

New South Wales Local Scheme

Regulatory Framework



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1. About the New South Wales Local Scheme



The New South Wales Local Scheme is a regulatory system designed to contribute to a well governed and managed community housing sector, and provide a platform for the ongoing development and viability of the community housing sector across New South Wales.

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

The key objectives of the NSW Local Scheme 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 National Regulatory System for Community Housing (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.

2. Purpose of this Document

This Regulatory Framework outlines how the Registrar will deliver on the regulatory functions under the NSW Local Scheme.

This framework includes applicable legislation, relevant codes applied to assess the registration and performance of providers, how the public register works, and how providers' performance is monitored, enforced and reported.

This document complements other NSW Local Scheme documents, which should be read and applied in conjunction with this framework. In particular:

- **The Charter** - sets out the overarching vision, objectives, regulatory principles and philosophy of the NSW Local Scheme.
- **Tier Guidelines** – interpret the requirements of NSW law concerning the category and allocation of the tier of registration of a provider.
- **Evidence Guidelines** – set out the evidence sources and performance indicators for assessing providers against the NSW Local Scheme Regulatory Framework outcomes.
- **Enforcement Guidelines** – explains the process by which the Registrar is appointed and the Registrar's powers of enforcement under NSW law.

Detailed guidance on other specific aspects within the NSW Local Scheme (e.g. affiliated entity arrangements, financial viability) are also contained in other operational guidance notes, fact sheets, templates and policies. All these documents will be available on the Registrar's website at <https://www.rch.nsw.gov.au/nsw-local-scheme>.

3. Legislation

In October 2016, NSW Parliament enacted an amendment to the *Community Housing Providers (Adoption of National Law) Act 2012* (NSW) to establish a local system of registration, monitoring and regulation of entities that provide community housing but are unable to be registered under the *Community Housing Providers National Law* (NSW).

In August 2017, under section 25A of the Act, the NSW Minister for Family and Community Services directed the Registrar to commence the NSW local registration system (known as the NSW Local Scheme) that:

- as far as reasonably practicable, is consistent with the National Regulatory System for Community Housing (NRSCH)
- does not include the 'wind-up' condition of registration under the National Law (NSW), whilst ensuring that any assets or assistance provided by the NSW Government is appropriately protected
- initially focuses on registering NSW Local Aboriginal Land Councils (LALCs).

The scope of the Registrar's NSW Local Scheme functions is limited to regulatory activities in accordance with the National Law (NSW).

4. NSW Local Scheme Regulatory Framework

The NSW Local Scheme Regulatory Framework sets out the performance outcomes and requirements that must be met by NSW Local Scheme registered community housing providers.

The performance outcomes under the NSW Local Scheme Regulatory Framework are:

- 1. Tenant and housing services** - the community housing provider is fair, transparent and responsive in delivering housing assistance to tenants, residents and other clients.
- 2. Housing assets** - the community housing provider manages its community housing assets in a manner that ensures suitable properties are available at present and in the future.
- 3. Community engagement** - the community housing provider works in partnership with relevant organisations to promote community housing and to contribute to socially inclusive communities.
- 4. Governance** - the community housing provider is well-governed to support the aims and intended outcomes of its business.
- 5. Probity** - the community housing provider maintains high standards of probity relating to the business of the provider.
- 6. Management** - the community housing provider manages its resources to achieve the intended outcomes of its business in a cost effective manner.
- 7. Financial viability** - the community housing provider is financially viable at all times.

5. NSW Local Scheme Register

The Registrar maintains the NSW Local Scheme Provider Register, a public record of all NSW Local Scheme registered community housing providers.

The Provider Register is divided into three parts, known as 'tiers': Tier 1, Tier 2 and Tier 3. The tiers reflect differences in the nature, scale and scope of different providers' community housing operations. Each tier has a different level of regulatory oversight and engagement.

Where necessary, the NSW Local Scheme Provider Register will include details of enforcement actions and conditions of registration in line with the NRSCH.

6. Regulation of Community Housing Providers

The aim of the NSW Local Scheme is a well governed, effectively managed and viable community housing sector that meets the housing needs of tenants and provides assurance for NSW Government and investors.

Regulation holds registered community housing providers accountable for complying with the National Law (NSW). The governing body and management of each registered community housing provider is responsible for ensuring the provider delivers community housing in compliance with the National Law (NSW).

The NSW Local Scheme encourages the sector to take a proactive approach to managing the delivery of community housing in accordance with the NSW Local Scheme Regulatory Framework.

