

# National Regulatory System for Community Housing Tier Guidelines

## 1. Introduction

### National Law Guidelines

These guidelines are made jointly by the relevant Ministers of each participating jurisdiction and are published in the New South Wales Government Gazette pursuant to section 10(2) of the Community Housing Providers National Law (the National Law).

These guidelines should be read in conjunction with:

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

### Registration Tiers

The Registration Tier Guidelines relate to guidance on the interpretation of the following sections of the National Law.

12 (2) (b) The National Register is to record the category of registration of the entity

**category** of registration means a category of registration under this Law for which provision is made in the guidelines under section 10 (2)

12 (3) The Registrars may agree to divide the National Register into different parts to assist in the administration of the National Register.

12 (4) The primary Registrar for an entity may at any time, by notice in writing to the entity, vary the category of registration of the entity and move the registration of the entity to any other part of the National Register.

14 (2) A Registrar must, as soon as is practicable after making a determination under this section, notify the applicant in writing of:

- (a) the determination, and
- (b) if the application is not approved, the reasons for the determination, and
- (c) if the application is approved, the category of the registration including whether the entity has been registered in a particular part on the National Register and any conditions to which the registration is subject.

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

## 2. Principles

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

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

### 3. Purpose

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

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

Registration in any particular tier is therefore determined by an organisation’s level of risk.

Proportionality is achieved by differentiating registration tiers based on whether an entity:

- meets incorporation requirements for a particular registration tier
- meets the evidence requirements of the National Regulatory Code for a particular registration tier
- meets requirements associated with related party arrangements.

It is important to note that Registrar decisions about tiers is different to their assessment of risks associated with a provider’s compliance with the National Law. Within any tier, Registrars will vary the amount of regulatory engagement depending on actual compliance and the risks of non-compliance.

### 4. Registration Tiers

1. The National Register will be divided into parts specifying three categories of registration —referred to as Tier 1, Tier 2 and Tier 3
2. The Regulatory Code within the National Law sets out the performance outcomes that must be demonstrated by all Tier of registration
3. To be registered in a particular tier, an entity must:

- a) Meet the incorporation requirements for the particular tier
  - b) Demonstrate they meet the evidence requirements for the particular tier
  - c) Demonstrate that if they have related party arrangements they maintain control over activities & decisions that impact on their compliance with the National Law
4. The Tier of registration is determined by an entity's level of assessed risk which in turn determines the performance requirements and intensity of regulatory engagement of the registered community housing provider.
  5. Risk is not static and may change over time; this in turn may lead to a change in tier of registration.
  6. The tier of registration is the first level of risk stratification to support a risk based approach to the regulation of community housing providers. It predominantly deals with the consequences of risk associated with the scale and scope of a provider's community housing business.
  7. The assessment of performance data and information is the second level of risk stratification which predominantly deals with the nature and intensity of regulatory engagement and, where necessary, action. This engagement will be regularly reviewed in the light of changing business focus and complexity and performance.

## 5. Eligibility requirements

### Tier 1

8. A Registrar may only place an entity in Tier 1 of the Register if the entity:
  - a) Is incorporated as either a company limited by shares under the Corporations Act 2001 or a company limited by guarantee under the Corporations Act 2001
  - b) Demonstrates that if they have related party arrangements they maintain control over activities and decisions that impact on their compliance with the National Law (see Section 7); and
  - c) Demonstrates they meet the evidence requirements for a Tier 1 provider—as specified in the NRSCH Evidence Guidelines
9. Tier 1 providers face the highest level of performance requirements and regulatory engagement —reflecting the fact that Tier 1 providers are involved in activities that necessitate management of a higher level of risk based on
  - Operating at large scale—meaning any serious non-compliance has the potential to impact on large numbers of tenants and assets
  - Ongoing development activities at scale—meaning any serious non-compliance has the potential to affect the viability of the provider

### Tier 2

10. A Registrar may only place an entity in Tier 2 of the Register if the entity:
  - a) Is a body corporate created through State/Territory or Australian government legislation. This includes:

