - as indicated by: <ul style="list-style-type: none"> • high unit-output costs for management of existing stock and/ or development of new stock - relative to agreed benchmarks • low leverage rates for attracting non-government investments - relative to agreed benchmarks. 		

<i>Outcomes</i>	<i>Risks associated with NFP Growth activities that are appropriately managed through the National Regulatory Framework</i>	<i>Risks with broader community housing that can be managed through individual jurisdiction regulatory arrangement [jurisdiction specific]</i>	<i>Risks that can be managed by the industry [possibly linked to the National Community Housing Standards]</i>
Outcomes for tenants and applicants			
<p>4. Appropriate and affordable homes that meet tenants' needs and preferences now and in the future</p>	<p>NFP Growth organisations failing to plan and deliver responsive and cyclical maintenance to ensure that existing stock meets relevant affordable housing guidelines - as indicated by:</p> <ul style="list-style-type: none"> • lack of appropriate verification that the condition of existing stock meets affordable housing guidelines • lack of appropriate verification that the organisation's asset management plans will continue to maintain the condition of stock within affordable housing guidelines • high levels of tenant dissatisfaction with the condition of their property and timeliness in resolving day-to-day and emergency maintenance problems. 		
<p>5. Affordable housing developments that deliver appropriate and affordable new homes</p>	<p>NFP Growth organisations failing to plan and deliver new housing developments in ways that ensure new affordable housing stock will meet affordable housing guidelines - as indicated by:</p> <ul style="list-style-type: none"> • lack of appropriate verification that the organisation's housing development plans will deliver new stock within affordable housing guidelines. 		
<p>6. Responsive housing services that are appropriate to tenants with complex housing needs</p>	<p>NFP Growth organisations not adequately considering the views and needs of tenants - as indicated by:</p> <ul style="list-style-type: none"> • a lack of appropriate verification that the organisation's housing services comply with affordable housing guidelines (covering eligibility, allocations, rent, tenure and exits) • serious or repeated breaches of national guidelines on the appropriate delivery of housing service to tenants with complex housing needs • high levels of tenant dissatisfaction with the responsiveness of housing services 		

<i>Outcomes</i>	<i>Risks associated with NFP Growth activities that are appropriately managed through the National Regulatory Framework</i>	<i>Risks with broader community housing that can be managed through individual jurisdiction regulatory arrangement [jurisdiction specific]</i>	<i>Risks that can be managed by the industry [possibly linked to the National Community Housing Standards]</i>
7. Good-quality housing services that contribute to sustainable tenancies and sustainable communities	<p>NFP Growth organisations not contributing to partnership arrangements with support providers and community regeneration partnerships - as indicated by:</p> <ul style="list-style-type: none"> • lack of appropriate verification that the NFP Growth organisation actively contributes to partnership arrangements with support providers to ensure the sustainability of tenancies • lack of appropriate verification that the NFP Growth organisation contributes to community regeneration partnerships in locations where they have high concentrations of affordable housing tenants. 		
Outcomes for the industry			
8. A positive reputation for managing affordable housing portfolios and delivering affordable housing developments	<p>NFP Growth organisations not developing and sustaining strong commercial relationships with affordable housing partners (developers, financiers and private sector investors) - as indicated by:</p> <ul style="list-style-type: none"> • lack of appropriate verification of the organisation’s existing, successful commercial partnerships, or a willingness of partners to consider a significant role for the organisation in large-scale affordable housing developments • lack of appropriate verification of the contribution (cash, assets, commercial arrangements) that a NFP Growth organisation is able to bring to large-scale affordable housing developments. 		
9. A positive reputation for maintaining high standards of probity	<p>NFP Growth organisation’s failing to maintain high standards of probity - as indicated by:</p> <ul style="list-style-type: none"> • serious breaches of the organisation’s code of conduct (which sets out the ethical and behavioural expectations for both Directors and staff, including conflicts of interest) • serious fraud or corruption • serious non-compliance with statutory requirements • serious failure or delays in notifying the regulator of incidents that risk damaging the reputation of the sector. 		

Attachment 2: Implementation Strategies

The establishment and development of a registration system in each jurisdiction will occur in line with Framework Implementation Strategies prepared by each jurisdiction.

These strategies outline each jurisdiction's approach to participating in the proposed National Regulatory Framework reflecting the different starting points and contexts in each jurisdiction.

A summary of the key elements of the National Regulatory Framework and the starting point for each jurisdiction is presented in Table A2.1 below.

Table A2.1: Key elements of the National Regulatory Framework

	NSW	Vic	Qld	SA	WA	Tas	NT	ACT
Contract management system for NFP providers	✓	✓	✓	✓	✓	✓	✓	✓
Endorsed registration system framework	✓	✓	✓	✓	✓			
Procedures for registering NFP providers	✓	✓	✓	✓	✓			
Procedures for registering different categories of NFP providers	✓	✓			✓			
Registrar position to oversee registration arrangements	✓	✓			✓			
Legislation that underpins the registration of NFP growth providers	✓	✓		✓				✓
Regulatory code for assessing registration status		✓			✓			
Regulatory code aligned with the National Regulatory Code					✓			
Procedures for assessing NFP Growth provider compliance with the National Regulatory Code								
Register of NFP Growth providers (that comply with the national regulatory code)					✓			
Mutual recognition arrangements for NFP Growth providers assessed by other jurisdictions								

NSW Implementation Plan

Context

NSW Parliament passed the *Housing Amendment (Community Housing Providers) Act 2007* in November 2007. These amendments provide the framework for a statutory registration and regulation system for community housing providers in NSW. The amendments make provision for the appointment of a Registrar, registration of community housing providers and the making of supporting Regulation which outlines a Regulatory Code with which community housing providers must comply to be registered.

The provisions of the Act commence once the Regulation is made. Once the system commences, Housing NSW will only provide assistance to organisations that are registered.

The draft *Housing Regulation 2008* outlines the Regulatory Code which forms the basis to the new regulatory system. The draft Regulatory Code has nine outcomes, and has been developed to align with National Regulatory Code outcomes. It applies to initial registration and ongoing regulatory engagement. It allows for four classes of registration – 1) growth provider, 2) housing provider, 3) housing manager and 4) small housing manager. Regulatory requirements will be proportionate to the level of risk to which providers are exposed.

The Registrar of Community Housing has been appointed, and is working to establish the Office of the Registrar of Community Housing and supporting systems and processes for the implementation of the new regulatory system. This includes the development of evidence guidelines. Under the new regulatory system, the Registrar will maintain a public register of community housing providers.

Subject to a statutory consultation period, and the draft *Housing Regulation 2008* being approved by NSW Parliament, the new regulatory system will replace the current performance-based registration system (PBRs) for community housing providers. Under the amendments to the *Housing Act 2001*, the new regulatory system should be fully implemented within two years, with all community housing providers requiring to be registered within that timeframe in order to continue to receive assistance from Housing NSW.

The PBRs will continue to operate until the new regulatory system commences.

Participation in national work

NSW supports contributing to cooperative arrangements between the Australian government and all other State / Territory jurisdictions, to develop and implement the National Regulatory Framework. In the initial implementation phase up to June 2011, this could include:

- participating as a member of a National Regulatory Forum (or other similar governance arrangement) to oversee the development and implementation of the National Regulatory Framework
- making available existing tools and expertise, based on experience gained through the implementation of the new NSW legislative framework for regulation and registration, to support the development of national guidelines for:
 - assessment and verification of compliance with the National Regulatory Code
 - reporting registration decisions
 - ongoing monitoring and reporting about ongoing compliance of registered NFP Growth providers operating within NSW

- providing advice to other jurisdictions, where requested, about setting up and managing registration systems
- investigating the appropriateness, feasibility and costs of preparing registration assessment reports against the National Regulatory Code for a limited number of potential NFP Growth providers operating in smaller jurisdictions.
- participating in a review of the regulatory framework within the first five years

Priorities for NSW

To participate in the National Regulatory Framework, NSW would seek to ensure that it implements its legislative based regulatory system in alignment with the requirements of the national framework. Specifically, in the initial implementation phase, this could include:

- disseminating information to potential NFP Growth providers about NSW's expectations about the scale and requirements for the NFP Growth sector
- Offering NFP Growth registration to providers who have been appointed as growth providers in NSW, and who are able to demonstrate the capacity to effectively operate at scale and to manage successful commercial arrangements for affordable housing developments. This registration would be based upon assessments against the NSW regulatory code, using evidence consistent with nationally agreed evidence guidelines.
- create a NSW Register of NFP Growth Providers:
 - registered based on an assessment undertaken by the NSW Office of the Registrar of Community Housing
 - registered based on an assessment undertaken under the Registration System of another jurisdiction, where that jurisdiction is recognised by the National Regulatory Forum as conducting full registration assessments of NFP Growth providers based on nationally agreed guidelines for assessment and verification of compliance with the National Regulatory Code
- investigate the appropriateness and feasibility of mutual recognition arrangements where registration assessments have been undertaken under the Registration System of another jurisdiction

Final decisions about the activities, timing and order of implementation will depend on a range of factors, including available resources within Housing NSW. NSW will prepare regular updates to the implementation plan to inform other jurisdictions of progress and future plans.