The governing bodies of registered community housing providers are responsible for ensuring their own good governance, probity, community engagement, quality tenancy and asset management, and financial viability.

The NSW Registrar of Community Housing:

- registers the provider and can cancel its registration in certain circumstances
- monitors and enforces the provider's compliance with the National Law (NSW)
- investigates complaints about the provider's compliance with the National Law (NSW)
- records and makes publicly available certain information about the provider

- provides information and advice to the relevant Minister and NSW Government (policy/funding) agency (see section 12).

The Registrar expects that each registered community housing provider will undertake regular evidence based self-assessment of performance against National Law (NSW) and the NSW Local Scheme Regulatory Framework, using audit and peer review where appropriate.

The aim of each registered community housing provider should be for the periodic assessment of compliance to result in confirmation of good performance conforming to the requirements of the National Law (NSW) and the NSW Local Scheme Regulatory Framework.

The Registrar will also regulate a provider's compliance with the National Law (NSW) (see Section 11). The Registrar operates separately from the funding and service provision roles performed by relevant NSW Government agencies, and makes independent regulatory decisions in accordance with the Registrar's functions under the National Law (NSW) (see Section 9).

7. Risk-based Regulation

The NSW Local Scheme is designed to identify, monitor and respond to risks that have serious consequences for tenants, funders and investors, community housing assets and the reputation of the sector in the state of New South Wales.

A proportionate regulatory approach is needed with different levels of regulatory engagement for providers with different risk profiles. The Registrar will work from the principle of setting the minimum requirements necessary to appropriately manage risk.

The greatest regulatory focus and scrutiny will be on providers assessed to have the greatest risk due to the scale and scope of their activities, and where the realisation of the risks would translate into significant impact for tenants, assets and sector reputation.

For this reason, the Registrar categorises community housing providers into different tiers of registration according to the scale and scope of their activities, and applies different levels of regulatory oversight and engagement to each tier. The registration tier is the first level of risk profiling.

The second level of risk profiling involves the Registrar examining performance and assessment data and information to assess the actual risks associated with the provider's capacity and compliance with the National Law (NSW).

The Registrar makes this assessment in the context of the provider's business, with an understanding of the provider's scale and scope, operating environment, business plan and outcomes, and history in the delivery of community housing. The Registrar will also take into account trends in performance, as well as other relevant factors.

This engagement will be regularly reviewed in light of changing business focus, complexity and performance. However, a standard level of engagement and ongoing compliance assessment will always be undertaken even when a provider is deemed to be very low risk (see section 11).

When the Registrar assesses risk, the Registrar focuses on the provider's community housing activities. This assessment will not always be the same as the provider's own assessment of risk.

More information about tiers, their requirements and the allocation process can be viewed within the Tier Guidelines, available on the Registrar's website.

Details regarding the relationship to risk and compliance can be found in section 12.

8. Eligibility Criteria

Each tier of registration under the NSW Local Scheme has eligibility requirements that a provider must address in order to become registered.

These tier-specific requirements are as follows.

Tier 1

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

- is incorporated as either a company limited by shares or a company limited by guarantee under the *Corporations Act 2001* (the Corporations Act)
- demonstrates that if it has affiliated entity arrangements it maintains control over activities and decisions that impact on its compliance with NSW law
- demonstrates it meets the evidence requirements for a Tier 1 provider, as specified in the Evidence Guidelines.

Tier 2

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

- is a body corporate created through State or Australian Government legislation, which are:
 - companies limited by shares under the Corporations Act
 - companies limited by guarantee under the Corporations Act
 - corporations incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*
 - other bodies' corporate created through other State or National legislation (e.g. Local Aboriginal Land Councils which legislation declares to be a body corporate).

- demonstrates that if it has affiliated entity arrangements it maintains control over activities and decisions that impact on its compliance with NSW law
- demonstrates it meets the evidence requirements for a Tier 2 provider.

Tier 3

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

- is a body corporate created through State or Australian Government legislation, which are:
 - companies limited by shares under the Corporations Act
 - companies limited by guarantee under the Corporations Act
 - corporations incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*
 - co-operatives or incorporated associations under NSW State legislation
 - other bodies' corporate created through other State or National legislation (e.g. Local Aboriginal Land Councils which legislation declares to be a body corporate)
- demonstrates that if it has affiliated entity arrangements, it maintains control over activities and decisions that impact on its compliance with NSW law
- demonstrates it meets the evidence requirements for a Tier 3 provider.