- companies limited by shares under the Corporations Act 2001;
  - companies limited by guarantee under the Corporations Act 2001;
  - corporations incorporated under the Corporations (Aboriginal and Torres Strait Islander) Act 2006; or
  - cooperatives or incorporated associations under State/Territory legislation
  - other bodies corporate (e.g. Trusts) created through other State/Territory or National legislation.
- b) Demonstrates that if they have related party arrangements they maintain control over activities and decisions that impact on their compliance with the National Law (Section 7); and
- c) Demonstrates they meet the evidence requirements for a Tier 2 provider—as specified in the NRSCH Evidence Guidelines
11. Tier 2 providers face an intermediate level of performance requirements and regulatory engagement —reflecting the fact that Tier 2 providers are involved in activities that necessitate management of a level of risk that is lower than Tier 1 providers but higher than Tier 3 providers based on
- Operating at moderate scale—meaning any serious non-compliance has the potential to impact on a moderate number of tenants and assets
  - Small scale development activities - meaning any serious non-compliance has the potential to affect the viability of the provider

### **Tier 3**

12. A Registrar may only place an entity in Tier 3 of the Register if the entity:
- a) Is a body corporate created through State/Territory or Australian government legislation. This includes:
- companies limited by shares under the Corporations Act 2001;
  - companies limited by guarantee under the Corporations Act 2001;
  - corporations incorporated under the Corporations (Aboriginal and Torres Strait Islander) Act 2006; or
  - cooperatives or incorporated associations under State/Territory legislation
  - other bodies corporate (e.g. Trusts) created through other State/Territory or National legislation.
- b) Demonstrates that if they have related party arrangements they maintain control over activities and decisions that impact on their compliance with the National Law (Section 7); and
- c) Demonstrates they meet the evidence requirements for a Tier 3 provider—as specified in the NRSCH Evidence Guidelines
13. Tier 3 providers face a lower level of performance requirements and engagement —reflecting the fact that Tier 3 providers are involved in activities that necessitate management of a lower level of risk based on
- Operating at smaller scale—meaning any serious non-compliance has the potential to impact on a smaller numbers of tenants and assets
  - No ongoing development activities -

## 6. Registration decision about tiers

14. An entity or a registered community housing provider may apply to be registered in any Tier—regardless of their past, current or planned scale and type of community housing activities. However, the onus will be on the applicant to be able to fully demonstrate that they meet the requirements for that particular tier of registration—both on application and as part of ongoing compliance assessments.
15. In assessing an application for Registration or a change to Registration, a Registrar must make an assessment of the overall level of risk in the entity's delivery of community housing activities and make a determination of the required level of regulatory oversight. Registrars from participating jurisdictions will develop and apply common definitions to ensure consistent determinations are made of the required level of regulatory oversight. The framework underpinning these determinations is presented in Attachment 1.
16. Within each Tier, Registrars will also make assessments of the actual risks associated with a provider's compliance with the National Law and will use this assessment to determine the required level of regulatory engagement appropriate to these risks. This is separate to decisions about registration tiers which relate to eligibility criteria and the scale and scope of community housing activities.
17. A Registrar may reject an application for Tier 3 registration if the Registrar makes a determination that Tier 1 or 2 regulatory oversight is required based on the entity's community housing activities. A Registrar may reject an application for Tier 2 registration if the Registrar makes a determination that Tier 1 regulatory oversight is required based on the entity's community housing activities.
18. If an application for Registration is approved, a Registrar's determination about the Registration Tier of an entity under Section 14 (2) will be based on
  - Evidence provided by the entity about their incorporation status
  - Evidence provided by the entity about related party arrangements and their ability to maintain control over activities and decisions that impact on their compliance with the National Law
  - Evidence provided by the entity to demonstrate that they meet the evidence requirements for a particular registration tier
19. As the evidence guidelines are cumulative (i.e. Tier 1 evidence requirements encompass Tier 2 and 3 requirements; Tier 2 evidence requirements encompass Tier 3 requirements), the Registrar can determine that an entity should be registered in a lower Tier than they applied for as long as this is consistent with the Registrar's determination of the appropriate level of regulatory oversight (e.g. an entity applying for Tier 2 registration may be registered as a Tier 3 provider as long as the Registrar determines that their activities only requires Tier 3 regulatory oversight)
20. A change to the Registration Tier of a registered community housing provider may be initiated by
  - a) An application from a registered community housing provider to change Tiers; or