Victorian Implementation Plan

Context

Victoria currently has a legislatively-based registration system operating under the Housing Act 1983. Rental housing agencies are registered as either Housing Associations or Housing Providers. Agencies registered as housing associations undertake new housing initiatives based on a mix of government funds and private sector investment, to meet specific housing needs as well as managing property i.e. growth providers. Other agencies registered as housing providers manage rental housing properties on behalf of government.

The registration and regulatory framework is overseen by the Registrar of Housing Agencies, a statutory position under the Housing Act and delivered through the Housing Registrar.

Under the Housing Act, registered housing agencies are required to meet specified performance standards (Minister's Performance Standards for Registered Housing Agencies, July 2005).

The current registration process for Housing Associations and Housing Providers involves a comprehensive assessment for compliance with the Performance Standards. The Office of the Registrar of Housing Agencies has developed a range of assessment methodologies and tools for conducting registration assessments, including a major emphasis on financial viability.

Participation in national work

Given the endorsement of the National Regulatory Framework by Housing Ministers, Victoria would seek to contribute to cooperative arrangements between the Australian government and all other State / Territory jurisdictions, to develop and implement the Framework. In the initial implementation phase up to June 2011, this would include:

- participating as a member of a National Regulatory Forum (or other similar governance arrangement) to oversee the development and implementation of the National Regulatory Framework
- making available existing tools and expertise, based on the experience gained with implementing the Victorian Regulatory Framework, to support the development of national guidelines for:
 - assessment and verification of compliance with the National Regulatory Code
 - reporting registration decisions
 - ongoing monitoring and reporting about ongoing compliance of registered NFP Growth providers operating within Victoria
- providing advice to other jurisdictions, where requested, about setting up and managing registration systems
- considering requests from smaller jurisdictions to prepare registration assessment reports against the National Regulatory Code for a limited number of potential NFP Growth providers operating in smaller jurisdictions. For practical reasons, Victoria may be best placed to assist Tasmania.
- participating in a review of the regulatory framework within the first five years

Priorities for Victoria

To participate in the National Regulatory Framework, Victoria would seek to review the operation of its current regulatory arrangements to ensure a better alignment with the requirements of the national framework, with particular regard in the initial stages to evidence guidelines and mutual recognition. Specifically, in the initial implementation phase, this could include:

- disseminating information to potential NFP Growth providers that the category of registered housing association (defined under the Housing Act) is broadly equivalent to the definition of NFP Growth providers defined under National Regulatory Framework
- reviewing the operation of the performance standards for registered Housing Associations [NFP Growth providers] to ensure practical alignment with the outputs of the National Regulatory Code
- ensuring that the evidence currently used in relation to performance standards is consistent with the evidence guidelines of the National Regulatory Code
- investigate the appropriateness and feasibility of mutual recognition arrangements where registration assessments have been undertaken under the Registration System of another jurisdiction
- create a Victorian Register of NFP Growth Providers:
 - registered based on an assessment undertaken by the Victorian Housing Registrar
 - registered based on an assessment undertaken under the Registration System of another jurisdiction, where that jurisdiction is recognised by the National Regulatory Forum as conducting full registration assessments of NFP Growth providers based on nationally agreed guidelines for assessment and verification of compliance with the National Regulatory Code

Final decisions about the activities, timing and order of implementation will depend on a range of factors, including available resources within the Victorian Department of Human Services. Victoria will prepare regular updates to the implementation plan to inform other jurisdictions of progress and future plans.

Queensland Implementation Plan

Context

Queensland currently has a legislatively-based registration system operating under the Housing Act. While all providers are registered under a single category of registration, Housing Regulation (updated in February 2007) specifies different regulatory requirements for different types of providers. For example, affordable housing providers and long-term community housing program providers with more than 100 tenancies must be accredited under the National Community Housing Standards.

The current registration process is essentially an administrative process, although once registered, providers are required to comply with the prescribed requirements in the regulatory code.

Participation in national work

Following endorsement of the proposal for the National Regulatory Framework by Housing Ministers on 14 March 2008, Queensland will seek to contribute to cooperative arrangements between the Australian government and all other State / Territory jurisdictions, to develop and implement the Framework. In the initial implementation phase up to June 2011, this could include:

- participating as a member of a National Regulatory Forum (or other similar governance arrangement) to oversee the development and implementation of the National Regulatory Framework
- providing advice to other jurisdictions, where requested, about setting up and managing registration systems
- considering requests from smaller jurisdictions to prepare registration assessment reports against the National Regulatory Code for a limited number of potential NFP Growth providers operating in smaller jurisdictions. For practical reasons, Queensland may be best placed to assist the Northern Territory.
- participating in a review of the regulatory framework within the first five years

Priorities for Queensland

To participate in the National Regulatory Framework, Queensland will seek to introduce changes to its current regulatory arrangements to ensure a better alignment with the requirements of the national framework. Specifically, in the initial implementation phase, this could include:

- Disseminating information to potential NFP Growth providers about Queensland's expectations about the scale and requirements for the NFP Growth sector
- Amending the Housing Regulation 2003 to:
 - create a specific registration category for recognising NFP Growth providers (or equivalent)
 - create a specific set of prescribed requirements that apply to registered NFP Growth providers – which are fully consistent with the National Regulatory Code
 - review the existing prescribed requirements (Part 3 of the current regulations) to determine which, if any, of these requirements may also apply to registered NFP Growth providers

- Offering provisional NFP Growth registration to a small number of suitable providers who are able to demonstrate the capacity to effectively operate at scale and to manage successful commercial arrangements for affordable housing developments. For example, evidence of existing, successful commercial arrangements for affordable housing developments.
- Provisional NFP Growth registration would be subject to a successful full assessment within a specified period
- Conducting first full registration assessments of NFP Growth providers based on nationally agreed guidelines for assessment and verification of compliance with the National Regulatory Code
- Appointing a Registrar to oversee the implementation of the Queensland Registration system
- Creating a Queensland Register for Registered NFP Growth Providers – including NFP Growth providers:
 - registered based on an assessment undertaken through the Queensland registration system
 - registered based on an assessment undertaken under the Registration System of another jurisdiction, where that jurisdiction is recognised by the National Regulatory Forum as conducting full registration assessments of NFP Growth providers based on nationally agreed guidelines for assessment and verification of compliance with the National Regulatory Code

South Australian Implementation Plan

Context

South Australia currently has a legislatively-based registration system covering Housing Cooperatives and Housing Associations (SA Co-operative and Community Housing Act 1991.) The Registration of Housing Associations is dealt with in Schedule 1 of the Act.

When this legislation was enacted, the focus was on small, community-based housing providers, which required reasonably prescriptive intervention powers.

The current registration process is essentially an administrative process, although once registered, providers are required to comply with the prescribed requirements in the legislation.

Unlike most other jurisdictions, SA does not have funding capacity to establish a State based NFP Growth program as has occurred in other jurisdictions, and is unlikely to do so in the foreseeable future.

As such, SA's focus is on developing opportunities for higher level NGO participation primarily around existing State and Federal based programs (eg. NRAS), or new programs that are anticipated to come out of the National Affordable Housing Agreement.

Participation in national work

South Australia maintains its commitment to contribute to the development and implementation of the National Regulatory Framework. In the initial implementation phase up to June 2011, this will be primarily focussed on:

- Development of a state-based "Preferred Provider" process, to identify potential NGO partners with the broad ability to operate at larger scale and higher capacity in higher risk programs. It is intended that this preferred provider process would:
 - Target both SA and interstate based NGOs
 - Not guarantee successful NGOs access to specific funds or opportunities ("preferred" NGOs would still need to submit competitive bids for specific program/project opportunities as they arise)
 - Provide preferred NGOs with:
 - A statement of ambition and intent
 - A broad level of Government endorsement for NGO dealings with other private and non Government partners
 - Confidence and relationship building opportunities with the State Government
 - Greater understanding of higher level program requirementsOpportunity to better prepare for these requirements (including but not limited to access to some level of State Government developmental assistance)
 - Provide State Government with:
 - A pool of broadly capable high capacity NGOs that can be the target of future program/project opportunities
 - "Filtering out" of less capable NGOs
 - A greater sense of specific NGO developmental requirements that it can work towards addressing
 - Refer to the National Regulatory Framework in developing preferred provider requirements
 - Attempt to identify potential NGO partners with capacity in both Affordable

Housing and High Needs Housing areas.