9. Separation between Regulation and Policy/Funding

The scope of the Registrar's NSW Local Scheme functions includes:

- maintain the NSW Local Scheme Provider Register
- assess the suitability of entities to be registered
- register entities and cancel registration
- monitor compliance
- investigate complaints
- provide and share information, and
- advise the Minister and Housing Agency.

NSW Government agencies have responsibility for policy and funding activities and decisions.

To give effect to these functions and responsibilities:

- there is to be transparency in arrangements for the separation of regulatory decisions and policy/funding decisions
- the Registrar will make regulatory decisions in the Registrar's own right in performing statutory functions
- NSW Government agencies will not instruct or seek to influence regulatory decisions
- exchange of information between the Registrar and NSW Government agencies will occur through the arrangements outlined in section 12 relating to information sharing.

NSW will have in place arrangements that demonstrate a clear separation of processes with regards to regulatory decisions and policy and funding decisions.

These should include but are not limited to:

- terms of appointment of the Registrar
- structural arrangements that ensure the Registrar's decisions are not subject to the approval of a senior officer in a NSW Government agency.

10. Registration

Registration requirements

An eligible entity that provides or intends to provide community housing can apply to the Registrar for registration as a NSW Local Scheme community housing provider in a particular Tier.

The Registrar will use the eligibility requirements in the Tier Guidelines and the Evidence Guidelines when making a decision about registration and appropriate tier of registration.

The Registrar will register the entity if satisfied that:

- the provider will comply with the National Law (NSW) and the NSW Local Scheme Regulatory Framework
- the provider will comply with any conditions of registration
- approval is appropriate in the circumstances.

All providers, at the time of applying for registration under the NSW Local Scheme must meet the conditions of registration as per requirements of the National Law (NSW) (see conditions of registration below).

Registration process

The Registration Return Guide sets out information about the registration process.

There are two main parts to registration:

1. Eligibility and Tier Form

A provider submits an Eligibility and Tier Form (ETF) to the Registrar. The Registrar uses this to confirm whether the organisation is eligible to apply for registration as a NSW Local Scheme community housing provider and to make a determination of the provider's provisional Tier.

2. Application for Registration

A provider which is assessed as eligible for registration will be sent an

Application for Registration (AFR) and supporting documentation. These documents are appropriate to the provider's provisional Tier and are designed to allow the Registrar to collect the evidence necessary to determine whether the provider has the capacity to comply with the performance requirements and outcomes of the NSW Local Scheme Regulatory Framework.

By assessing the information and detailed documentation provided, the Registrar will make a full assessment of the provider's eligibility and, if appropriate, the Tier in which the provider will be registered.

The Tier Guidelines and the Evidence Guidelines contain detailed information on the eligibility requirements for each Tier (see section 8), and the evidence required.

In normal circumstances, the application process will be completed in three months. The overall registration process normally takes four months.

Conditions of registration

All community housing providers registered under the NSW Local Scheme must comply with the conditions of registration set out in the National Law (NSW). Specific information on three of these conditions of registration is listed below:

Assets' List

Under the requirements, all registered providers must keep and maintain a list of their community housing assets in a form approved by the Registrar and make this list available upon request to the Registrar. This document will be referred to as the Assets' List.

The Assets' List will contain all assets defined as 'community housing assets', as follows:

- a) land vested in the provider by or under the community housing legislation in the State of NSW, or

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

The requirements in NSW as to what assets must be recorded on the Assets' List will be consolidated and made publicly available to community housing providers.

The 'wind-up' conditions

The NSW Local Scheme, as much as practicable, is to be consistent with the NRSCH with the exclusion of the conditions of a wind-up clause in the constitution of certain providers (such as Local Aboriginal Land Councils), whilst still ensuring that any assets or assistance provided by the NSW Government agencies are appropriately protected.

This condition must be met before an organisation can be registered under the NSW Local Scheme. For the purposes of implementing this condition two formats are made available for registration to commence:

- a) A clause in the provider's constitution that states 'All remaining community housing assets in the State of New South Wales on winding up will be transferred to another registered community housing provider or to a NSW housing agency in the jurisdiction in which the asset is located'.
- b) A policy ratified by the provider's governing body, where the provider

(e.g. a Local Aboriginal Land Council) can demonstrate that the policy wording is consistent with the wind-up requirements.

Providers are encouraged to refer to the National Law (NSW) and may wish to seek legal advice on compliance with the National Law (NSW). Such advice can be provided to the Registrar to demonstrate that the constitution or policy wording is appropriate and compliant with the conditions of registration.