- b) A compliance assessment by the Registrar that identifies a change to the scale or scope of operations of the registered community housing provider; or
  - c) Any advice or notification to the Registrar that indicates a change in scale or scope of operation.
21. In making a determination to change the Registration Tier of an entity under Section 12 (4), the Registrar is required to
- a) provide a notice in writing to the entity stating their reasons for the change and any requirements that will need to be met for a different registration tier
  - b) give the entity the opportunity to submit additional information or documents to demonstrate that the requirements for the new Tier have been fully met.
22. In making a determination of the Registration Tier as part of an application for registration or the variation of an existing registration under Section 13, the Registrar is only required to consider:
- a) information or documents submitted by the entity with the application form or further information or documents requested by the Registrar for the purposes of determining the application
  - b) whether the information or documents submitted or requested unambiguously demonstrates that the requirements for a particular Tier have been fully met.
23. A Registrar is not obliged to change the Registration Tier of an entity under Section 12 (4) of the National Law if a provider becomes non-compliant—that is, they may proceed to use other enforcement powers including issuing a notice of non-compliance.
24. A Registrar’s determination about the Registration Tier is an appealable decision under Section 25 (1)(a) and (b) of the National Law.
25. A Housing Agency of a participating jurisdiction (as defined in the National Law) may make it a requirement of receiving and keeping housing assistance (funding or assets) that an entity is registered in a particular Registration Tier.

## 7. Related party arrangements

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

27. A Registrar is required to consider the related party arrangements of an entity in making a determination of the Registration Tier
28. Registrars from participating jurisdictions will develop and apply a common set of procedures for assessing related party arrangements to ensure consistent determinations are made
29. An applicant for registration or a registered community housing provider must make an initial and on-going disclosure of related party arrangements under Section 13(5)(a) and Section 15(2)(d) of the National Law.
30. A failure by an applicant for registration to disclose related party arrangements is grounds for rejecting an application
31. A failure by a registered community housing provider to disclose related party arrangements represents a non-compliance under Section 15 (2)—namely a failure to notify the Registrar of a change in the affairs of the provider that may impact on its compliance with the Law.
32. In order to be registered, an entity with related party arrangements must demonstrate that they can maintain control over activities that impact on their compliance with the National Law

## Attachment 1: Definitions

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

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

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

### ***Scale of community housing tenancy management activities***

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

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

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

### ***Scale of community housing property management activities***

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

- small scale / lower risk if the provider has responsibility for asset management for less than 100 properties
- moderate scale/ moderate risk if the provider has responsibility for asset management between 50 and 500 properties
- large scale / higher risk if the provider has responsibility for asset management more than 350 properties.

### ***Development activities***

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

- lower risk if the provider is involved in a one-off and very small scale development activity
- moderate risk if the provider is involved in small scale development activities
- higher risk if the provider is involved in ongoing development activities at scale

Development scale is measured in both number and cost.



**Table A1: Example of the typical Registration Tier for different community housing activities**

SCOPE								
Ongoing development activities at scale	Tier 1		Tier 1		Tier 1		Tier 1	
Ongoing small scale development activities	Tier 2		Tier 2		Tier 2		Tier 1 or Tier 2	
One-off and/or very small scale development activities	Tier 3		Tier 2 or Tier 3		Tier 2		Tier 2	
No development activities	Tier 3		Tier 3		Tier 2 or Tier 3		Tier 2	
	0	50	100	300	500	2,000		
	SCALE							
	Number of community housing tenancies							
	Number of community housing properties (with asset management responsibilities)							