- Development of an integrated regulation, development and quality framework based on the National Framework, to help regulate and develop NGOs who enter into new program activities via the preferred provider process.

Additional input will continue to occur via:

- Participating as a member of a National Regulatory Forum (or other similar governance arrangement) to oversee the development and implementation of the National Regulatory Framework
- Providing advice to other jurisdictions around its preferred provider process and associated regulation framework, where requested
- Participating in a review of the regulatory framework within the first five years

Priorities for South Australia

To participate in the National Regulatory Framework, South Australia will seek to change its current regulatory arrangements to ensure a better alignment with the requirements of the national framework. Specifically, in the initial implementation phase, this will include:

- Promotion of the State based preferred provider arrangement as a prudent option for:
 - SA based NGOs wishing to develop capacity, including those wishing to operate nationally under the National Framework
 - Interstate NGOs wishing to expand operation into South Australia
- Disseminating information to interested South Australian based NGOs about the National Framework and requirements for operation across jurisdictions
- Reviewing the SA Co-operative and Community Housing Act 1991 to ensure it provides a suitable legislative vehicle for registering and regulating NGOs who operate in higher level programs.
- Investigating the feasibility of mutual recognition arrangements under the National Framework for NGOs registered in other jurisdictions

It is anticipated that SA based registration, regulation and developmental support for NGOs in higher level programs will occur through the relevant State Office (Office for Community Housing), rather than appointment of a Registrar.

Western Australian Implementation Plan

Context

Western Australia has investigated the establishment of an administratively based registration system that would cover NFP Growth providers, Preferred Specialist Providers and other Compliant Funded Providers.

Over time, there is the intention of putting in place legislation to underpin a new registration system.

Western Australia is currently exploring options for the development of the NFP Growth sector.

Participation in national work

Given the endorsement of the National Regulatory Framework by Housing Ministers, Western Australia would seek to contribute to cooperative arrangements between the Australian government and all other State / Territory jurisdictions, to develop and implement the Framework. In the initial implementation phase up to June 2011, this could include:

- participating as a member of a National Regulatory Forum (or other similar governance arrangement) to oversee the development and implementation of the National Regulatory Framework
- providing advice to other jurisdictions, where requested, about setting up and managing registration systems
- participating in a review of the regulatory framework within the first five years

Priorities for Western Australia

To participate in the National Regulatory Framework, Western Australia would seek to develop a new registration system that was consistent with the national framework. As a jurisdiction with a relatively small community housing sector, the scale of the registration system and pace of implementation will be tailored to the needs of Western Australia. For the purposes of registration of NFP growth providers, the criteria and processes will be developed from the National Regulatory Code, once endorsed. For the other registration tiers the National Community Housing Standards will be used. The framework of these standards will also be used for performance monitoring and compliance purposes.

Specifically, in the initial implementation phase, this could include:

- disseminating information to potential NFP Growth providers about Western Australia's expectations about the scale and requirements for the NFP Growth sector
- developing and implementing an administratively based registration system.
- the administratively based registration system will offer NFP Growth registration as a provisional arrangement to a small number of suitable providers who are able to demonstrate the capacity to effectively operate at scale and to manage successful commercial arrangements for affordable housing developments.
- NFP Growth registration would be subject to a successful full assessment within a specified period

- conducting first full registration assessments of NFP Growth providers based on nationally agreed guidelines for assessment and verification of compliance with the National Regulatory Code
- appointing a Manager Regulation and Compliance to function as Registrar to oversee the implementation of the WA Registration system
- investigate the appropriateness and feasibility of mutual recognition arrangements where registration assessments have been undertaken under the Registration System of another jurisdiction
- creating a WA Register of NFP Growth Providers - including NFP Growth providers:
 - registered based on an assessment undertaken through the Western Australian registration system
 - registered based on an assessment undertaken under the Registration System of another jurisdiction, where that jurisdiction is recognised by the National Regulatory Forum as conducting full registration assessments of NFP Growth providers based on nationally agreed guidelines for assessment and verification of compliance with the National Regulatory Code, and where the NFP intends to compete for business in Western Australia
- enact appropriate legislation to:
 - create a specific registration category for recognising NFP Growth providers (or equivalent)
 - create a specific set of prescribed requirements that apply to registered NFP Growth providers – which are fully consistent with the National Regulatory Code

Final decisions about the activities, timing and order of implementation will depend on a range of factors, including available resources within the Western Australian Department of Housing and Works. WA will prepare regular updates to the implementation plan to inform other jurisdictions of progress and future plans.

Tasmanian Implementation Plan

Context

Tasmania currently has a small community housing sector, but is interested in investigating options to provide more cost-effective housing assistance through registered affordable housing providers.

On 20 September 2005, the Premier announced the creation of a new Affordable Housing Organisation TAHL, the Tasmanian Affordable Housing Ltd, that will initially focus on leasing up to 700 new affordable rental houses over the next four years from private and not-for-profit investors for people on low incomes.

As a small jurisdiction, Tasmania is seeking to adopt low-cost approaches such as simple administratively-based registration systems that utilise assessments undertaken by jurisdictions with established registration systems.

Over time, depending on the scale and scope of NFP Growth activities in Tasmania, it may be appropriate to put in place legislation to underpin any registration system.

Participation in national work

On the basis of the endorsement of a National Regulatory Framework by Housing Ministers, Tasmania will seek to contribute to cooperative arrangements between the Australian government and all other State / Territory jurisdictions, to develop and implement the Framework. In the initial implementation phase up to June 2011, this could include:

- participating as a member of a National Regulatory Forum (or other similar governance arrangement) to oversee the development and implementation of the National Regulatory Framework
- participating in a review of the regulatory framework within the first five years

Priorities for Tasmania

To participate in the National Regulatory Framework, Tasmania would seek to develop a simple, low-cost registration system that was consistent with the national framework. As a jurisdiction with a relatively small community housing sector, the scale of the registration system and pace of implementation will be tailored to the needs of Tasmania.

Specifically, in the initial implementation phase, this could include:

- disseminating information to potential NFP Growth providers about Tasmania's expectations about the scale and requirements for the NFP Growth sector
- reviewing existing registration systems operating in other jurisdictions to identify the opportunities and barriers to collaboration. This could include negotiating arrangements with larger jurisdictions to undertake registration assessment against the National Regulatory Code for the limited number of potential NFP Growth providers that could operate in Tasmania. For practical reasons, Victoria may be best placed to assist Tasmania
- appointing a Registrar to oversee the maintenance of a Tasmanian Register of NFP Growth Providers

- putting in place a simple administrative registration system that offers NFP Growth registration. It is assumed that organisations would be registered based on an assessment undertaken through the Registration System of another jurisdiction, where that jurisdiction is recognised by the National Regulatory Forum as conducting full registration assessments of NFP Growth providers based on nationally agreed guidelines for assessment and verification of compliance with the National Regulatory Code
- developing a proposal for enacting appropriate legislation to underpin the Tasmanian Registration system

Final decisions about the activities, timing and order of implementation will depend on a range of factors, including available resources within the Tasmanian Department of Human Services. Tasmania will prepare regular updates to the implementation plan to inform other jurisdictions of progress and future plans.

Northern Territory Implementation Plan

The Northern Territory does not currently have a significant mainstream community housing sector, but is interested in investigating options that allow it to provide more cost-effective housing assistance through registered affordable housing providers. The NT has a significant Indigenous community housing sector, primarily located in remote communities. This sector is undergoing significant reform and may provide opportunities for NFP Growth providers in the future.

As a small jurisdiction, the Northern Territory is seeking to adopt low-cost approaches such as simple administratively-based registration systems that utilise assessments undertaken by jurisdictions with established registration systems.

Over time, depending on the scale and scope of NFP Growth activities in the Northern Territory, it may be appropriate to put in place legislation to underpin any registration system.

