



Registrar of  
Community Housing



**NSW Registrar of Community  
Housing's Input:**

# **NRSCH Review**

This advice is from an independent statutory officer and is provided pursuant to the Registrar's function contained in section 10(1)(h) of the NSW *Community Housing Providers (Adoption of National Law) Act 2012*.

## Purpose of Paper:

This paper responds to calls for submissions to the review into the NRSCH. It contains the opinion of the NSW Registrar of Community Housing on the performance of the NRSCH and suggests necessary changes to the system in order to increase benefits for the participants and broader public.

The NRSCH as a scheme comprises:

1. The regulatory bodies – funded public service bodies headed by an independent statutory officer appointed by the relevant Minister.
2. The participants – registered community housing providers, their affiliates and companies seeking registration. This includes their representative bodies and peaks.
3. The impacted – tenants, families, carers etc. involved in the housing experience. This includes representative bodies and advocacy groups.
4. The funders and asset owners – responsible for the land, funding support and/or asset subject to community housing agreements; including monitoring of provider contract management
5. The governments (& taxpayers) – who require assurance of transferred risk and sector viability.
6. The Housing Agencies – responsible for the policy settings required to be met by providers under registration.

In addition, the scheme overlaps with many other government regulated and un-regulated schemes through both the experience of the tenant and also the business and compliance experiences of the provider.

This paper has been organised into four main sections to assist the NRSCH Review, as:

- Current design and performance of the NRSCH
- Continuous improvements to NRSCH within the current authority of the Registrars
- Drivers for change
- Required changes that fall outside the realm of the Registrars

Some of the changes to the scheme suggested in this paper require amendments to the National Law. The majority of scheme improvements can be achieved through changes to implementation instruments. Options for implementation of ideas raised in this paper will be released in subsequent input for the Review when called for.

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## Executive Summary:

The NSW Registrar's input to the NRSCH Review provides insights into the nature of the scheme, the past performance of the scheme, what improvements are being pursued regardless of the NRSCH Review process, and what areas of reform are needed that are beyond the capacity of Registrars to address. This advice also considers key drivers that will continue to test the NRSCH over the next ten years and are likely to shape new opportunities that could be addressed by the Review.

The points raised are supported by other performance evaluation and reporting work conducted by the NSW Registrar. While the observations in this paper are those of the NSW Registrar, assessments and publications supporting these findings have all been contributed to by providers and key stakeholders.

***In overview, the NRSCH has performed well as a largely self-regulatory system with the Registrars acting as an independent performance monitoring service for government.*** Provider performance has improved under the scheme to standards beyond those achieved on scheme entry. Participants have met government assurance expectations and sustained and built operations to the benefit of improved tenant outcomes.

***The Registrars' highly connected regulatory system has continuous improvement mechanisms in place which have contributed to this improved effectiveness through heightened reporting, visibility, consistency and proportionality of operations.***

The provider participation part of the NRSCH has equally co-contributed through various representative groups that have worked collegiately for common improved productivity outcomes which underline the largely not-for-profit nature of the scheme.

***The policy and funding assurance components of the NRSCH are less aligned to the objects of the National Law, with inefficiencies in contract/funding management and policy settings continuing to limit the national benefits of the scheme and reduce productivity.***

The key areas of reform required under the NRSCH that remain outside the Registrars' control to remedy include:

- reducing the contract and red-tape burden (across housing and other funded services);
- assisting providers to operate across borders by removing differences in state policy settings;
- investing in the independence of the Registrars including their capacity building capability nationally;
- adjusting the Registrar's enforcement and information collection powers commensurate with addressing operational and scheme viability risks;
- revisiting scheme design settings such as broadening participation and reviewing the classification system; and
- standardising the roles of the housing agencies formally under the NRSCH (including introducing accountabilities for achieving the objects of the National Law).

## Current Performance (2012-2018):

### Scheme Design (Attachment 1 provides further detail)

The design of the NRSCH is largely a self-regulating system with relatively small, independent, government registration, monitoring and intelligence bodies (the Registrars). The scheme is designed to allow flexible operation across borders and facilitates the easy sharing of information and intelligence among jurisdictions. Contract and funding managers, who are part of the Housing Agencies, create assurance on specific housing programs and agreements. The Registrars' role is to monitor whole-of-business performance of registered providers that could create risks to these programs over time. This design leverages the nature of the not-for-profit sector, their access to multiple funding streams and programs not available to public housing, and recognises the range of compliance, contracting and standards systems they endure. It leverages the CHPs' public outcome interests and also their willingness to invest in better practices.

Over the period of the NRSCH, CHPs have diversified and become more complex as program expectations and funding streams have shifted. They now face more layers of contracting systems, with varying levels of expectation, and layers of duplication within the assurance systems provided by the Registrars and other regulatory bodies. Those registered report that being registered is important to the reputation of their business. However, many housing and subsidised accommodation providers remain outside a single regulated system and enjoy the benefits of being funded, but subject to less scrutiny.

At the same time, public housing interests have tended to contain the scheme to limit CHP operations to manage, and not own, existing stock. This part of the scheme design is largely unresponsive to the objects of the National Law to facilitate the financing and environment to release the strength of CHPs in order to increase volume as well as the conditions of stock.<sup>1</sup> With such limits in place, Governments need to direct Housing Agencies to increase volume through specifically funded and bureaucratically tied programs. As a consequence social housing volumes have remained relatively static over many years while affordable housing stock – in which the CHPs are provided greater licence to contribute volume – has multiplied. Innovation in NSW Commissioning and new models of market-led development (such as bond aggregator) are providing better practice alternatives to the traditional, unresponsive tender system that collectively impact the viability of the not-for-profit business sector.

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<sup>1</sup> See for example: Darcy, M. 'Growth' of Community Housing May be an Illusion. But cost shifting is not, in Business Daily, <http://www.businesses.com.au/general-business/432604-growth-of-community-housing-may-be-an-illusion-the-cost-shifting-isn-t>, downloaded 25/1/2019.

The Tier system was designed to provide a macro scheme risk model reflecting the level of vested risk in the CHP. There are misinterpretations of the design. The lower Tier providers (Tier 3) may be considered more at-risk by financing bodies. Funding managers may concentrate on the top tier (Tier 1) providers due to the amount of government assets or funding they attract. This may mean for example that the Tier system is only perceived as reflecting the proportion of managed government public housing stock; therefore not leveraging the sector's development capacity.

Hence, some scheme re-design is necessary for the NRSCH to remain fit-for-purpose over the next five years; especially in the areas of clear definition of Housing Agency roles, ownership, and accountabilities (inclusive of funding and contract management) in achieving the objects of the National Law.

### **Scheme Performance (Attachment 2 provides further detail)**

Regardless of the scheme weaknesses identified under the previous heading, the NRSCH has performed beyond expectations in generating business strength, viability, diversity and outcomes of the objects of the National Law. This is evidenced by:

- Improvements in performance against the outcomes of the code by businesses from their registration through their compliance monitoring.
- The responsiveness of CHPs to regulator's steerage on better performance, indicated in the history of recommendations that have been met. There have been very few business "failures" in the scheme. The small number of providers identified as being in difficulty have been assisted by regulatory oversight to achieve improved performance through the early prevention and risk management systems employed by the Registrars.
- The adaptability of CHPs to government programs including the investment in expanding the sector. Recent assessment of 10 year projections of sector viability indicate the sector remains healthy over the next 10 years although profit margins are declining. Assuring some longer-term funding streams and reforming the contract management obligations would significantly increase the sector's ability to manage strategic shocks and maintain its current healthy position.
- Insights by the NSW Registrar of the performance of non-NRSCH registered housing businesses in NSW indicate the confidence in the CHP sector is well-founded. Other businesses could be encouraged through policy settings to register under the NRSCH in order to broaden business equity and attract finance other than grants from government. The NRSCH has provided government with assurance of the sound operation and healthy prospects of a range of new and innovative housing products being delivered in NSW by registered CHPs – especially those new products aimed at easing the impact of broader Sydney housing pressures.

On the basis of a number of insights that have been raised by external parties over time on the performance of the NRSCH, the NSW Registrar is of the view that:

- The absence of a national council to shepherd the NRSCH does not appear to have restricted the performance of the system. Some tidying up of the intergovernmental processes is desirable but it does not have to involve additional layers of governance with additional cost to taxpayers.
- There are no apparent barriers for Victoria and Western Australia entering the NRSCH in terms of performance outcomes, other than the States' strategic design preferences. Operational procedures are consistent and the slight cultural differences in regulatory approach could be readily adapted.
- A re-invigoration of the national housing standards is not necessary to improve provider performance and could inadvertently conflate the scheme design faults noted above through adding unnecessary additional layers of performance reporting and cost. Early in the launch of the NRSCH, the sector disinvested itself from national standards as they were considered ineffective, duplicative and costly. That said, if the NRSCH Review was to lead to less independent regulatory oversight, such standards may need to be reimposed for monitoring by peaks.
- Regulatory oversight has demonstrated substantial improvement and high level of competitiveness by CHPs compared to other providers of subsidised housing.