The Registrar will examine the evidence and reach a final decision, which may or may not concur with the legal advice obtained by the provider.

Notification of adverse changes

A requirement of the National Law (NSW) requires providers to notify the Registrar of any change in their affairs that may have an adverse impact on their compliance with community housing legislation (adverse change).

An adverse change is any serious incident or event that may have an adverse impact on the provider's compliance with the National Law (NSW), including the performance requirements in the NSW Regulatory Framework. Notifying the Registrar of adverse changes is a corporate responsibility of the provider.

Notification must be made before, or no later than 72 hours after, the adverse change. It is a matter of judgment for the provider as to what changes should be notified to the Registrar.

Where a provider is uncertain about whether an incident or event is notifiable as an adverse change, the provider should contact the Registrar to discuss the matter. If a provider does not have the opportunity to discuss the matter with the Registrar, the provider should disclose it as a potential adverse change. This requirement forms part of a provider's ongoing compliance responsibilities.

11. Ongoing Compliance Assessments

The Registrar is responsible for both promoting a culture of compliance and detecting and addressing non-compliance at the earliest opportunity in order to protect the integrity of the community housing sector.

The Registrar will proactively engage with providers on an ongoing basis to foster compliance. This engagement will be risk-based to ensure the effective and efficient use of resources. The Registrar will use common risk profiling methods to assess the risk of non-compliance in the future and for ongoing compliance assessment.

In addition to proactive engagement with the sector to foster compliance, all registered community housing providers must periodically demonstrate that they are achieving relevant performance requirements under NSW Local Scheme Regulatory Framework and otherwise complying with the National Law (NSW).

Standard periodic compliance assessment

All community housing providers must complete a Compliance Return on a regular periodic basis, and submit it to the Registrar. Tier 1 and Tier 2 providers must complete a Compliance Return every year. Tier 3 providers must complete a Compliance Return every two years.

The Registrar may also seek input from other relevant parties, such as NSW Government agencies.

The Registrar uses the information in the compliance return and in the supporting documents to prepare a compliance assessment report. This report sets out the Registrar's determinations on tier and compliance, findings on performance and the reasons for the determination.

The provider receives a draft report for comment before the final compliance assessment report is issued.

Where necessary, the Registrar will provide guidance to the provider as to the types of action that the provider should take to improve performance and bring the provider to compliance.

This forms part of a periodic assessment that seeks to ensure ongoing compliance with the NSW Local Scheme Regulatory Framework and constitutes the minimum level of oversight that will be applied.

Triggered compliance assessment

In addition to standard periodic assessment, certain events or the outcome from the last assessment and risk profiling process may trigger additional compliance assessments outside of the standard cycle

Ongoing risk profiling will be used to analyse a provider's level of risk in addition to the standard compliance assessments. A higher risk profile may result in triggered compliance assessments to address the issues raised. The complete resolution of the issues should result in a reduction in the risk profile. This would allow the provider's compliance regime to return to the standard periodic compliance assessment cycle appropriate to its tier of registration.

Triggered compliance assessments will be proportionate to the risk that triggers them. The Registrar will limit the scope of additional assessment activities to the minimum additional engagement needed to understand the nature and extent of the risk, the impact this has or will have on the provider's community housing business, and to provide assurance that it has been appropriately mitigated.

Additional assessments may be limited to requesting additional information on a particular risk, or may extend to a wider compliance assessment.

12. Information Sharing

The Registrar and NSW Government agencies have agreed to manage, and where permitted, share information gathered through the NSW Local Scheme.

The Registrar will enter into an operating agreement with relevant Government agencies. Such agreements will be consistent with the following list of high level principles that will be applied to all information sharing in accordance with the National Law (NSW) and NSW Local Scheme Regulatory Framework:

1. A consistent approach to information sharing between the Registrar and Government agencies will be adopted.
2. Information shared between the Registrar and Government agencies will uphold the principle of maintaining separation between policy/funding and regulation.
3. Housing agencies will only request and the Registrar will only share information about individual community housing providers that is either publicly available, provided with the consent of the provider or falls within the threshold of a reportable incident as specified in the sections below.