Participation in national work

Given the National Regulatory Framework was endorsed by Housing Ministers, the Northern Territory will seek to contribute to cooperative arrangements between the Australian Government and all other State / Territory jurisdictions, to develop and implement the Framework. In the initial implementation phase up to June 2011, this could include:

- participating as a member of a National Regulatory Forum (or other similar governance arrangement) to oversee the development and implementation of the National Regulatory Framework
- participating in a review of the regulatory framework within the first five years

Priorities for the Northern Territory

To participate in the National Regulatory Framework, the Northern Territory would seek to develop a simple, low-cost registration system that was consistent with the national framework. As a jurisdiction with a relatively small mainstream community housing sector, the scale of the registration system and pace of implementation will be tailored to the needs of the Northern Territory.

Specifically, in the initial implementation phase up to June 2011, this could include:

- working with current providers, peak bodies and potential NFP Growth providers to develop a shared understanding of the likely scale and requirements for the NFP Growth sector in the Northern Territory.
- reviewing existing registration systems operating in other jurisdictions to identify the opportunities and barriers to collaboration. This could include negotiating arrangements with larger jurisdictions to undertake registration assessment against the National Regulatory Code for the limited number of potential NFP Growth providers that could operate in the Northern Territory. For practical reasons, Queensland may be best placed to assist the Northern Territory
- depending on progress of community housing sector development and the identification of realistic opportunities for NFP Growth providers in the NT:
 - Appointing a Registrar to oversee the maintenance of a Northern Territory Register of NFP Growth Providers

- putting in place a simple administrative registration system that offers NFP Growth registration. It is assumed that organisations would be registered based on an assessment undertaken through the Registration System of another jurisdiction, where that jurisdiction is recognised by the National Regulatory Forum as conducting full registration assessments of NFP Growth providers based on nationally agreed guidelines for assessment and verification of compliance with the National Regulatory Code
- developing a proposal for enacting appropriate legislation to underpin the Northern Territory Registration system

Final decisions about the activities, timing and order of implementation will depend on a range of factors, including available resources within the Northern Territory Department of Local Government and Housing and the level of interest from NFP Growth providers. The Northern Territory will prepare regular updates to the implementation plan to inform other jurisdictions of our progress, changes in priorities and future plans.

ACT Implementation Plan

Context

The ACT does not currently have a significant community housing sector, but is implementing options to provide more cost-effective housing assistance through registered affordable housing providers.

The *Housing Assistance Amendment Act 2008* (the Act) was passed on 19 August 2008 and will commence on 2 March 2009. The Act introduces a regulatory framework for not-for-profit housing providers in the ACT and preparations for implementation are underway.

Participation in national work

Following endorsement of the National Regulatory Framework by Housing Ministers, the ACT will seek to contribute to cooperative arrangements between the Australian government and all other State / Territory jurisdictions, to develop and implement the Framework. In the initial implementation phase up to June 2011, this could include:

- participating as a member of a National Regulatory Forum (or other similar governance arrangement) to oversee the development and implementation of the National Regulatory Framework
- participating in a review of the regulatory framework within the first five years

Priorities for the ACT

To participate in the National Regulatory Framework, the ACT will seek to develop a low-cost registration system that is consistent with the national framework. As a jurisdiction with a relatively small community housing sector, the scale of the registration system and pace of implementation will be tailored to the needs of the ACT.

Specifically, in the initial implementation phase, this will include:

- Review and analysis of existing models and current regulatory processes in other jurisdictions. Identification of the opportunities and barriers to collaboration. This could include negotiating arrangements with larger jurisdictions to undertake registration assessment against the National Regulatory Code for the limited number of potential NFP Growth providers that could operate in the ACT.
- Consultation with key stakeholders to inform the development of regulatory instruments outlined in the Act.
- Continued dissemination of information to potential NFP Growth providers about the ACT's expectations about the scale and requirements for the NFP Growth sector.
- Putting in place a registration system that offers NFP Growth registration. Organisations may be registered based on an assessment undertaken through the Registration System of another jurisdiction, where that jurisdiction is recognised by the National Regulatory Forum as conducting full registration assessments of NFP Growth providers based on nationally agreed guidelines for assessment and verification of compliance with the National Regulatory Code

The ACT will prepare regular updates to the implementation plan to inform other jurisdictions of progress and future plans.

Australian Government Implementation Plan

Context

The Australian Government is interested in investigating options that allow jurisdictions to provide more cost-effective housing assistance through registered NFP Growth providers.

As the Australian Government does not currently have a direct role in providing housing assistance through NFP Growth providers, its role in a National Regulatory Framework would be focused on coordination, oversight and research.

Participation in national work

As the National Regulatory Framework has been endorsed by Housing Ministers, the Australian government will seek to contribute to cooperative arrangements with State / Territory jurisdictions, to develop and implement the Framework. In the initial implementation phase up to June 2011, this could include:

- participating as a member of a National Regulatory Forum (or other similar governance arrangement) to oversee the development and implementation of the National Regulatory Framework
- considering requests from jurisdictions to contribute to projects to develop and implement the Framework
- participating in a review of the regulatory framework within the first five years

Priorities for the Australian Government

To participate in the National Regulatory Framework, the Australian government would seek to support jurisdictions by:

- collating information about different jurisdictions expectations about the scale and requirements for the NFP Growth sector
- collating information about the pace and scale of implementing new regulatory arrangements across jurisdictions (eg. progress with development registration systems; number of registered providers)
- preparing summary reports for PRWG and HMAC on the implementation of new regulatory arrangements

Final decisions about the activities, timing and order of implementation will depend on a range of factors, including available resources within the Department of Families, Housing, Communities and Indigenous Affairs.

Attachment 3: Good practice regulation - building on Australian and international experience

A1 Objectives of regulation

Implicit in Housing Ministers' commitment to developing a National Regulatory Framework for affordable housing is the assumption that there is a shared understanding of the answers to three fundamental questions:

- **Why regulate?** - what does government seek to achieve through regulation, that could not be achieved through other means
- **Why a national framework?** - what elements of regulation are best progressed nationally because of the potential to capitalise on work already completed within jurisdictions and the cost-effectiveness of nationally coordinated approaches that apply across all jurisdictions
- **Who or what is being regulated?** - what range of organisations or activities does regulation seek to control or influence.

This section presents a discussion of the key issues related to these questions to provide a basis for defining the objectives of the National Regulatory Framework.

A1.1 Why regulate?

Regulation can be defined as those forms of individual and sectoral control and influence adopted by jurisdictions to achieve specified outcomes. So what are the outcomes that governments seek to achieve through regulation, and why could they not be achieved without government controls.

Australian and international experience suggests that as long as affordable housing remains a high-profile issue, government will find it hard to resist regulating it. As the UK Chartered Institute of Housing has highlighted (CIH, 2006), it is the profile of these activities and the risks associated with these activities that drive regulation. These risks relate to a number of key issues.

Protecting affordable housing residents and taxpayers

The current Cave Review of Social Housing Regulation in England (Department for Community and Local Government, 2006) has provisionally identified two core requirements for regulation, which originate from the needs of the principal stakeholders in affordable housing - namely:

- to secure for affordable housing residents high quality services which offer them, and the communities of which they are a part, effective mechanisms to ensure that their landlords meet the obligations to provide those services, and to ensure that they have an effective voice in the design and delivery of those services
- to secure for taxpayers proper assurance that the resources that government makes available for affordable housing go to those landlords who can make the best use of them to provide good quality homes and services for government-identified priority populations.

This aligns with the UK Chartered Institute of Housing (2006) view that there is broad agreement amongst stakeholders that:

- where residents, applicants and other consumers cannot protect their own interests, government should ensure (directly or indirectly) that they receive services in accordance with their legal rights and prevailing good practice
- if the taxpayer invests in the provision or management of affordable housing:
 - its investments need to be protected from misuse or loss
 - its investments should contribute towards meeting prevailing government priorities
 - the government needs to ensure that it is receiving value for money for the investment.

The rationale for regulating to protect tenants is grounded in the consensus in the literature that there is not a free and fair market for affordable housing. This reflects issues of scarcity and rationing of affordable housing properties, in which tenants have limited power to make choices about which landlord they rent from or to switch to another landlord if they are dissatisfied. Some form of sectoral control over the use of resources is seen as appropriate to ensure affordable housing is fairly allocated to priority populations and that resources are used as efficiently and effectively as possible to meet tenants' needs and governments' objectives in relation to affordable housing. This form of regulation needs to be distinguished from broader consumer protection legislation for residential tenancies, which is firmly established in all Australian jurisdictions.