### **Continuous Improvement of the Scheme by Registrars: (Attachment 3 provides further detail)**

The adaption of CHPs to government programs has continuously prompted Registrars to improve the NRSCH to advance the sector as well governed, well managed and viable. The Registrars have adopted a number of measures to assure consistency in operations across the country, improved reporting, visibility of outcomes, and capacity building around new entrants. This is evidenced by:

- Flexibility in approach to engagement and escalation, and working towards reforming the regulatory requirement for market segments within the Tier 3 risk grouping
- The Regulatory Advisory Group (RAG) was introduced as part of the NRSCH governance and has largely performed the functions which were envisaged for the National Council. RAG has provided guidance and standardisation in varied policy environments and monitoring direction in addition to scanning for emerging opportunities for the scheme improvement. While there are some calls for the establishment of a more directive national body, this is not considered necessary unless the NRSCH design shifts to a more self-

regulatory model and thus needs a central industry codes and standards setting body.

- An increase in relevant public reporting on sector performance, with plans to extend this reporting to include individual provider performance included in the national Register over the next three years.
- Capacity building of new entrants through fact sheets, more frequent workshops, targeted improvement programs, and guidance for peaks and representative bodies.
- Improvement in intelligence-sharing relationships with other regulators both at NSW level and Commonwealth. This responds to the increasing complexity and diversification of providers, but also is an adjustment in efficiency and red-tape.

Central to these reforms has been an investment in, and reshaping of, the NRSCH secretariat. The team (re-designated as the NRSCH National Office) provides the knowledge, reporting, governance, quality assurance, national guidance, and reform management system for the Registrars – including for non-participating Registrars that contribute to the NRSCH.

Much of the reform to be done within the Scheme over the next five years will necessitate increased funding for the National Office in annual contributions.

## **Drivers Steering Scheme Design for the Future (Attachment 4 providers further detail)**

Key drivers are set to alter the landscape for NRSCH performance over the next ten years:

- **Affordable Housing:**  
Diversification of registered community housing has increased new business opportunities, however the ending of NRAS subsidies causes risk for viability of these providers and the stability of tenants. The limited coordination of stewardship nationally, limited monitoring, and lack of clarity, create risks to maintaining the current levels of affordable housing stock over the next 10 year period. On the other hand, potential new approaches being proposed for affordable housing funding and concessions could markedly impact the viability of businesses and encourage more participants across the country. This needs to be considered in the Review.
- **Disability Sector:**  
The expansion of the registered community housing sector which has seen builders, developers and Specialist Disability Accommodation providers seek registration under NDIS create new challenges for the NRSCH. The impact of



converging layers of regulatory oversight or gaps in oversight over the next ten years needs to be considered by the Review.

- **Aboriginal Housing:**  
The NSW Registrar has been regulating Aboriginal Community Housing Providers since the 2011, firstly under the special NSW regulatory scheme and currently under the NRSCH and the NRSCH derivate – the NSW Local Scheme. This shift to the oversight by an independent regulator is reflective of the government intent to assist the sustainability of Aboriginal housing providers including supporting a viable Aboriginal housing sector of benefit to Aboriginal people. Specific funding for capacity building and registration is supporting this program. The learnings from this program for the NRSCH could be considered by the Review if the Review is assessing expansion options with new types of participants.
- **Financial Viability**  
The sector remains well positioned even with additional requirements for reporting and services being imposed on sector. These additional requirements include but are not limited to the program-specific and contracting demands of tailored social and affordable housing initiatives in NSW and elsewhere. Additional requirements are being levied in terms of wraparound services, homelessness services, disability services and Aboriginal Housing services. The benefits of using the outcomes framework of the NRSCH should be considered in lieu of Departments producing a separate and duplicative human services reporting framework for CHPs and their tenants.
- **Commissioning (not procurement)**  
A clear rationale for regulatory coverage across the housing sector would assist strategic commissioning, generate understanding, build confidence, ensure business equity and attract funding. Currently the commissioning design is cost heavy and CHPs are absorbing this viability burden. Therefore, this area requires reform nationally.

### **Areas outside Registrar's Capacity for Continuous Improvement of the Scheme: (Attachments 1 and 4 provide further information)**

Under the NRSCH there are a number of areas that require reform which lie outside the control of the Registrars; these include:

- **Scheme design:** The Registrars have the authority for operational adjustments within the NRSCH. Design of participation, authority and the allocation of resourcing to Registrars are matters for the NRSCH Review and Departments.

- **Contract management:** While being part of a broader control framework, the quite significant and varied contract management, Housing Agency and policy settings in each jurisdiction (including participating and non-participating) restrict the ability of businesses to operate across borders and may be perceived as acting contrary to the objects of the National Law.
- **Powers:** The Registrars have no statutory information collection powers, – which tends to limit access to tenant records during an investigation, and the collection of information from funding bodies and other entities beyond the CHPs. The growth and diversification of CHPs is requiring greater connectivity with other non-housing jurisdictions; however, the National Law includes no powers to share and acquire information beyond the conditions of registration of the provider. Victoria
- **Affordable housing:** the scheme lacks the consistent policy settings that would allow Registrars to develop an asset level view and a common registration and compliance assessment construct for for-profit CHPs and respond to the risks in the affordable housing sector and rent-setting.
- **Capacity building:** new government initiatives are encouraging new entrants, which in turn, necessitates the primary Registrar to invest resources to assist the entry of new providers into the sector (including for-profit companies); however, this is not a recognised function under the National Law. Most contemporary regulators have a guidance function and are funded for education programs and encouraging better practice; which they can then assess the impact of through their performance monitoring.
- **Advice function:** Given the diversification of the sector and the Registrars' whole of business assessment view and reporting functions, there is a gap in functions to advise on improvements in scheme design features.
- **Independence:** Registrars operate under varied arrangements which test the independence required of them under National Law. Hence standardising some of the key arrangements for the independence of Registrars across the jurisdictions is warranted.
- **Central reporting:** The growing burden on the Registrars to act collectively means additional and ongoing funding for expanding NRSCH National Office roles is necessary.
- **Tier structure:** While Registrars are acting within existing Tier structures to market segment providers for more effective performance monitoring, the NSW Registrar notes ongoing misperceptions about the nature and function of Tier classification system may necessitate the Review revamping the classification system in its entirety. This may also be a natural outcome from any decision to adjust the NRSCH to either a more invasive or less invasive regulatory regime.
- **Outcomes structure:** While Registrars have operational discretion to negotiate improved evidence requirements supporting the existing outcomes framework of the NRSCH, the codification of the seven performance

outcomes of the Act should be reviewed. In particular the Review may wish to consider reinforcing (or removing) the whole-of-business nature of assurance of the performance outcomes and also additional flexibility for Registrars such as the discretion not to apply Performance Outcome 3 where unnecessary.

- **Wind up clause and body corporate provisions:** The NRSCH Review should consider removing these two entry preconditions and allowing the Registrars to apply them as registration conditions where they apply to businesses seeking registration. This would reflect the changed nature of providers in the scheme, provide greater freedom for governments to leverage the NRSCH, and would reduce the need for state local schemes designed for specific market segments that do not meet such preconditions.

## Attachment 1: Scheme Design of NRSCH:

The NRSCH as a scheme comprises:

- The regulatory bodies – funded public service bodies headed by an independent statutory officer appointed by the relevant Minister.
- The participants – registered community housing providers, their affiliates and companies seeking registration. This includes the representative bodies and peaks.
- The impacted – tenants, families, carers etc. involved in the housing experience. This includes representative bodies and advocacy groups.
- The funders and asset owners – responsible for the land, funding support and/or asset subject to community housing agreements.
- The governments (& taxpayers) – who require assurance of transferred risk and sector viability.
- The Housing Agencies – responsible for the policy settings required to be met by providers under registration.

In addition, the scheme overlaps with many other government regulated and un-regulated schemes through both the experience of the tenant and also the business and compliance experiences of the provider.

The vision of the NRSCH is to ensure a well governed, well managed and viable community housing sector that meets the housing needs of tenants and provides assurance for government and investors.

### Regulatory design

The regulatory design of this scheme is a provider registration system that allows businesses to self-monitor and identify, as well as monitor and respond to risks that have serious consequences for tenants, funders and investors. Given the nature of the provider community, this design is intrinsically a “self-regulated” framework where providers are expected to manage their own performance in pursuing viable, sustainable and compliant behaviours across its business.