Information sharing under the National Law (NSW)

The National Law (NSW) requires the Registrar to provide relevant Government agencies with the following information:

- registration and regulation of registered entities and any other matter under community housing legislation
- issuance of a Notice of Intent to Cancel Registration
- information regarding providers whose application for:
 - conditions to which the registration is subject copy of any binding instructions

Additional information sharing

1. The Registrar will not share any commercial-in-confidence or board-in-confidence material without the consent of the provider, unless it pertains to a breach of law that requires the Registrar to make such information available.
2. The Registrar will encourage providers to submit information directly to the relevant Government agency about any incident or finding that could have a serious negative impact on tenants, community housing assets or the reputation of community housing. Where a provider chooses not to submit this information, the Registrar may notify the relevant agency about such an incident and provider appropriate supporting information.
3. The Registrar will provide assessments of performance of individual providers and on the NSW Local Scheme to the Minister and Housing Agency to satisfy the objects of the National Law (NSW); in particular, section 3 (1) (b) 'to facilitate government investment in the community housing sector and ensure the protection of that investment'.

12. Information Sharing

4. The Registrar and Government agencies will inform each other when any significant details about a provider are changed, including enforcement actions.
5. Government agencies will inform the Registrar of significant changes to legislation and policy.
6. Government agencies will provide the Registrar with a schedule of any significant resource allocations to individual providers.
7. Government agencies will provide the Registrar, upon request, with validation about basic information about a provider's property/dwelling numbers in which an agency has an interest, programs under agreement Government, recurrent funding and maintenance responsibilities.

13. Enforcement Action

The Registrar has a range of enforcement powers to ensure that tenants and community housing assets are appropriately protected if a provider does not comply with its obligations.

Generally, the Registrar will prefer staged and escalated approaches to enforcement. If the matter is not serious or urgent, the Registrar will endeavour to work co-operatively with the provider. Providers are expected to identify and remedy any areas of non-compliance or failure.

Before taking enforcement action, the Registrar will consider a full range of interests, including the interests of tenants, the provider, secured creditors and Government agencies (where appropriate).

The Registrar will take enforcement action if non-compliance is significant and requires more than regulatory engagement to ensure compliance is achieved.

The Registrar's enforcement powers are:

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

In exercising these powers under the National Law (NSW), the Registrar will comply with the Enforcement Guidelines. The purpose of the Guidelines is to ensure consistency in accordance with the principles of good regulation and in the use of enforcement powers.

14. Reviews and Appeals

The Registrar and Registrar's delegates will exercise discretion and make decisions in the conduct of their duties. Good public administration requires the proper use of discretionary powers that affect the rights and interests of individuals and organisations. Accepted good practice allows for the review of decisions of public officials.

Whereas some decisions trigger a specific right to external review, the Registrar will also provide an option of internal review on all administrative decisions and the professional conduct of regulatory staff.

Internal review involves an affected person or organisation applying to the Registrar to have the decision reviewed by an officer not substantially involved in the original decision. The request for an internal review must be made within 28 calendar days after the day the affected person or organisation received the original decision.

The Registrar will appoint an internal review officer, who will be an individual who was not substantially involved in the original decision-making. The internal review officer will consider all original documents and the original decision and any additional information in relation to the original decision.

At the end of the review, the officer may:

- affirm the decision
- vary the decision, or
- set aside the decision and make a decision in substitution for the decision that is set aside.

Appeals

The National Law (NSW) provides for the external review of certain decisions made by the Registrar including:

- a decision to vary the category of registration of a provider
- a decision to refuse an application for registration, or to refuse an application to vary the provider's registration
- a decision to impose or revoke an additional standard condition of registration
- a decision to cancel the registration of a registered provider
- a decision to refuse an application by a registered provider to cancel the provider's registration
- a decision to issue Binding Instructions to a registered provider
- a decision to appoint a statutory manager to a registered provider

Once the Registrar provides the entity with written notice of one of these types of decisions, the entity has 14 days to appeal to the relevant Appeal Tribunal.

The Registrar will ensure an appeals' management process is in place, consistent with the principles of natural justice. Successful appeals of decisions made by the Registrar are to be published as part of the registration information.

15. Sector Engagement

The Registrar's ongoing effectiveness as a regulator depends on sound relationships with stakeholders.

It is crucial that the Registrar engages with stakeholders co-operatively to provide an effective regulatory environment that has the trust and support of tenants, providers and investors.

Whereas the Registrar's most direct relationships are with community housing providers, the Registrar has a number of mechanisms in place to promote and ensure an understanding of all stakeholders' needs.

The Registrar will have mechanisms in place to consult and engage with stakeholders on regulatory approaches and sector engagement. This may include sector engagement activities that are co-ordinated nationally where required.

For more information

For more information on the NSW Local Scheme, please access the NSW Registrar's website at <https://www.rch.nsw.gov.au/nsw-local-scheme>.



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