The rationale for regulation is strongly grounded in seeking to minimise the risks to tenants and taxpayers – in a manner which is both proportionate to the risks faced, and the availability of non-regulatory options for managing these risks. There remains a tension between focussing any regulatory regime on controls to manage risks, while at the same time encouraging innovation and enterprise in managing resources to increase the supply of affordable housing. In this context, it is important that other non-control mechanisms are available to complement 'black-letter' regulation through performance management, capacity building and training. At the same time, without regulation, a number of Australian jurisdictions have found they lacked the controls to appropriately facilitate direct intervention where needed and to keep organisations engaged with current priorities.

Encouraging innovation and enterprise

In a free market, not-for-profit and for-profit organisations would invest in affordable housing initiatives to the extent that they were able to sustainably generate the social and financial returns expected by their 'shareholders'.

However, the continuing challenges with housing affordability in Australia and other nations highlights that the market for affordable housing does not function effectively (DC&LC, 2006) and that overcoming these affordability challenges requires a complex suite of solutions.

As part of the framework for *National Action on Affordable Housing*, Housing Ministers nationally have promoted a potential role for the NFP Growth sector working with housing development, finance and investment partners.

The Australian and international literature highlights that an appropriate regulatory regime can help secure the reputation of the NFP Growth sector as a preferred partner in large, affordable housing developments. In the UK context, there has been a direct relationship between regulation and the cost of borrowing to NFP providers – in part reflecting the more predictable outputs that have been generated in the regulated affordable housing market. At the same time, the literature highlights that stakeholders are predominately interested in regulation providing appropriate assurance that key risks are being monitored and affordable housing outputs are being achieved. The challenge is to ensure that the regulatory controls needed to provide this assurance, typically through inspections, audits and performance

monitoring, do not undermine the innovation and appropriate risk-taking that are the strengths of the NFP sector.

Clearly a balance is needed between the level of assurance required and the costs associated with regulation. In the Australian context, where regulation is being considered to support the emergence of a new NFP Growth sector, the scope and focus of regulatory controls will need to reflect the relative immaturity of the sector. This contrasts with other contexts, such as England where the NFP Growth sector has been managing large housing portfolios for over 30 years.

A1.2 Why a national framework?

Currently, organisations in Australia that aspire to be part of the NFP Growth housing sector typically operate in only one State or Territory and have a direct contractual arrangement with only one government jurisdiction. A key exception relates to some Indigenous community housing organisations that could receive direct funding from both the Australian Government and a State/ Territory Government.

However, in the future, an NFP Growth organisation that operated nationally could have a relationship with nine different jurisdictions and be potentially subject to nine different regulatory regimes.

In other sectors, different jurisdictional regulatory arrangements for the same activity often lead to significant compliance costs or disincentives to operating across jurisdictions or nationally to generate economies of scale. These disincentives potentially relate not just to NFP Growth organisations, but also to their development, finance and investment partners.

At the same time, there are potentially significant savings for jurisdictions if the cost of developing and maintaining regulatory systems can be shared across jurisdictions - for example, the costs involved with developing standards and systems for assessing and reporting compliance against these standards.

More broadly, the Australian literature highlights that a national framework would provide clarity for investment partners and predictability of the requirements of regulation.

A1.3 Who or what is being regulated?

There is an ongoing debate in the Australian and international literature about whether affordable housing regulatory arrangements should be designed to regulate the whole organisation or only the affordable housing activities that an organisation provides.

This debate is most clearly seen in the current Cave Review of social housing regulation in England, where a key issue is whether the current organisation-based registration system is stifling potential economies of scale and innovation by placing unnecessary restrictions on the type of organisation that can be part of the affordable housing sector. Currently, registration is limited to non-profit distributing organisations and excludes unregistered organisations from owning subsidiaries which are registered housing providers.

The Cave Review is examining the strengths and weaknesses of either:

- allowing registered organisations to be a subsidiary of a large organisation - thereby ring-fencing that part of the organisation involving publicly-subsidised assets. This approach is intended to reap the benefits of the economies of scale within a larger group, while allowing regulatory controls to protect the interests of tenants and taxpayers within the ring-fenced body
- moving to a licensing-based approach that is concerned only with establishing the continued effectiveness of the organisation to deliver the agreed services specified in

a commercially-negotiated contract - and which therefore could be open to all organisations. This approach allows regulatory requirements to be specified as part of development, ownership and management contracts.

While much of the debate in the UK has been around allowing commercial organisations to directly participate in the development and management of affordable housing, the issues are also relevant in the context of the Australian NFP Growth sector.

For example, how would the National Regulatory Framework facilitate the involvement of:

- national churches that may have large affordable housing portfolios - but initially only a small portfolio of publicly-subsidised assets
- NFP organisations that want to combine their own assets with publicly-subsidised assets in a joint venture
- for-profit organisations that want to directly participate in an affordable housing development using a not-for-profit subsidiary as a vehicle
- local governments that want to participate in affordable housing development.

While the question of who or what would be regulated under a National Regulatory Framework is discussed further in section A3, the experience in the UK highlights the critical issue of reducing barriers to operating at scale by ensuring there are not unnecessary restrictions on the type of organisation that can be part of the NFP Growth sector. This contrasts with the Australian context where the NFP Growth sector is still immature, and most jurisdictions currently place specific restrictions on organisational eligibility.

In addition there may be National Competition Policy issues to be considered. The policy requires that regulation should not restrict competition unless it can be demonstrated that the benefits of the restriction outweigh the costs and that the objectives of regulation can only be achieved by restricting competition.

A2 Principles of good regulation

The experience of administering and complying with regulatory systems across a range of sectors is that the day-to-day experience of regulating is often quite different from the original intention. Regulation is often more intrusive and more costly than originally assumed and generates less benefits than expected.

So what is needed to ensure that the National Regulatory Framework for affordable housing is delivered to achieve the agreed objectives?

This section presents a discussion of the key principles that the Australian and international literature highlight as pivotal to the appropriate delivery of regulatory arrangements for affordable housing. These include:

- proportionality and transparency of regulatory controls
- a risk-based approach
- a focus on outcomes rather than processes.

A2.1 Proportionality and transparency of regulatory controls

In recognising the benefits and costs that come with the imposition of rules through regulation, there has been an increasing focus in government over recent years on 'what is good regulation' (Allen Consulting Group, 2003). The Australian Government Productivity Commission defines good regulation as regulation which achieves its goal in a way that brings the greatest net benefit to the community. The word 'net' means that the regulation must be judged not only by its beneficial effects but also the costs that arise in achieving them.

For this overall net benefit to be satisfied, regulation needs to meet three tests (Banks, 2001):

- Regulation must be the most effective way of addressing an identified problem or risk
- It must impose the minimum burden on those regulated
- It must have minimum negative impact on others.

The United Kingdom focuses its test of net benefit around five principles of good regulation (Better Regulation Commission, 2006):

- **Proportionate:** Regulators should only intervene when necessary. Remedies should be appropriate to the risk posed, and costs identified and minimised
- **Accountable:** Regulators must be able to justify decisions, and be subject to public scrutiny
- **Consistent:** Government rules and standards must be joined up and implemented fairly
- **Transparent:** Regulators should be open, and keep regulations simple and user-friendly
- **Targeted:** Regulation should be focused on the problem, and minimise side effects.

A2.2 Risk-based approach

The Housing Corporation, which has responsibility for the regulation of housing associations in England, uses a risk-based approach to regulation (Housing Corporation, 2005) that emphasises tailoring the level of regulatory engagement to the risks posed by individual organisations. Under the model, providers are segmented into lower, medium and higher risk clusters based on an assessment of the probability and impact of identified risks. The implications of a risk-based approach are (NSW Office of Community Housing, 2005):

- limiting the application of regulatory controls to those activities that represent a significant risk, and which cannot be cost-effectively managed through other non-regulatory mechanisms
- explicitly identifying the key risks to stakeholders, and the indicators that can be used to monitor these risks
- scaling back regulatory engagement for activities that fall into the low probability, low impact category (i.e. low risk). In these cases, greater reliance can be placed on self-assessments and ongoing performance monitoring
- development of 'tiering' arrangements within regulatory systems to reflect the different risk categorisations.

In the context of an NFP Growth sector, the intended scale and profile of these new activities means that the risks to stakeholders are significantly higher than those posed by the broader community housing sector. The challenge of risk-based approaches is to ensure that the regulatory controls for NFP Growth activities:

- remain proportionate and tightly focused on the identified risks rather than expanding into areas that overlap with the day-to-day risk management responsibilities of Boards of Management
- dovetail with individual jurisdiction arrangements for managing the lower (but potentially still significant) risks associated with the broader community housing sector

A2.3 Focus on outcomes rather than processes

The clear message from the international literature is that government's role in regulatory systems for affordable housing should focus on the outcomes to be achieved for tenants and taxpayers - rather than prescribing the processes that providers should use to achieve these outcomes.