The regulatory role was established as a broader business monitoring and intelligence function, not designed to supplant the inspection and audit functions expected of providers; albeit some investigation and enforcement capacity is available to Registrars if necessary. The onus on business promotes productivity and reflects the strong diversity of the sector, community resilience, accountability and resistance to shocks<sup>2</sup>. Under this framework, the provider is well positioned to identify risks, determine mitigation strategies and implement compliance and better practice

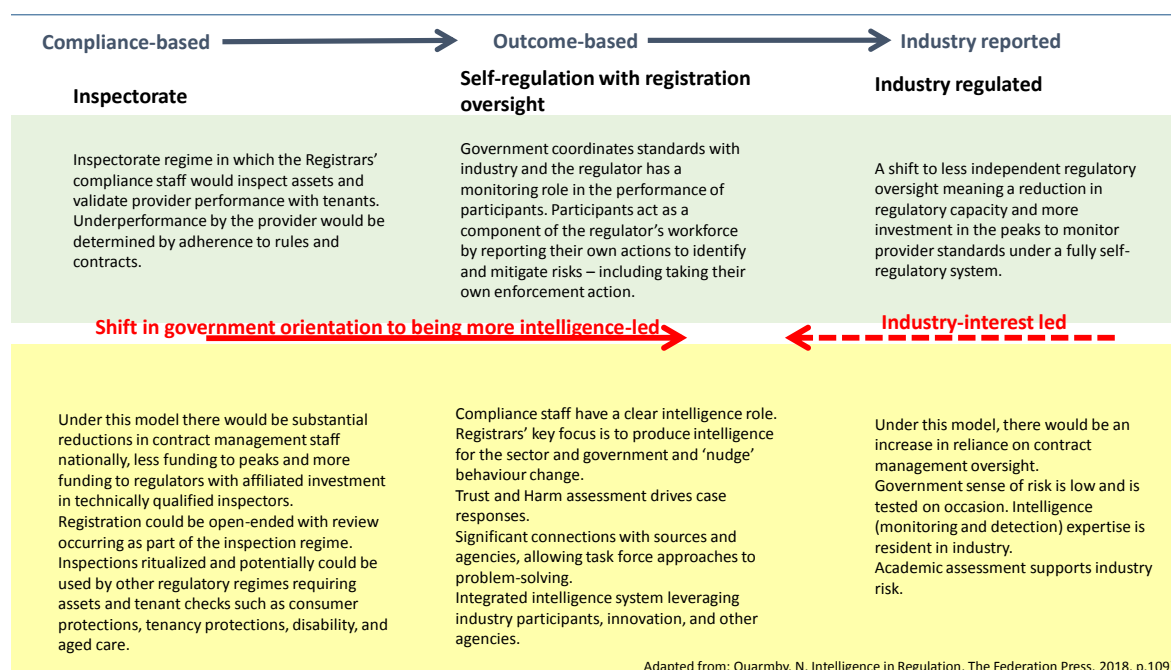
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<sup>2</sup> Sparrow, M. ‘Joining the Regulatory Field’, *American Society of Criminology* 11 (2012): 354

measures. Independent regulatory oversight is to monitor and ‘nudge’ this performance.

The other types of regulatory models that could be adopted under the NRSCH are shown in the below diagram where the **current** NRSCH model (in the **centre column**) is shouldered by two potential adaptations – neither of which are viewed as necessary by the NSW Registrar:

1. Shift to a more controls-based inspectorate regime.
2. Shift to more industry-regulated scheme.



Adapted from: Quarmby, N. Intelligence in Regulation, The Federation Press, 2018, p.109)

Figure 1 The current NRSCH Scheme design (centre) with alternative models to the left and right

The current design of the NRSCH appears to have been the most appropriate broad design to encourage the type of participant behaviours required. A shift away (to either a more invasive regulatory system or a more self-regulatory scheme) should be carefully considered for unintended consequences. The variance in these designs relates to how much the providers can be trusted to self-regulate, and the best balance between contract oversight and independent monitoring. The merits of these regulatory models requires an assessment on how effective the NRSCH is in achieving policy objectives.

The NSW Registrar understands that an industry-led regulatory model (on the right of the Figure 1) was tried prior to the recognition of community housing providers in legislation; but was deemed insufficient to assure government risk. The more invasive inspectorate model (on the left) was considered unnecessary. On inception, the regulation encountered an immature community housing sector heavily

dependent on government handouts and an accreditation to standards scheme where all risks were absorbed the government. Performance of providers has greatly improved since inception with little need for more invasive powers. That said, familiarity can lead to blasé behaviours over time and new forms of monitoring performance may be considered necessary for the next five years. Any moves towards either of these alternative models, should consider the rationale for not adopting these models or moving away from these models in the past; as well as why the current scheme design would need such alteration.

### **The level of inclusiveness of the scheme**

The regulation of community housing providers was initially designed to protect government investment in the sector and was limited to organisations that received assistance from the Housing Agency. The Tiering of providers into three groupings tended to reflect the proportion of transfer of government risk to the CHPs.

Due to changes to the housing market that were becoming obvious but not quite clearly articulated, the NRSCH, through the Inter-Government Agreement, was made open to a range of participants and new housing products that involve for-profit organisations interested in contributing to housing solutions and organisations that have no connection with the Housing Agencies. The broadening of scheme participation has assisted the government policy intentions of providing additional subsidised housing related products and concessions in order to meet growing demand including from moderate income owners. Recent NSW government initiatives to grow social housing stock have recognised the capacity of some Tier 2 and Tier 3 CHPs to leverage greater financing (especially within the larger faith-based bodies).

However, the Review may choose to limit participation in the scheme by restricting participation to providers who are only funded by the government for low and very low income brackets; that is; revert the scheme to the narrower field of social housing. While this would simplify the NRSCH and ease the policy differences across jurisdictions, in the NSW Registrar's view, this would be a backwards step.

Rather the policy settings should embrace expansion and business diversity to realise tenant improvements across the spectrum of very low to moderate incomes. An example of incongruence is that the NSW Registrar has providers seeking registration with no intended connections with the Housing Agency or any other government agency, and who are not subject to the Affordable Housing Ministerial Guidelines. Yet the intent of their business sits with the intended better outcomes for affordable housing supply. Registration provides the business with solid credentials within industry, plus gives some government assurance of the continued better outcomes for its populace. It would be natural for the Registrar to refuse entry due to the limited connections with government of such providers but to the detriment of the

policy intent. Of note, the decision 'not to register' is appealable. Yet the grounds 'not to register' in such circumstances are unclear.

In the absence of a clear view on expanding participation, the Registrars can apply conditions of registration to providers and therefore shape participation rules at an operational level. However, it would be preferred that a national approach be considered and design stewardship utilise sub-scheme opportunities within the NRS using the NRS instruments (such as Additional Standard Condition of Registration or ASCOR) to provide clarity for such organisations seeking to enter the regulatory sphere. This would enhance the provision of affordable housing solutions and better respond to the needs of Australian communities.

The Review is encouraged to consider the broadening of the scheme to a number of possible other entrants into the regulated sector. Of note is a more pronounced industry self-regulation model raises questions on how to draw all providers in the system under a more singular industry-representative model.

### **The need for the National Registrar**

The question of the need for a single national regulator needs to be separated from the question of the need for National Council. A coordinating, standard-setting and reporting body (such as the Council) is a governance rather than an operational regulatory mechanism. That said, if the NRSCH was converted into an industry regulated model, the need for a National Council to provide oversight of the peak bodies, would be paramount.

Regardless of the viewpoint, the design requirement for a new level of regulatory authority at the Federal level depends on the level of risk owned by the Commonwealth versus the States. If the risks to tenants, ownership of housing assets, financial viability and reputation of the scheme are transferred to the Commonwealth, then the associated assurance need for regulatory oversight under Commonwealth law would be warranted. If however the risk remains with the States, the idea of an additional level of regulation should not be conflated with any additional levels of coordinating activities that support the scheme.

While the current scheme design continues and the risks manifest at state level, the NSW Registrar would argue that there is no logical argument for a Federal regulator and that improvements to coordination are better focussed on expanding the role and resourcing of the National Office (as discussed elsewhere in this submission).

### **National roles and functions of the Housing Agencies**

While performing well as a scheme, some design features of the NRSCH have not kept pace with the growing complexity of providers in the scheme. As a result these features now undermine the room for growth, viability and stewardship, which has left a once strong framework open for risk into the future. These key design areas require

re-evaluation to accompany the growing number and complexity of entities projected within the NRSCH. While these scheme design limitations need to be addressed, the solution is not necessarily to shift to a more invasive or less invasive regulatory system. The NSW Registrar's recent forward forecasting of sustainability of the scheme has indicated that the main factors that could threaten to impact the objects of the NRSCH sit in the scheme's lack of certainty as to the future of income streams, additional compliance costs imposed through contracting, and the unclear roles and remit of contract management, the peaks, funding managers and housing agencies.

The absence of nationally agreed functions for the Housing Agencies and accountabilities against a strategy and National Law, have a direct impact on the effectiveness of the NRSCH. Without further definition of the functions of the Housing Agency in National Law, as well as their obligations aligned to the Registrars' accountabilities, each funding agency and policy arm can act independently within the NRSCH with effects contrary to the objects of the Act.

The non-viability of a provider could be a direct result of contract and funding management decisions that are not in accordance with National Law. Similarly, the actions by an individual may lead to systemic failure in a provider. However, the Registrar can only take enforcement action against the provider. The Registrar cannot censure an individual or deny access to an individual from working in community housing after potential catastrophic actions. Similarly, the Registrar has no instrument to provide notice of inappropriate actions of public servants to the relevant Housing Secretary. The provider has no clear appeal rights against decisions made by the Housing Agencies under National Law. Similarly, Housing Agencies can open up or restrict entry of providers with no engaged stewardship and resourcing of the regulatory system to manage the operational registration implications.

The need for alignment with the Registrars' functions in this policy, design and contract management obligation setting is essential to the adaptability and oversight requirements outlined in the NRSCH Charter<sup>3</sup>. In particular this is important to realise the object of the National Law and the IGA relating to promoting business opportunities across borders.

The Review of the NRSCH cannot therefore be focused only on the Registrars' roles. Scheme regulatory design and oversight is more clearly a function of the Housing Agencies. This weakness has compounded nationally by incomplete regulatory design for the clear cross-over points between disability housing, social housing, affordable housing, homelessness shelters, aging accommodation, temporary/crisis housing, aboriginal housing, boarding housing, and public housing.

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<sup>3</sup> See NRSCH Charter [http://www.nrsch.gov.au/\\_data/assets/file/0011/288218/D\\_Charter.pdf](http://www.nrsch.gov.au/_data/assets/file/0011/288218/D_Charter.pdf)



**The NRSCH Review should hence consider the option of expanding the scheme to be a National Regulatory Scheme for Subsidised Housing.**

Along these lines the Review may also wish to consider removing the current Tier-based system of classification and construct a new model based on capacity to deliver housing outcomes and market segments.

The trend for community housing providers to diversify business across these domains and into private and development businesses, will only conflate this design weakness into the next ten years.

**Summary of suggested improvements to the NRSCH:**

- Define the role and accountabilities of the Housing Agency in the National Law with respect to the objects of that law.
- Increase the powers of Registrars to investigate and take action against any entity or individual that impacts providers' non-compliance with the law and negatively impacts on the objects of the National Law.
- Introduce the concept of capacity building into Registrar's function – as an 'advise, assist and educate' function.
- Consider expanding the scheme for community housing to subsidised housing; therefore including all providers of subsidised housing.
- Consider a different Tier model involving market segmentation and capacity.

## Attachment 2: Performance of Providers Under the NRSCH

The performance of CHPs over the past five years has generated business strength, viability, diversity and met the outcomes of the objects of the National Law. These key performance areas have been reported through various NSW Registrar and NRSCH reports. In overview, providers entering the NRSCH – which has high entry levels for performance in the first instance – tended to only improve their performance across whole-of-business indicators. The small few who evidenced a decline in performance tended to do so as a result of internal cultural dynamics and/or leadership issues.

- Over the term of the NRSCH, the NSW Registrar has only had to intervene with one (of approximately 150) CHP with noncompliance in their tenant management systems likely to be causing harm to tenants.
- Where a dip in asset management performance occurred in one year, CHPs readily addressed the causal factors for the decline and returned overall performance to high levels.
- Evidence provided to the NSW Registrar clearly indicates that CHP Boards and CEOs are not satisfied with simply being compliant with national codes but pursue better practice, invest readily in others' businesses to collectively improve the reputation of the sector, and aspire to be highly regarded as preferred providers.
- Interaction with CHPs and Registrar's staff is largely in the domain of better practice improvements, reducing red-tape, and sector confidence.
- The NSW Registrar has reported an observable difference in performance between companies registered under the NRSCH and similar companies, operating in similar subsidised markets, with no equivalent level of scrutiny/oversight.

To support these observations, extracts from supporting reports are below with the full reports available on the NSW Registrar's website:

### Sector Overview 2017:<sup>4</sup>

- *The community housing sector in NSW has consolidated after transition from a state to national scheme and providers are, on the whole, preparing their businesses for a period of sector growth and enhanced public expectation. To support this, the Registrar enhanced capability to assess complex financial and business models in 2017-18*
- *There was an observable difference in the performance of providers operating in a fully regulated market, compared to providers subject to monitoring through only contract management. This is especially clear in transparency and responsiveness to required improvements. This variance in scheme*

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<sup>4</sup> 2017 Annual Statement of Performance <http://www.rch.nsw.gov.au/publications-and-forms/fy-2016-17>

*performance supports current policy to encourage providers to become registered under a regulated system, including public housing and other providers involved in assisted accommodation support in NSW.*

- *Added focus on repair and maintenance standards, better practice in the visibility of appeals processes, evictions, notifications and other key procedures, targeted improvements in property utilisation reporting, business capacity and planning to meet the heightened expectations of the doubling of the NSW community housing sector over the next three years*

#### Key Judgements:<sup>5</sup>

- *Healthy trend in CHPS responsiveness and continuous improvement, including investment in better practice*
- *CHPs respond well to the Registrar's oversight and recommendations, and the current self-regulatory model appears to encourage better outcomes*
- *The number of providers and complexity of business arrangements of providers is expected to grow in 2017-18 in line with new affordable and social housing programs in NSW*
- *The doubling of tenants in community housing in NSW over the next few years will naturally increase complaints being managed by CHPs and require adjustments in complaint handling and response capacity*
- *The variance in transparency and responsiveness to recommendations indicates that in some areas of commissioned services, the capacity building in providers of social housing and other associated services would benefit from regulatory oversight*
- *2016-17 interventions into CHPs with specific compliance issues indicated some early signs of weaknesses in strategic and risk planning, managing conflicts of interest, compliance with policies and procedures, and workforce engagement practices*
- *The Tier 1 and 2 sector was financially stable. An assessment specific to the Tier 3 sector was made later in 2017-18 where more contemporary data was available to the Registrar*
- *The modest financial growth of Tier 1 and 2 community housing providers (CHPs) over the past three years is in part due to the sector preparing for these community housing initiatives*
- *The Registrar noted a decline in surplus forecasts by CHPs. This decline potentially correlates with provider feedback that in the future, subsidies may not keep pace with costs*
- *The financial performance of Aboriginal community housing providers was assessed as being financially viable for the immediate future*

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<sup>5</sup> Registrar Outcomes 1-3 <http://www.rch.nsw.gov.au/publications-and-forms/fy-2016-17>

### **Attachment 3: National Key Reforms Completed or Underway**

The Registrars have continued to evolve and develop the NRSCH. The Registrars have developed operational policies and procedures to standardise operations and reflect the principles of regulation across: enforcement, engagement, investigations, reporting and communications. Enhancements in complaints handling, assessment approaches, and financial analysis have also occurred.

Operationally, the Registrars have shared resourcing and delegated functions to focus on risks, address immediate national issues, harness expertise, and simplify interaction for providers. The Registrars also have shared case decisions with each other to test consistency in enforcement and escalation approaches. One investigation in NSW was supported by investigation resources supplied by the QLD Registrar. The NSW Registrar acts as the operational Registrar for Tasmania and the Northern Territory.

The Registrars have collectively engaged the Tier 3 sector to develop market segmented, risk based approaches to better practice regulation of like entities. The Registrars have an annualised program of systems enhancements designed to grow capacity in the IT tools and functions supporting better practice regulation and reporting.

Each jurisdiction contributes to regular analyst and financial analyst working groups designed to enhance collective regulatory assessment capability, includes processes and skills. The contributions to quarterly national data, reporting and review processes, assists the continuous improvement of the NRSCH. This is supported by formal engagement mechanisms with national policy representatives and biannual advisory group meetings with peak bodies and policy representatives. An example of collectively targeting risk is the Registrars' targeted effort underway to produce a collective assessment into the potential impacts of the end of NRAS on provider behaviours in the coming years.

Registrars have developed a plan to have full public reporting in three years starting with enforcement and complete history of providers' performance. Then add a performance overview statement. Then release graphic performance data sets.

Central to these reforms has been an investment in, and reshaping of, the NRSCH secretariat. The Secretariat was originally instituted as the support function for a national council that was never initiated. The role shifted to supporting the NRSCH governance and IT systems infrastructure. Over the last two years, roles of the Secretariat have expanded to lead the reform initiatives of the Registrars; especially in the above programs of work. The team (re-designated as the NRSCH National Office) provides the knowledge, reporting, governance, quality assurance, national guidance, and reform management system for the Registrars – including for non-participating Registrars that contribute to the NRSCH. The National Office is

increasingly involved as the interface nationally with other regulators, including with the National Housing Finance Investment Commission.

Much of the reform to be done within the Scheme over the next five years will necessitate increased funding for the National Office in annual contributions.

A reference for some of these changes is the *NRSCH Annual Update 2017-2018*. This covers the 2017-2018 key milestones in the continuous improvement of the NRSCH - aligned with our principles of good regulation - as:

***Proportionate – reflecting the scale and scope of regulated activities***

- *Reviewed the information we collect from providers through their Financial Performance Report to ensure there is an appropriate balance in the information collected and the regulatory burden placed on providers. The recommendations from this review will be considered along with the outcomes of the Tier 3 evidence requirements review and the impacts of the bond aggregator to identify changes to be completed in 2018-2019 following consultation.*

***Accountable – able to justify regulatory assessment and be subject to scrutiny***

- *Improved communication and transparency of decisions through providing simple and tailored reports on compliance performance for the provider's Boards and executive review, enhancing the readability of the Compliance determination report, and initiating compliance briefings in some jurisdictions to assist and demystify provider obligations.*
- *Improved consistency and transparency of NRSCH programs through agreement and development of the NRSCH Regulatory Engagement, Assessment, Investigation and Information Access and Sharing policies*

***Consistent – based on standardised information and methods***

- *Developed a national assessment methodology to be adopted by all jurisdictions to enable the consistent application of evidence guidelines used to monitor and assess provider performance.*
- *Finalised national enforcement process and system configuration to ensure consistency in data collection and reporting*

***Transparent – clear and open processes and decisions***

- *Improved regulatory information available to CHPs through the revision of registration and compliance guides for providers*
- *Improved transparency of information on the National Register to include details of enforcement action*
- *Developed a five year Strategic Plan and common vision for the administration of the NRSCH*

***Flexible – avoiding unnecessary rules about how providers organise their business and demonstrate compliance***

- Registrars engaged the Tier 3 provider community nationally to ascertain their views on evidence requirements and compliance scheduling, and co-design improvements to the way Tier 3 performance is assessed and monitored. Tier 3 providers who had recently been through a compliance assessment were especially engaged in this reform initiative. The engagement is allowing Registrars to now consider how and when to segment the Tier 3 sector in order to apply more flexible and adaptable regulatory arrangements that are more pertinent to the businesses being regulated.