This principle is embedded in the language of virtually all modern regulatory systems for affordable housing - although in practice a large number of these 'outcomes-based' regulatory requirements include significant amounts of fine detail on processes. The distinction between outcomes and processes is fundamental to determining the positioning of government and industry in regulating the not-for-profit housing sector.

A recent evaluation of the NSW Community Housing Accreditation System (NSW Office of Community Housing, 2005) emphasised the importance of the not-for-profit housing industry having a lead role in managing the current accreditation system which focuses on promoting continuous improvement against good practices defined by the National Community Housing Standards. It was argued that the accreditation system needs to be industry-driven, given the practice-based focus of the standards and the need to avoid duplication and conflicts with any outcomes-based regulatory system driven by government.

The National Community Housing Standards include a number of process standards that are directly relevant to the NFP Growth sector - namely in relation to acquiring and developing stock (Standard 2.3), and developing income streams for acquiring new stock (Standard 2.4). Both of these Standards highlight signposts of good practice, including undertaking feasibility studies before deciding on the best method to acquire new stock (Signpost 2.3.3), and negotiating formal contractual agreements when entering into partnership with other organisations to develop stock (Signpost 2.4.4).

However, adopting good practice is necessary but not sufficient to achieve the intended outcomes for tenants and taxpayers. The achievement of these outcomes also depends on the organisation's leadership, skills and strategies for working at the interface between government and the private sector. Essentially, similar organisations may be using the same good practices, but achieving different affordable housing outcomes.

A3 Regulatory code

If regulation is defined as those forms of individual and sectoral control and influence adopted by jurisdictions to achieve specified outcomes, then the specifications for the regulatory system must identify both the outcomes to be achieved (regulatory code) and the 'levers' available to the regulator to influence their achievement (regulatory controls).

This section reviews the affordable housing regulatory codes used in Australia and internationally, to identify the main outcomes sought by stakeholders from regulation and the risks to the achievement of these outcomes.

A3.1 Priority outcomes and risks

Regulatory codes for affordable housing currently used in Australia and internationally can be distilled down to requirements to ensure that organisations involved in the development and management of affordable housing are:

- viable
- properly governed
- properly managed (including property and tenancy management at scale, and broader organisational and risk management).

Within these areas, the various regulatory codes define specific requirements that must be met by regulated organisations to provide assurance that certain outcomes will be achieved or to minimise the risk of outcomes not being achieved. In many cases, the intended outcomes and associated risks are not explicitly stated, but are implicit in the regulatory requirements.

The following sections highlight the implicit priority outcomes and risks associated with the range of regulatory codes currently used in Australia and internationally, with an emphasis on the outcomes and risks associated with large-scale affordable housing initiatives.

A3.1.1 Viable

Organisations involved in the development and management of affordable housing are expected to remain financially viable and solvent - typically defined as having adequate recourse to financial resources to meet their current and future business and financial commitments.

The implicit outcomes associated with viability are:

- **No loss of government assets** - ensuring the value of government investments in affordable housing are protected from losses which could occur if an insolvent organisation is forced to use its assets to cover debts to secured creditors
- **No loss of housing services for tenants** - ensuring that tenants are protected from losing services which could occur if a non-viable organisation ceases to operate or discontinues the delivery of housing services
- **Good value for money from government assistance** - ensuring that government assistance is used efficiently - in terms of the:
 - unit cost for management of existing stock
 - unit costs for delivery of new stock
 - leverage of non-government investments
 - quality of stock and services
 - targeting of assistance to priority populations
- **Protecting the reputation of the NFP Growth sector** - ensuring there is not a loss of confidence in the sector as a result of the financial failure of one or more NFP Growth organisations.

The risks to the achievement of these outcomes covered by the various regulatory codes, include:

- lack of appropriate verification (such as through a robust business plan and audited accounts) that the NFP Growth organisation has adequate recourse to financial resources to meet current and future commitments
- lack of appropriate verification (such as through a risk management plan) that the NFP Growth organisation has adequate controls in place to manage financial and non-financial risks that could significantly impact on the delivery of affordable housing
- lack of appropriate expertise (Board and senior management) and governance arrangements to control large-scale investment and financial decision-making
- lack of appropriate management and staff expertise to undertake housing developments and large-scale property and tenancy management
- lack of appropriate financial policies and systems to support effective management and accountability (e.g. policies and strategies to minimise prolonged vacancies in

housing stock and loss of rental income).

In some cases, specific regulatory requirements are placed on providers to ensure they are not involved in activities that increase risks. For example, the Regulatory Code in Queensland requires that regulated organisations “cannot use funded property as security for a loan”.

A3.1.2 Properly governed

Organisations involved in the development and management of affordable housing are expected to be properly governed - typically defined as having appropriate Board and senior management expertise and governance arrangements to control decision-making.

The implicit outcomes associated with organisations being properly governed are:

- **No loss of government assets** - ensuring the value of government investments in affordable housing are protected from losses which could occur if poor investment decisions are made or decisions are not controlled
- **Delivery of expected affordable housing outputs** - ensuring NFP Growth organisations deliver contracted affordable housing outputs on-time, on-budget and to acceptable standards
- **Performance in meeting affordable housing business targets** - ensuring NFP Growth organisations achieve the targets set in their business plan
- **Protecting the reputation of the NFP Growth sector** - ensuring affordable housing partners (developers, financiers and private sector investors) are confident in the capacity of NFP Growth organisations to have a significant role in large-scale affordable housing developments.

The risks to the achievement of these outcomes covered by the various regulatory codes, include:

- lack of appropriate expertise (Board and senior management) and governance arrangements that result in:
 - poor financial and investment decisions being made
 - financial and investment decisions not being monitored
 - controls not being in place to prevent fraud and corruption
 - controls not being in place to ensure government assistance is used for the purposes for which it was provided
- lack of appropriate expertise (Board and senior management) and governance arrangements that result in:
 - poor project management decisions being made on housing developments
 - development project budgets and delivery schedules not being monitored
 - controls not being in place to prevent budget and schedule over-runs on development projects
- lack of appropriate verification of NFP Growth organisations’ capacity to have a significant role in large-scale affordable housing developments, as demonstrated by:
 - a history of involvement in successful affordable housing partnerships
 - business relationships with a range of potential affordable housing partners (developers, financiers and private sector investors)
 - financial resources that the organisation can bring to large-scale affordable housing developments (cash, assets, capacity to obtain loans)
- proven incidents of failing to maintain high standards of probity, including serious:

- breaches of code of conduct (which sets out the ethical and behavioural expectations for both Directors and staff, including conflicts of interest)
 - fraud or corruption
 - non-compliance with statutory requirements
 - failure or delays in notifying the regulator of incidents that risk damaging the reputation of the sector.
- lack of appropriate governance policies and systems to support effective decision-makings.

In some cases, specific regulatory requirements are placed on providers regarding governance arrangements. For example, the Regulatory Code in Victoria requires that organisations have “policies to secure a sufficient number of appropriately qualified or experienced persons” to their governing body, and that the “governing body meets regularly and provides effective oversight of the operations of the agency and the actions of management.”

A3.1.3 Properly managed

Organisations involved in the development and management of affordable housing are expected to be properly managed - typically covering core property and tenancy management functions as well as broader organisational and risk management responsibilities.

The implicit outcomes associated with being properly managed are that:

- **Affordable housing tenants live in homes that meet appropriate community standards** - in terms of safe, amenity and maintenance
- **New housing developments deliver homes to appropriate standards** - to ensure that future tenants have the opportunity to live in homes that reflect community standards
- **Tenants’ views and needs are central to the design and delivery of affordable housing**
- **Tenants live in sustainable communities** - with NFP Growth organisations contributing to community regeneration and social and economic participation strategies in communities where there are high concentrations of affordable housing.

The risks to the achievement of these outcomes covered by the various regulatory codes, include:

- NFP Growth organisations failing to plan and deliver responsive and cyclical maintenance to ensure that existing stock meets relevant national affordable housing guidelines [including specifications for measuring property conditions and the acceptable timeframe for asset management plans]
- NFP Growth organisations failing to plan and deliver new housing developments to ensure future affordable housing stock meets relevant national affordable housing guidelines
- lack of responsiveness by NFP Growth organisations to the views and needs of tenants
- lack of consistency in applicants’ and tenants’ experiences of accessing, maintaining and exiting their tenancies, or a failure to comply with national affordable housing policy guidelines (covering eligibility, allocations, rent, tenure, housing support and exits)

- lack of contribution by NFP Growth organisations to community regeneration and economic and social participation partnerships in local communities
- lack of appropriate property and tenancy management policies and systems to support the management of large-scale affordable housing portfolios.