**Targeted – focused on the core purposes of improved tenant outcomes and protecting vulnerable tenants, protecting government funding and equity and ensuring investor and partner confidence**

- Commenced work with the Commonwealth Department of Treasury to support the establishment of the National Housing Finance and Investment Corporation (NHFIC) and other initiatives that contribute to the ongoing development and viability of the community housing sector
- Contributed to discussions with policy representatives in relation to the proposed scope of the review of the operation and effectiveness of the National Regulatory System
- The Registrars have used indicators derived from this reporting to initiate targeted enquiries during assessment processes in FY18/19 on the impacts of the end of the NRAS subsidy scheme in the coming years.

**Key Reforms implemented by the NSW Registrar:<sup>6</sup>**

In addition to contributing to the NRSCH reforms noted above, the NSW Registrar has also reported regulatory improvement outcomes in the areas of:

**1. Improvement to performance**

The Registrar has introduced a number of changes to internal systems and processes to support our compliance and performance monitoring as well as improvement of functions:

- Conducting registration assessments in a consistent manner; allowing for registration assessments decisions to be defended if challenged by providing reasons for decisions and providing guidance for improvement.
- Provided performance specific trends, analysis and audits across business activities to analyse provider behaviour across specific performance areas, contributing to a strengthened evidence base to justify numerous recommendations.
- Implemented the additional standard condition of registration (ASCOR), an extra requirement that can be imposed on registered community housing providers in addition to the conditions of registration specified in Section 15(2)(a) to (i) of the National Law.
- Promoting better practice strategies through intervening early, changing governance and detecting poor practices. These improvements consist of guidance notes, campaigns and briefings.

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<sup>6</sup> Registrar of Community Housing Annual Report 2018

- Changing the way we present our compliance reports by acknowledging good performance and allowing for more comparable information.
- Developed and implemented a tool to assist in prioritising assessments; the tool will inform future compliance schedules, with a greater focus on risk prioritisation.
- Financial risk modelling. Our work with the Aboriginal housing community under the PARS registration program, led to financial viability modelling that triggered a shift in strategic thinking about the balance between contracting oversight and regulation in the Aboriginal Housing sector in NSW. This has led to improved capability for financial assessment in the Registrar's office, but also a shift in regulatory strategy in NSW for supervision of providers.
- Introduced the NSW Local Scheme designed to provide registration and regulatory oversight for providers not able to meet some of the specific rules of the NRSCH – such as the wind-up clause provisions.

## **2. Sector Engagement**

- Over the last year the NSW Registrar has conducted a range of information briefings with the sector on both compliance processes and the NRSCH review. Several face to face session and 5 webinar sessions on the NRSCH compliance process was held with 75 providers during 2017/18.
- Along with this there were face to face sessions and webinar sessions held with providers to obtain views on the NRSCH review.
- Providers appear more responsive to new ways of engaging through such means as webinars. Costs, time, availability, travel, and general accessibility are some of the reasons why holding webinars are more successful. As a result, providers have engaged more frequently and understand the Registrar's role and expectations of compliance much better.
- Our staff also held information sessions on regulation and compliance for key representatives of the Housing Agencies in NSW, Tasmania and the NT. These were designed to establish a better understanding of roles and functions on both sides, improving lines of communication across operational matters and increasing the profile of the RCH relative to the stewards of the social housing system. As a result of increased communications, we have seen significant improvements in information sharing with the NSW Housing Agency by providing crucial information in relation to a provider's non adherence to their contract and received information that may influence a current compliance assessment.

## **3. Capacity Building**

The NSW Registrar's observation of capacity building in the sector is that the impact of broad-based capacity building programs have not been effective. This is consistent with experience in other regulated sectors. Indeed, the Registrar has reported notable declines in performance of entities subject to poorly designed capacity building programs.

AHO funding has assisted the NSW Registrar to resource a capacity building team to work with providers to prepare and build their capability to expedite entry into the NRSCH. Tools and an interactive education process have been developed to assist

providers' health-check their business and develop an action plan signed by their Board, to remedy weaknesses.

The success of this program has been in streamlining the normally arduous process for applicants once they pursue registration. While initially established to assist Aboriginal Housing providers to transition to the NRSCH, the capacity building program has also been of value to other CHPs and applicants for registration. The ideas and learning from this program have also contributed to the Registrar's capacity building briefings for policy and funding staff noted in other sections of this report.



## Attachment 4: Areas Remaining Open for Reform

While there are a number of areas of the NRSCH able to be reformed by Registrars, much of the strategic shape and design of the system remains beyond the scope of the Registrars to address. The following sections offer some key reform areas for consideration by the NRSCH Review.

### **Adding strategic stewardship thinking into the Regulatory Scheme**

The Review should encourage the formulation of agreed long term strategies for the Australian subsidised housing systems so that any changed market conditions can be catered for and the NRSCH can adjust to projected risks. It is suggested that a more useful long term lens is to adjust the frame of reference to “subsidised housing” or “housing for social outcomes” and include in this frame of reference all types of accommodation, shelter, land, concessions, and funding supported by the taxpayers, which are leveraged by providers to support the breadth of the tenant experience. Community housing need not be assumed to be public housing managed by not-for-profits. Rather policy stewards should acknowledge that community housing now encompasses the breadth of experience from homelessness shelters, disability accommodation, crisis support, social housing, affordable housing, boarding housing, and some aspects of retirement/aging accommodation. The benefits of treating this as a holistic system is that it recognises the work of the CHPs across these sectors, their ability to migrate tenants across these pathways, the potential reductions in red-tape and bureaucracy, and the invaluable enhancements this would afford to the tenant experience.

The NRSCH Review should naturally consider the role of providers, where at-risk provider behaviours could emerge and what level of regulation is required.

Such thinking naturally then feeds into the review of state enabling laws and the requirements for registration as providers of other associated accommodation/facilities (as CHPs provide services across this spectrum). This also assists any view on government public housing providers as needing to be regulated as subsidised housing providers, the Housing Agencies’ strategic stewardship role (as well as housing agreement manager), what is meant by the independence of the office of the Registrar, and remove some of the current inconsistencies in housing subsidies such as those reported by the Productivity Commission, in public housing, boarding houses, in homelessness, and in the funding of non-registered providers nationally.

### **Defining the role of the Housing Agency under the law**

The Review needs to refine the role of the Housing Agency and its responsibilities under the law.

To be considered should be stewardship and obligations on the Housing Agency not to impact on CHP performance in a way that undermines the objects of the Act. This is currently implied and not accounted for in practice.

Housing Agencies should not also be providers due to scheme conflict of interest issues. The Housing Agency should be required to have clear and transparent procedures reflecting the expectations they levy on CHP. The Housing Agency should have a clear role to resource the Office of the Registrar and this to be done in a way independent of their provider functions and provider monitoring functions, but linked clearly to their assurance expectations of sector performance.

### **Regulation for a range of housing products delivered by CHPs**

Governments are making a large investment into the provision of all housing products for people on very low, low and medium income. This is reflected in a range of housing products: from crisis accommodation to affordable housing. Affordable housing is the key deliverable of a number of the largest community housing providers and a source of cross subsidisation of different social housing programs aimed at achieving overall housing and human services outcomes. The impact of the current affordable housing initiatives and future investment into housing for key workers will contribute to the overall housing strategy by freeing up places in accommodation and housing for people on lower income.

The NSW Registrar is becoming very active in this regulatory space; however, is aware of marked differences in other State positions that create regulatory inconsistencies and reduce CHP business operations and productivity. Affordable housing is accepted within the construct of community housing as the provision of community housing applies to people on moderate incomes who would otherwise not be eligible for social housing. However, 'affordable housing' is not nationally accepted within policy as part of community housing. Hence there is little agreed sense of risks to be managed within the NRSCH associated with affordable housing.

The NSW experience indicates new and emerging risks in the affordable housing sector require quite significant advances and adjustments to approaches within the NRSCH, including a closer interest in individual property and rent-setting behaviours. The set-up and resourcing for Registrars does not cater for this.

Monitoring by the NSW Registrar has indicated several key risks are beginning to impact on the NRSCH:

1. Lack of a single register of affordable housing properties and/or ready access to property data.
2. Surge in registration requirements, including by non-traditional for-profit organizations.
3. Lack of assurance necessary at the asset and rent level for affordable housing contracts with 10 year periods.

4. Lack of coordination between different elements of the approval process for the same property.
5. Lack of requirement to monitor client's pathway through housing products.
6. The ending of NRAS subsidies – risk of viability for registered community housing providers and risk for tenants in houses owned by private developers that community housing providers manage.

### **The need for equitable regulatory treatment of all providers of subsidised housing**

The NSW Registrar supports the call by the Productivity Commission for a level playing field for all providers of subsidised housing. The use of the National Regulatory System (NRSCH) as a suitable framework to independently assure this equity is also supported. However, the Registrar notes that specific to the inclusion of public housing under this framework, there are a number of major shifts required in governance and housing law to enable such change.

Unlike in a number of international housing regulatory bodies outlined in the NRSCH Review Discussion Paper, in Australia there is no single, risk-defined assurance framework for organisations providing housing subsidised by governments; making independent monitoring of the spectrum of tenant experiences patchy. In some areas of subsidised housing, provider performance is independently oversighted by a statutory regulator. In others, monitoring occurs through contract managers and/or through representative bodies. In public housing, oversight is through national governments' reporting obligations, and state audit bodies. The emphasis here is on data at a unit metrics level and there is less reporting about outcomes against the objects of Housing Laws.

In provider compliance reporting, the Registrar has noted business impacts and business concerns over the advantage afforded to non-registered entities and the adverse impacts of multiple, often competing, government contract management systems; especially across borders. The lack of a single assurance framework for subsidised housing programs means reduced visibility of outcomes, complex reporting frameworks, unnecessary duplication and red-tape, as well as unclear oversight authorities and accountabilities.

### **Risks for the financial viability of community housing providers**

In financial analysis of provider performance undertaken by the Registrar's office, the sector has clear financial viability and sustainability margins over the next ten years. However, the Registrar notes that these margins are being eroded in contracted compliance costs and uncertain funding streams.

Provider analysis also detected viability risks for registered providers that also provide Specialist Disability Assistance (SDA) until future funding mechanisms are clarified. There is also additional burden on CHPs needing to be separately

registered and assured for the same performance outcomes under the new disability regulatory regime. Both these issues have been reported to the NSW Registrar in evidence of impacted business planning and forecasting.

While the Registrars are responding by examining ways to operationally reduce the burden on providers, the NRSCH Review may consider strategic avenues to reduce the impact on the objects of the Act and business productivity by recommending streamlining measures where the NRSCH crosses with other associated regulatory regimes.

### **Other drivers affecting CHPs' future financial viability**

Some environmental drivers for provider viability with an effect on financial viability metrics and scheme performance cannot be impacted by housing policy settings and stewardship. These include commercial loan rates, land prices and general employment costs and so on. Other drivers are adjustable and include:

- Subsidy levels
- Large scale property transfers
- Targeted programs like the NSW social and affordable housing fund
- The national rental affordability scheme
- The bond aggregator

A number of providers are involved in various aspects of development, whether through offering development management services, project management services, partnering with other organisations (such as commercial developers), through to participating in joint development partnerships or acting as a developer themselves. 55.8% of providers are directly involved in the development of stock. Forms and levels of funding for these development projects vary considerably, with usage of varied levels of retained equity and debt facilities and a number of other forms of grants and subsidies available.

Of note, there are a range of planning instruments and processes in relation to the provision of affordable housing, with considerable variation in terms of application and impact, and various usage levels across local government areas. An example of a prominent initiative is the NSW Affordable Housing Rental State Environmental Planning Policy (SEPP). Rental SEPP allows developers to increase floor density in new developments in suitable locations (e.g. close to public transport, schools, shops, medical centres) with attached conditions of development approval. For example, that a certain percentage of the development is used as affordable housing which must be managed by a registered community housing provider for a period of 10 years. This has resulted in business responding to, and delivering, much needed affordable housing relief in especially Sydney. To enable this response, the Registrar's office has registered a number of real estate agents and developers. To promote the government outcomes while containing risk, Registrars have agreed to issue Additional Special Conditions of Registration to real estate agents in order to

address the regulatory requirements specific to their business and respect the uniqueness of their business within the CHP community.

### **Expanding the role of the Registrars to Capacity Building<sup>7</sup>**

The scheme design of the NRSCH does not include a clear picture of capacity building in a similar fashion to most regulatory schemes. The Registrars have no dedicated function to provide advice, assistance and guidance to the sector in order to educate about better practices. There are, however, numerous funded programs in place that resemble capacity building functions. These include programs that aim to improve outcomes in the Aboriginal Housing sector, as well as programs like the Industry Development Strategy (IDS) which saw 42 funded projects related to the capacity development of providers and the broader industry.

Through the regulatory assessment function, the NSW Registrar has observed an obvious gap in the intentions of the industry development programs and new entrants' and existing participants' ability to demonstrate improvements. The Registrar is aware of a number of capacity building programs for CHP operating outside the outcome performance measures of the NRSCH. For many, there has been no measurable, tangible improvements in capacity of CHP.

A capacity building function added to the Registrar's role, would allow for:

- Scheme stewards to fund the regulator for capacity building programs with clear and observable performance measurement included.
- Registrars to maximise participation in the scheme and assist providers implement better-practice protections for our most vulnerable.
- Provide better practice guidance to participants where development, viability and quality of community housing is encouraged.
- Promote confidence in good governance of registered CHPs to facilitate greater investment in that sector.
- Make it easier for CHPs to operate in more than one jurisdiction.

Currently, the NSW Registrar has funding for a specific capacity building initiative as a regulatory process/tool for the use of regulatory staff and NRSCH applicants. The design of this initiative could inform NRSCH re-design.<sup>8</sup>

### **The wind-up clause and body corporate provisions restricting entry and NSWLS<sup>9</sup>**

The NRSCH was built on the previous legislative scheme which was only open to organisations receiving assistance from Housing Agencies. It was designed at the

<sup>7</sup> RCH's Capacity Building – Registrar's Forum 31<sup>st</sup> October

<sup>8</sup> RCH 17/18 Annual Report

<sup>9</sup> RCH Annual Report 2018

beginning of significant investment into the community housing sector, including in the form of vesting of property titles. The government felt that a universal assurance mechanism for securing its interest in assets vested to providers needed to be reflected in the legislation. Among other measures, a compulsory requirement for all applicants and registered providers was introduced requiring them to have an acceptable clause in their constitution guaranteeing the return of government owned assets to the government. This enabled the transfer of government-owned assets to another registered provider in case the CHP wound up. This is referred to as the 'wind up clause' condition of registration. It forms a precondition for entry in addition to the requirements relating to corporate structure of applicants and registered providers.

This design feature has tended to reinforce a false perception of community housing being public housing managed by non-government organisations. For example, social housing is often conceived as a composite of public housing (managed by public servants) and community housing (managed by not-for-profits).

While these are important preconditions for some providers, the Review should consider allowing the Registrars more flexibility in considering applications from body-politics and those businesses for which the wind-up clause is not relevant.

Examples being organisations that want to be registered but provide community housing without assistance by the Housing Agency such as affordable housing providers, local government councils, boarding house providers, and Local Aboriginal Land Councils.

Such flexibility could involve a review of registration conditions to cover new entrants that would add value to Scheme but are currently restricted from entry. Currently, to correct this unnecessary barrier, both QLD and NSW have Local Schemes that leverage the intent of the National Law, but establish separate systems for providers that cannot meet the statutory preconditions. Hence, such an adjustment could do away with the need for Local Schemes or could facilitate the emergence of tailored national sub-Schemes for unique market segments. For example, the NRSCH could cater for sub-Schemes that extend participation to associated providers such as Homelessness providers.

As an explanatory note:

*In October 2016, NSW Parliament enacted an amendment to the National Law to establish a local system of registration for the monitoring and regulation of entities that provide community housing but are unable to be registered under the National Law in NSW. In August 2017 the NSWLS formally commenced under Ministerial directive to the Registrar with the NSWLS portal open for registration applications on 1 January 2018.*

*The key objectives of the NSWLS are to:*

- *Provide a NSW local system of registration, monitoring and regulation of entities that provide community housing but are unable to be registered under the NRSCH*
- *Provide a regulatory environment to support the growth and development of the community housing sector*
- *Pave the way for future housing product development*
- *Protect Government investment in the community housing sector.*

*In the first instance, the NSWLS is only open to registering local Aboriginal Land Councils (LALCs). The requirement for LALCs in NSW to be registered under the NSWLS will likely contribute to an increase in the number of Tier 3 providers seeking and attaining registration.*

### **Provider classification system**

Tiers of registration were established to support standardised implementation of Section 12(2)(b) of the National Law which specifies that the National Register should contain the category of registration of registered providers. Tier classification replaced the previous Classes of registration in the NSW and ACT regulatory systems. The Victorian regulatory system has its own classification regime. Although the Victorian system closely aligns with the national scheme, the focus of the Victorian scheme is on the major providers.

Tiers are incorrectly believed to refer to inherent risks to an organisation's ability to operate in compliance with regulatory requirements relating to tenants, assets, government investment and reputation. At a scheme-risk level this is true. The larger the size of organisation and the scope of activities of a provider, the higher likelihood of harm and the greater responsiveness of the regulator to prevent it or detect it early and request actions to mitigate and remove the harm. However, the Tier system provides only a macro-risk perspective to the Registrars, with the Registrars' engagement and escalation policies related more to the business risks evidencing in the CHP rather than their Tier.

This is an important but unclear distinction for many policy and financing bodies. The concept of Tier and the importance of Tier is relevant to the regulatory design and stewardship (Housing Agency) functions of the NRSCH. The Tier system shapes, but does not drive the operational risk considerations of the Registrars; which are more influenced by compliance, harm and trust/threat considerations. In terms of operational risk a Tier 3 failure can be just as dramatic and problematic for Registrars as a Tier 1. However, the failure of a Tier 1 provider would be a critical risk factor for Housing Agencies. A fallacy perpetuated by some observers of the NRSCH is that only the Tier 1 providers receive supported financing and expansion opportunities. However, the history of Tier 2 and 3 providers winning tenders in NSW, plus the willingness of the NHFIC to consider business cases from all Tiers, indicates this is unfounded.

Industry representatives and Registrars started the discussion about possible changes to the provider classification system in 2016. The feedback from the stakeholders has been that the current Tier structure has worked reasonably well and has adequately reflected the scale and capacity of providers. A more transparent articulation of information about what Tiers of registration mean have been suggested. The key issues concerning the Tier system have been not about the NRS itself, but about the CHPs branding and positioning themselves. Housing Agencies and financiers do not appear to rely upon the regulatory tiering system in their decision making; however, may still misconstrue the meaning.