A3.2 Issues

There are a number of issues that need to be considered in developing a regulatory code for the NFP Growth sector in Australia. In particular:

- **How can the regulatory code best underpin the objectives and principles of the National Regulatory Framework?**

The proposed objectives and principles for the National Regulatory Framework focus on defining regulatory requirements in terms of clear outcomes for affordable housing clients, taxpayers and the reputation of the NFP Growth sector.

Currently, most regulatory codes attempt to achieve this focus by defining specific requirements that must be met by regulated organisations (e.g. the organisation must operate a viable business with adequate recourse to financial resources to meet commitments).

The alternative approach is to explicitly define the outcomes for clients and taxpayers (e.g. no loss of government assets, clients live in decent homes), and identify the specific risks associated with NFP Growth activities that need to be managed to achieve this outcome.

The advantage of an organisation-focused regulatory code is that it makes explicit the regulator's expectations of organisations operating in the sector. The potential weakness is that it is easy to lose sight of the risks that are trying to be managed through regulation, and to ensure that regulatory responses are proportionate to the risks faced in different contexts.

The advantage of an activity-focused code is that the outcomes and risks are explicitly stated and there is flexibility for different jurisdictions to provide separate guidance on specific organisational requirements.

- **Are separate regulatory standards needed for NFP Growth activities?**

The impacts of risks associated with NFP Growth sector activities are significantly different from those in the broader community housing sector - most notably:

- the scale of the NFP Growth activities (e.g. the risks associated with property and tenancy management for 2,000 properties are very different than for 200 properties)
- the type of NFP Growth activities (e.g. involvement in the financing of development, the project management of new housing development and the ownership arising from such investment).

This means that either new 'standards' are added to existing regulatory codes to reflect the new risks, or greater distinction is drawn between the risks for NFP Growth activities and broader community housing sector risks.

One possible approach is to adopt a common outcomes framework that applies to both NFP Growth and the broader community housing sector, but separates the risks with NFP Growth activities (that are best managed through a National Regulatory Framework), and the risks with broader community housing (that can be managed through individual jurisdiction regulatory arrangement or industry-led regulation).

This issue is closely linked to decisions about whether to co-locate regulation with housing development functions (as is the case in the UK and all Australian jurisdictions).

- **What level of detail is needed in the regulatory code?**

The regulatory codes currently used in Australia and internationally vary considerably in the level of detail embedded in the code. Some codes focus on high-level standards supported by detailed guidance notes, whereas others prescribe detailed requirements, including adopting specific policies and procedures.

The potential advantage of the detailed regulatory requirements, particularly during the development phase of the NFP Growth sector, is that they support a high level of assurance that organisations are adopting recognised good practices. On the other hand, it works against the principle of recognising the independence of NFP Growth organisations to determine the best ways of achieving the outcomes sought by the regulator.

In relation to a national regulatory framework, the potential advantage of focussing on high-level standards is that it provides greater flexibility for different jurisdictions to adapt the regulatory code to their particular context. Further, many of the details associated with the regulatory code will need to rely on national policies and guidelines for affordable housing (e.g. allocations/ rent policies) that are yet to be developed and are likely to change over time.

- **How will compliance with the regulatory code be measured?**

While the different mechanisms for measuring compliance with the regulatory code are discussed in Section 5, all of these mechanisms assume there are agreed attributes or indicators of compliance - that is, what will it look like or what can be measured if the outcome is being achieved or the identified risks are being appropriately managed.

One possible approach is to adopt a common set of indicators that would be used by all jurisdictions to measure compliance, but which allows flexibility for jurisdictions to establish benchmarks or evidence guidelines relevant to their context. Clearly, consideration will need to be given to the costs associated with an effective compliance regime.

- **How will the regulation of NFP growth activities dovetail with broader regulatory activities in the community housing sector?**

While the focus of this project is on NFP Growth activities, these activities do not exist in isolation from the broader community housing sector. This raises a number of issues including:

- Are transitional arrangements needed for support organisations that wish to move from the "community housing sector" to the "NFP Growth sector"
- Is a national approach needed for the regulation of the broader "community housing sector" (mirroring the national approach to the regulation of the NFP Growth sector)
- Would a 'multi-tiered' registration system (see Section 5) provide the flexibility to operate a single regulatory system covering both NFP Growth and other community housing providers

A4 Mechanisms for delivering regulation

There is a diversity of mechanisms for regulating affordable housing currently in place across Australia and internationally - covering legislatively-based registration systems, contract-based licensing systems, industry-recognised accreditation systems and self-regulatory codes of practice.

The central question for the National Regulatory Framework is what mechanism will deliver proportionate regulatory controls to best manage the risks associated with NFP Growth activities (Section A3), consistent with the principles of good regulation (Section A2) and the objectives of the national framework (Section A1).

This section reviews the range of possible regulatory controls (Section A4.1), the mechanisms for implementing these controls (Section A4.2) and the issues that need to be considered in selecting both an optimum approach for the Australian context and other acceptable approaches (Section A4.3).

A4.1 Regulatory controls

Regulatory controls refer to the 'levers' that may be needed by the regulator to influence the achievement of specified outcomes. Based on Australian and international experience in regulating affordable housing, there are seven broad categories of 'levers' used to varying degrees:

- Restricting government assistance to a defined group of organisations (e.g. limiting assistance to 'registered' or 'licensed' providers)
- Prioritising government assistance to organisations that demonstrate superior performance (e.g. allocating resources for new housing developments to 'Grade A' providers in high-need locations)
- Withdrawing government assistance from a provider that fails to continue to meet the regulatory code
- Publishing information about providers' performance to facilitate consumer and industry pressure for improved performance
- Issuing a mandatory directive which requires that a regulated provider undertake some specified action to improve performance (e.g. prepare a performance improvement plan; appointing a government-nominated interim manager or Board member)
- Issuing a fine or penalty for a breach of the regulatory code
- Imposing a statutory charge that details rights as a secured creditor, in order to secure the enforcement of conditions associated with any assistance.

It is crucial to the thinking of the National Sector Development Plan that any acceptable regulatory controls preserve the independent status of NFP Growth organisations. This raises a number of issues.

There has been considerable interest in Australia over the Central Bayside Division of General Practice legal case to clarify the impact of government regulatory and output-based contractual arrangements on the charitable status of NFP organisations. The August 2006 High Court decision confirmed that Central Bayside was a charitable organisation on the basis that it had an independently formed Board which made its own decisions. Importantly, the legal judgement indicated it may have been different if the Central Bayside Board were appointed, dismissed or controlled by government.

There is a view in the literature that regulatory controls such as the appointment of an interim manager or Board member to a NFP Growth organisation may be unenforceable if the organisation is incorporated as a company limited by guarantee, because it conflicts with the duties imposed on the directors of the organisation under the *Corporations Act*.

There may also be limitations to regulatory controls where an NFP Growth organisation has entered into contracts with private-sector partners. Even though the regulator has a public interest in seeking to protect the tenants and any public subsidy applied to affordable housing, the regulator has no legal standing in the contract. It is likely that if an intervention clause was inserted into these private contracts, even if the clause was very favourable to the private investor, the mere presence of such a clause may be a significant deterrent to private investors.

In relation to regulating the transfer and use of capital assets by not-for-profit housing providers, the scope of regulators' powers is most clearly and conveniently defined in terms of a statutory charge – a legislatively based control over capital assets in which the government has an interest. A statutory charge can apply to all properties which have been the subject of government assistance, and is implemented either as a prohibition on dealings with the land without prior consent or as an interest which is registrable on the title.

A4.2 Mechanisms for implementing regulatory controls

The most common mechanisms for implementing regulatory controls are registration, licensing and accreditation. Unfortunately, each of these terms is used differently in housing sectors in Australia, compared to other social service sectors and other international jurisdictions. The following information is based on the common-usage of these terms in the Australian social housing context.

A4.2.1 Registration

Registration refers to a standards-based recognition system whereby government assistance is restricted to those organisations that meet specified criteria - both in terms of the type of organisation (e.g. companies limited by guarantee), and their demonstrated capacity to meet prescribed performance standards. Registration is typically concerned with regulating the whole of an organisation.

South Australia, Victoria and Queensland currently operate legislatively based registration systems for community housing providers. The Victorian system is multi-tiered in that it has separate recognition for Housing Associations (potentially NFP Growth organisations) and smaller housing providers.