Reports from providers indicate the current Tier system and the corresponding Registrar's risk and engagement policy is fit for purpose. However, there is scope within this macro segmentation to introduce operational level risk-segmentation allowing for flexibility in registration, monitoring, reporting and review. Operational risk-segmentation can accommodate government/program exposure and assist red-tape reduction and joined regulation. The Registrars' work in reviewing the regulatory oversight of Tier 3s and market segmenting Tier 3s, reflects this intent.

The NSW Registrar believes the provider classification system needs no immediate law reform as it is an administrative construct able to be addressed, in part, through the Registrars' own reform efforts. The NSW Registrar does note, however, that ongoing misperceptions of the nature and function of Tier classification system may necessitate the Review considering a new approach.

For example, if the Review considers design proposals to narrow the Scheme (to just social housing) or broaden the Scheme (to all forms of subsidised housing), a review of Tier structures will be necessary. In particular broadening the Scheme to include a range of providers involved in housing may necessitate the need for a Tier 4 category which involves a light touch due to the nature of the business being in services rather than purely housing and the overlap with pre-existing standards and regulatory regimes in other areas.

In short, the NSW Registrar recommends the NRSCH Review should look to broaden the provider base under the NRSCH to include all subsidised housing and some services, and in so doing, consider additional categorisations of providers such that emerging forms of assistance and participation in market segments now and into the future is reflected in the regulatory system.

### **Enforcement laws**

While still balancing the objects of improving business performance and productivity to benefit tenants, one alternative approach to scheme design is a shift to more of an enforcement/inspectorate based model (see Attachment 1). However, a number of improvements could be made to strengthen the NRSCH investigation and



enforcement provisions without altering the fundamentally self-regulatory nature of the scheme.

The Victorian Registrar's authorising environment is reminiscent of an inspectorate oriented regulatory regime. The Victorian regime includes statutory powers for the Registrar including more invasive powers such as the issuance of warrants; appointing board members or an administrator to a registered provider; indemnifying persons on a governing body; directing a merger between registered agencies; and winding up the registered agency. Of note, while available to the Victorian Registrar these powers have not been called upon due to the lack of specific guidance in the legislation for implementing these processes as well as the maturity of the sector. In that regard the practical application of regulatory powers of the Registrar in Victoria is more akin to that applied under the NRSCH.

However, some specific aspects of the Victorian model may be useful in the NRSCH over time. These include:

1. Having a clear set of statutory powers for information collection that are not confused within the conditions of registration. Such information collection powers specific to the Registrar, should be broad to encompass requiring information of CHP, affiliated entities, of the Housing agency, of tenants related to areas of complaint, of other regulators, and of any other related funding body or financing body.
2. Also some consideration is warranted of applying the Victorian model of the Registrar having the decision responsibility to ensure the appropriate transfer of housing assets on wind-up.
3. Some consideration of enforcement powers against the Housing Agency and appeals avenues to Housing Agency decisions is also timely.
4. Currently there is no obligation on Housing Agencies, funding managers, or contract managers to provide any information on the performance of CHPs to the regulators (other than public service code of conduct standards). Registrars are only formally required to provide information to Housing Agencies of action they have taken, rather than actions they are considering taking. The absence of forewarning clearly does not support the level of assurance necessary for public monies and risk. In lieu, Registrars may enter into disclosure agreements with Housing Agencies. The disclosure rules for providing advice to Housing Agencies on enforcement action necessarily should include warning advice of potential or intended enforcement action. This must occur where the Registrar perceives collateral impacts on tenants and businesses from the Housing Agency not having been provided due warning to arrange for alternative measures to be put in place. Concomitantly, there should be a statutory obligation on Housing Agencies to provide information to Registrars

pertinent to the performance of the CHP that mirrors the notification obligation on CHPs.

Examples of weaknesses in powers under NSW enabling law:

- Section 11 of the Community Housing Providers (Adoption of National Law) Act 2012 (the Act), provides the investigation delegation of the Registrar to enact the investigative function listed under Section 10 of the National Law.
- Section 11 of the Act limits the delegation of investigative functions to persons employed by FACS.
  - It may be argued that this provision is restricting the Registrar from identifying and engaging specialist expertise or experience to carry out or assist in the investigation. In one case in NSW, this interpretation has limited the Registrar pursuing financial irregularities associated with Performance Outcome 7 (Financial viability) which required forensic audit of financial records within an investigation.
  - Such interpretation also appears contradictory with the Registrar's function (under the Act) as a statutory officer to remain independent from FACS as the housing agency.
- Given the Registrar has no statutory information collection powers, and hence there is no statutory connection to the use of powers and the conduct of an investigation, an option is for the Registrars to never take action under section 10(1)(e) of the National Law – i.e. “to investigate complaints...” Rather all action can be taken under section 10(1)(d) “to monitor compliance...” However, such an approach would appear to run contrary to the intent of the law.
- The NRSCH policy on investigations has been published by Registrars to provide a coherent narrative for providers on the Registrar's investigative processes and conduct. However, the investigative function under section 10(1)(e) could be made clearer within the National Law rather than in enabling laws and supporting policy.

Weaknesses in powers to collect tenant information under National Law:

- Section 10(1)(e) enables the Registrar to investigate complaints and significant concerns warranting such heightened intervention under the National Engagement Policy. Complaints relating to Schedule 1 of the Act, the National Regulatory Code – Tenant and Housing Services – will necessarily require the Registrar to make enquiries involving the specific circumstances of tenancies. This investigative interest relates to assessing the obligations of the provider under the National Regulatory Code to be “fair, transparent, and responsive in delivering housing assistance”, in particular:
  - Determining and managing eligibility, allocation and terminations
  - Determining and managing rents
  - Managing and addressing complaints
- As the powers of information collection are only contained in the conditions of licence, the Registrar is restricted to acquiring tenancy information from the provider. However the conditions of registration under section 15(6) restrict the provider from advising tenant information to the Registrar. While providers will normally work on approvals to supply such information, in one case, the

provider used this statutory limitation to deny the Registrar the ability to validate complaints against the provider from the community.

- While this case is not reflective of the whole and hence may not be seen to warrant legislative changes, the problem identified highlights a critical inconsistency in the law and the ability of the Registrars to assess against the principles of Performance Outcome 1 – Tenant and Housing Services.

#### Weaknesses in powers to collect whole-of-business information under National Law:

- It is not explicit anywhere in the National Law that the Registrar has scope to assess whole of business performance when assessing compliance with community housing legislation. The conditions of registration listed under Section 15(e) and (f) require providers to provide information in relation to “the affairs of the provider”.
- Performance Outcomes 1 (Tenant and Housing Services) and 2 (Housing Assets) have clearly framed evidence requirements pertinent to the housing components of CHP.
- Performance Outcomes 3 (Community engagement), 4 (Governance), 5 (Probity), 6 (Management), and 7 (Financial viability), all have express evidentiary needs associated with whole-of-business performance. In a scheme design sense, this is intended to allow Registrars to assess performance of other parts of the CHP’s business that, if they did not perform, could bring risk to the social housing components of the CHP’s business and therefore impact governments’ property or funding investment. This breadth of view tends to be supported by specific evidential requirements for the CHP to have administrative controls and effective procedures in place across its businesses – especially related to business planning, governance, compliance management and probity.
- With the shift of CHP to diversify into other not-for-profit and for-profit markets, the importance of this design feature has grown and most CHP acknowledge the need for Registrars to view their ‘whole-of-business’ performance. However, a growing (albeit small number) of CHP have business concerns over this design feature.
- The NRSCH Review would benefit from reconfirming this intent in regulatory design. Providing protections and assurance for the Registrars oversight needs for other parts of the business would be key in this; especially where conflict of interest registers and employment records reflect non-housing related issues.

#### Weaknesses in powers to collect information from other entities under National Law:

- There is no requirement under the National Law or enabling laws for Housing Agencies or other agencies to refer matters to the Registrars. There is an absence of law enabling the sharing of information from Housing Agencies; leading to a growing number of non-binding agreements and protocols.
- In some states, the designated Housing Agency has greater powers of information collection and enforcement than the Registrar (including criminal offence provisions), yet there are no accountability, appeal, information protections, and process that directs public service action. In specific circumstances, the Housing agency should refer cases to the Registrar for

investigation and use of the Registrar's powers. Yet these mechanisms do not exist clearly and uniformly in law.

- The NSW Registrar's view is that the National Law would benefit from transparent obligations for sharing information between relevant participants in the scheme; beyond that between provider and Registrar.

### **Consistency in Independence of the Registrars**

Each Registrar is employed differently in each state/territory. Most are public servants appointed by their Minister to the role. The NSW Registrar is not a public servant and is employed by the Minister under contract as a statutory officer. In some cases, the Registrar's Office sits within the policy arms of government and is influenced by other policy roles the incumbent has. In the ACT, the Registrar has a number of additional regulatory roles and resides in more of an assurance grouping for government.

There is no evidence to suggest that the various measures in place to maintain independence across the jurisdictions have not worked. Regulatory capture and policy capture is not in evidence in any of the independent assessment or enforcement actions taken. However, there are some signposts for scheme viability looking forward that indicate Registrars need to have a closer, independent view of the performance and accountability of funding and contract arms. There has also been a recent shift in some states to restructure their regulatory arm closer within the housing policy domain and arbitrarily reduce resourcing with no recognisance to the statutory demands of the NRSCH.

The NSW Registrar also notes that, while to date, separation and independence has occurred naturally in the pursuit of NRSCH functions, the culture and resourcing of the regulatory body can be influenced over time by the policy and political imperatives of the arm of government it resides in. Hence, the ACT model appears a more enduring model given the organisational culture it is embedded in rests within a more holistic government regulatory assurance system.

Given the size and jurisdictional imperatives of each region, a single approach to the employment of each Registrar would be problematic. However, state and territory governments through the NRSCH review should consider standardising arrangements for housing, supporting and resourcing the independence of their Registrar's office.

**Issues identified with Performance Outcomes of the National Regulatory Code**

The NRSCH National Regulatory Code sets out the performance outcomes which must be met by registered housing providers under the National Law. Over the past five years of operation, a number of issues have been identified where current Evidence Guidelines fall short in providing adequate direction to providers, these are shown in the below table. The Registrar will elaborate on possible solutions through input to the Review's Options Paper later in 2019.

While the performance outcomes in the code provide a useful human sources reporting and assessments framework, a number of the evidence guides appear limited or prescriptive. The result is a 'check list' approach applied to compliance monitoring where compliance is assessed on whether or not the information is provided commensurate with the evidence guidelines, rather than performance assessed against the outcome. The idea of improving performance and highlighting good practice can become limited to recommendations to create better evidentiary documents. Some elements of the outcomes are therefore too narrow to exert a positive assessment while others appear too conflated and are not applicable to all types of providers. For example, Tier 3 providers that are not government funded organisations but contribute to the housing landscape are not effectively assessed against this framework as examples in the evidence guidelines may not be relevant. In addition, some parts of the evidence relating to performance outcomes (such as financial reporting) are more suited to being provided to the Registrar at different times in the monitoring cycle than other forms of evidence. The re-stylising of evidence for market segments and more of a staged scheduling of evidence for specific provider segments, is currently being considered by the national Registrars.

Performance Outcome	Expectation	Specific Areas of the PO	Issues identified in implementation
1 Tenant and housing services	Under this performance outcome the community housing provider is expected to be fair, transparent and responsive in delivering housing assistance to tenants, residents and other clients	<ul style="list-style-type: none"> <li>a. determining and managing eligibility, allocation, and termination of housing assistance</li> <li>b. determining and managing rents</li> <li>c. setting and meeting relevant housing service standards,</li> <li>d. supporting tenant and resident engagement</li> <li>e. facilitating access to support for social housing applicants and tenants with complex needs</li> <li>f. managing and addressing complaints and appeals relating to the provision of housing services</li> <li>g. maintaining satisfaction with the overall quality of housing services.</li> </ul>	<p>The current evidence sets to test whether or not a CHP is being fair, transparent and responsive in delivering housing assistance, is the visibility of policies and procedures (on rent-setting, eligibility, allocation, and termination), the application of these policies, the adherence to housing service standards, tenant engagement, supporting tenants with complex needs, and managing and addressing complaints and satisfaction levels.</p> <p>Given Registrars are precluded from receiving information on tenants (their allocation, eligibility, rent-setting, treatment and termination), the main tests for these performance requirements are generalised and aggregated to whole of CHP policies, complaints systems, and tenant surveys.</p> <p>The key evidence sought may default to the existence of these systems rather than evidence of the effective implementation related to the outcomes measured. In some cases, evidence sought from others may be more suitable – such as the funding managers and other regulators. In some cases, having clearer insight into use of pathways and exits would be beneficial. Also in some cases, the ability to sample by tenant and asset would be beneficial. The latter is especially so in the affordable housing space, where access to property and rent setting information at the asset level is crucial to assessing this outcome.</p> <p>In the current evidence guidelines, a weight of evidential effort is afforded to complaints management and tenant surveys. The idea being that the performance of the provider can be tested against the number of complaints it receives or negative feedback.</p> <p>While client surveys of a proportion of tenants and formal complaint mechanisms are both useful, the NSW Registrar believes a variety of tenant engagement mechanisms could be reflected in the evidence guidelines.</p>
2 Housing assets	Under this performance outcome the community housing provider is expected to manage its community housing assets in a manner that ensures suitable properties are available at present and in the future	<ul style="list-style-type: none"> <li>a. determining changing housing needs and planning asset acquisitions, disposals and reconfiguration to respond (strategic asset management)</li> <li>b. setting and meeting relevant property condition standards</li> <li>c. planning and undertaking responsive, cyclical and life-cycle maintenance to maintain property conditions (asset maintenance)</li> <li>d. planning and delivering its housing development program (asset development).</li> </ul>	<p>Depending on which regulatory design is chosen (see Attachment 1 - page 12), if a more invasive and product based way of regulation is agreed (the inspectorate model), the assurance provided by Registrars would have to be adjusted. There should be clear powers to inspect premises and talk to tenants (connect to the powers reform area). To make enquiries about property conditions etc. which validates management but also assists the viability question.</p> <p>The NSW Registrar has identified that primarily there is a need for better and more efficient stewardship across the NSW housing landscape relating to the condition of assets that supports the formation of a single coherent system and an assurance/regulatory framework to oversee performance in the system. A single system would drive a more consistent and efficient approach to maintenance protocols and the provision for better tenant outcomes.</p>
3 Community engagement	Under this performance outcome the community housing provider is expected to work in partnership with relevant	<ul style="list-style-type: none"> <li>a. promoting community housing to local organisations that work with potential residents, tenants or clients, and community housing providers</li> <li>b. contributing to place renewal and social inclusion partnerships and planning relevant to the</li> </ul>	<p>Based on the five year experience and feedback from providers, the Registrar is of the view that community engagement should be considered in the context of a provider's size and business model. Where more nuance is needed and performance requirement is less of a 'one-size-fits-all' with metrics more attuned to solely housing management. The Registrar believes that more discretely segmenting providers by their dominant market segment would allow the assessment of each market segment to be finely nuanced with the appropriate exchange amongst other relevant regulators. In case of some market segments,</p>

Performance Outcome	Expectation	Specific Areas of the PO	Issues identified in implementation
	organisations to promote community housing and to contribute to socially inclusive communities	provider's community housing activities.	the community engagement performance outcome may not be assessed in a different way, or may not need to be assessed at all.
4 Governance	Under this performance outcome the community housing provider must be well governed to support the aims and intended outcomes of its business	<ul style="list-style-type: none"> <li>a. ensuring coherent and robust strategic, operational, financial and risk planning</li> <li>b. ensuring effective, transparent and accountable arrangements and controls are in place for decision making to give effect to strategic, operational, financial and risk plans</li> <li>c. complying with legal requirements and relevant government policies</li> <li>d. ensuring that the governing body has members with appropriate expertise or that expertise is available to the governing body.</li> </ul>	<p>Connections to other regulatory systems that require similar evidence for registration to other schemes in the area of governance are absent from the evidence guidelines.</p> <p>A community housing provider may benefit from tenant engagement in business planning and risk identification and treatment. Some providers use their membership base for this, however, the formal engagement of tenants in corporate planning is problematic in corporate law and for faith-based organisations. But there may be additional sets of evidence for different circumstances that would create the expectation of tenant involvement in the business planning processes of providers and stated preference in provider's/applicant's constitution for tenant participation on provider's governing body.</p>
5 Probity	Under this performance outcome the community housing provider is expected to maintain high standards of probity relating to its business	<ul style="list-style-type: none"> <li>a. establishing and administering a code of conduct</li> <li>b. establishing and administering a system of employment and appointment checks</li> <li>c. establishing and administering a system for preventing, detecting, reporting on and responding to, instances of fraud, corruption and criminal conduct</li> <li>d. maintaining the reputation of the community housing sector.</li> </ul>	The NRSCH system may benefit from combining the Governance and Probity Performance Outcomes which is the approach taken by the Australian Stock Exchange and OECD guidelines, as well as a number of Australian and overseas regulatory regimes.
6 Management	Under this performance outcome the community housing provider is expected to manage its resources to achieve its intended business outcomes in a cost effective manner	<ul style="list-style-type: none"> <li>a. demonstrating it utilises its assets and funding to meet business goals</li> <li>b. implementing appropriate management structures, systems, policies and procedures to ensure the operational needs of its business can be met (including having people with the right skills experience and the systems and resources to achieve the intended outcomes of its business.</li> </ul>	<p>.</p> <p>The NSW Registrar has conducted detailed campaigns targeting various aspects of utilisation, management of properties, rent as well as provider management structures, skills and succession planning. As a result some of these elements are being advanced by industry peak bodies. As the sector's profile continues to change this work is expected to capture new areas of risk associated with poor management.</p>

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Performance Outcome	Expectation	Specific Areas of the PO	Issues identified in implementation
7 Financial viability	Under this performance outcome the community housing provider must be financially viable at all times	a. ensuring a viable capital structure b. maintaining appropriate financial performance c. managing financial risk exposure.	Financial performance and viability of the sector is the area most likely to require substantial changes. Registrars are already working closely with relevant Commonwealth and state agencies, industry peaks, finance industry and providers on developing new aspects of monitoring financial performance and detecting early signs of risks of performance deterioration. Due to the current nature of the scheme, large providers have also developed their own monitoring and stress testing systems. Smaller providers may demonstrate financial outcomes differently depending on the type of business model they follow as well as the type of provider they are. Comments on segmenting T3 providers by their primary business activities refer to Attachment 4 – page 35 “Provider Classification System”.