A4.2.2 Licensing

Licensing also refers to a form of standards-based recognition whereby an organisation is approved to undertake a particular activity for a fixed but renewable term subject to satisfactory performance against performance standards (say three years). In essence, a licensing system is focused on the regulation of affordable housing activities rather than regulating organisations.

NSW currently operates an administratively-based "registration" system that aligns more closely with the characteristics of a licensing system as defined above - with fixed-term recognition that is open to a wide range of not-for-profit organisations (including specific-purpose Housing Associations, tenant-managed cooperatives, and large church-based providers with discrete subsidiary housing businesses). Like Victoria, the NSW system is multi-tiered - with currently three categories of licensed organisations. A unique feature of the NSW system is that the licensed organisations are awarded a performance grade linked to the extent to which their housing activities meet prescribed standards (Grade A, B or C). New funding opportunities are targeted to Grade A providers.

A4.2.3 Accreditation

Accreditation, in the Australian context, refers to recognition systems focused on continuous improvement towards, and verification that an organisation is meeting identified best

practice standards for the provision of community and affordable housing based around the National Community Housing Standards. The Standards are promoted as a tool for quality improvement. As a result, the system is intended to be “owned” by the community housing industry with recognition of achievements against the standards made by an independent committee with strong industry representation.

NSW and a number of other jurisdictions operate voluntary accreditation systems for community housing providers. Queensland has recently made accreditation one of the prescribed requirements of its registration system.

A4.3 Issues in selecting the optimum regulatory approach

A4.3.1 Legislation

Regardless of the chosen regulatory goals and scope of regulation, the literature highlights the distinct advantages of legislation as a basis for regulation, as opposed to contracts or administratively-based regulatory systems.

The community housing industry has emphasised that “a legislative approach will provide assurance for government that it has appropriate regulatory powers to ensure that its social, economic and other objectives are met whilst managing the risks inherent in community housing” (National Community Housing Forum, 2001).

The challenge is to develop legislation which retains the capacity and willingness to apply tough sanctions where needed, but aims to create an environment which encourages organisations to manage their own risks better and thereby reduce the burden of regulation.

Across the different jurisdictions, the key elements of legislation for achieving this balance in the NFP Growth sector are:

- a definition and description of the role of the NFP Growth sector
- objectives and principles of government assistance
- definition of prescribed requirements in the form of a regulatory code
- powers to provide funds and assets to support the provision of affordable housing
- powers of the regulator to intervene – either directly in the operation of the provider or by terminating government assistance
- provisions for appeal against decisions of the regulator.

In the context of the National Regulatory Framework, a legislative basis for regulation could be pursued through either Commonwealth legislation, or separate legislation (based on an agreed model) in each of the nine jurisdictions.

At the same time, it may be acceptable for some jurisdictions to continue to use administratively-based regulatory arrangements, with the required powers and prescribed requirements built into contracts with providers. As previously highlighted, NSW currently has an administratively-based registration/ licensing system, although it is planning to introduce legislation to support the system in 2007.

A4.3.2 Recognition of registered/ licensed NFP Growth organisations

A central part of all regulatory systems is the formal recognition of organisations that meet prescribed regulatory requirements - either through the registration of these organisations or the licensing of their activities.

The purpose of this formal recognition is to provide some level of assurance to stakeholders that regulated organisations have demonstrated the achievement of specified outcomes and that appropriate controls and sanctions are in place if they stop delivering these outcomes.

In the context of the National Regulatory Framework, this means establishing a 'club' whose members are organisations that are recognised by all jurisdictions as delivering the large-scale affordable housing outcomes specified in the NFP Growth Regulatory Code.

The threshold question for such a 'club' is what type of organisation would be eligible for membership. The current Victorian legislation restricts the registration of Housing Associations (potential NFP Growth organisations) to companies limited by guarantee whose constitution states that their primary activity is the provision of affordable rental housing. This means that other types of NFP organisations (such as churches) would need to establish subsidiary businesses with the required legal structure to participate in the Victorian NFP Growth sector. In contrast, the strategic direction being pursued in NSW is to leave the eligibility requirements for organisations as broad as possible (e.g. legally constituted non-profit non-government organisation) and to focus the controls on regulating high-risk activities.

Once this threshold question is addressed, there are a number of flow-on issues relating to:

- **The Registrar(s)** - what person or organisation has the mandate to formally recognise an organisation as a NFP Growth provider [either nationally or within individual jurisdictions]
- **The Register(s)** - what is the formal record of 'registered' organisations [either as a single national list or registers maintained by individual jurisdictions]
- **Registration** - what is the process by which organisations are placed on, or removed from the register. For the purposes of the National Regulatory Framework, the term Registration could potentially cover both "NFP Growth organisations" and "organisations involved in NFP Growth activities"
- **Categories of registration** - is there a need for different categories of registration. As a minimum, registration would need to explicitly distinguish between organisations recognised as NFP Growth providers and other NFP providers. More broadly, organisations could have different categories of registration based on their performance (e.g. Grade A, B, C).

A4.3.3 Assessments against the regulatory code

If registration (or licensing/ accreditation) involves recognising organisations that meet a specified regulatory code, then systems must be in place to assess performance against this code. Possible mechanisms for these assessments include:

- **Inspections** - formal evaluations conducted by the regulator, involving performance monitoring data and on-site evidence gathering, to reach evidence-based judgements about performance against the code
- **Reviews of submitted evidence** - desktop reviews by the regulator of evidence submitted by an organisation to demonstrate their performance against the code
- **Independent certification** - independent verification by appropriate assessors that an organisation is meeting the requirements of the code (e.g. verification by a financial auditor that an organisation is financially viable)
- **Industry certification** - verification by appropriate assessors from within the industry (but independent of the organisation) that an organisation is meeting the requirements of the code
- **Self-assessment** - internal verification by the organisation's Board that they are meeting the requirements of the code.

Each of these mechanisms provides a different level of assurance and a different perspective on performance. For example, industry certification has the advantage of using assessors with a detailed understanding of the sector, but does not provide the same level of assurance as independent certification. Inspections conducted by the regulator can be tailored to reflect the regulator's sensitivity to risk, but at the same time can be very costly for both the regulator and the regulated organisation.

This raises a number of potential challenges:

- Does the regulator have the resources and expertise to undertake credible assessments?
- Is the intensity of resources for individual organisation assessments proportionate to the risks posed by their activities?
- Do regulatory assessments maximise information available from existing sources (e.g. performance monitoring data)?
- Does participation in the assessment process place an unreasonable burden on providers?
- Are regulatory assessment undertaken in an environment that is independent of policy and funding decisions?
- Are judgements made by the regulator subject to appeal and broader scrutiny?

In the context of the National Regulatory Framework, there could either be a nationally-agreed approach to assessments (e.g. independent certification by licensed auditors) or locally-relevant approaches adopted by each jurisdiction.

Attachment 4: Cave Review of Social Housing Regulation

In December 2006, the Secretary of State for Communities and Local Government (CLG) commissioned Martin Cave to conduct a review of the regulation of social housing – in particular to establish objectives for social housing regulation and propose a system of regulation, and an institutional framework, capable of achieving those objectives.

The report of the Cave Review of Social Housing Regulation was published in late June 2007 (Cave, 2007).

A number of findings from the review reinforced the core proposal for a national regulatory framework for NFP growth providers. In particular:

- regulation of social housing is necessary to:
 - protect tenants
 - support sustainable communities in neighbourhoods with high concentrations of disadvantage and marginalisation
 - protect government investments in social housing
- the shortcomings of the current regulatory system in the UK are:
 - inadequate concern for tenant interests
 - over-regulation of some providers and excessive administrative burdens
 - inadequate separation of policy and regulation (leading to the unacknowledged implementation of policy by regulation)
 - poor incentives for efficiency
 - failure fully to utilise available capacity to expand provision in the housing association and private sectors
- the three principal objectives for the regulation of social housing are:
 - to ensure continued provision of high quality social housing
 - to empower and protect tenants
 - to expand the availability of choice of provider at all levels in the provision of social housing

The two principles underlying the design of the regulatory system are:

- to achieve the above objectives with a minimum degree of intervention
 - to apply the same approach, where possible, across all providers of social housing
- the core areas of regulatory risk relate to financial viability, tenant dissatisfaction, poor housing and services, poor efficiencies. The review identified five areas where data on these risks will need to be monitored:
 - level of tenant satisfaction, tenant involvement and choice
 - the standard of housing and service provided
 - financial projections
 - average operating costs
 - rents

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