



## Registrar's Update – Constitution Campaign Wrap-Up

This update focusses on the recent Constitution Campaign conducted by the Office of the Registrar of Community Housing (ORCH).

Over 18 months, the ORCH engaged in a campaign to review the strength of the wind-up clause in the constitutions of every nationally registered community housing provider (CHPs) with NSW as their primary jurisdiction.

I am pleased to report that this matter has been finalised as a campaign. A number of amended constitutions from some CHPs have yet to be submitted, awaiting ratification at their Annual General Meetings (AGM) at the end of this year. In future, any outstanding issues will be reviewed as part of the CHP's "business as usual" compliance.

It has been a rewarding and important learning experience for all involved including the sector, myself and our staff.

The cooperation of the sector in this campaign was excellent and I am grateful for the input.

### The Premise

It is a condition of registration of all community housing providers in the National Regulatory System Community Housing (NRSCH) that all registered CHPs must have a valid wind-up clause. The clause must provide that on winding up, any community housing assets are transferred to another registered community housing provider or to the Housing Agency. This requirement can be found in s15(2)(c) of the Appendix to the *Community Housing Providers (Adoption of National Law) Act 2012 (NSW)* (National Law).

This clause must be included in all nationally registered CHP constitutions, even if the CHP does not hold or does not intend to hold community housing assets or receive Housing Agency assistance. The term "community housing asset" and "community housing assistance" are legally defined terms. Local Scheme registrants have a policy which has the same effect.

The rationale is to make sure that social housing property numbers are not reduced, to protect government investment and to ensure social housing tenant outcomes are met.

We listened to your concerns and in consultation with the sector, we accepted that to meet Australian Charities and Not-for-Profit Commission obligations, the obligation to transfer to another registered CHP could be restricted in the wind-up clause to not-for-profit CHPs with charitable objects and charitable attributes, such as deductible gift recipient (DGR) status.

The ORCH team reviewed all 171 constitutions. The review found that 75% of Tier 1 and Tier 2 CHPs, and 61% of Tier 3 CHPs were fully compliant with the National Law.

The wind-up clause must remain in the constitution at all times. In any event, the National Law requires a mandatory notification to the Registrar if the CHP amends the constitution's wind-up clause. This was overlooked by some CHPs. Section 15(2)(h)(v) of the National Law says:

*...the provider must notify the primary Registrar for the provider of the occurrence of any of the following within the time specified:*

*(v) a change in the affairs of the provider that may have an adverse impact on its compliance with the community housing legislation - before or no later than 72 hours after the change.*

The NRSCH [Provider Notification Guidance](#) includes a requirement to notify the Registrar when “changes to the provider’s constitution affecting the wind-up clause that was in place and deemed eligible under the National Law when the provider’s registration was determined”.

There seemed to be a variety of reasons the clauses were not valid but one of the most common reasons was that when the constitution was reviewed and amended by the CHP, even by external lawyers, the wind-up clause somehow dropped out of the new version.

It is good governance to review an organisation’s constitution regularly. However, care should be taken to make sure that the new constitution is appropriately tailored for the organisation.

Often the original constitution was replaced by the “off-the-shelf” template from the ACNC without customising the document appropriately. It is important to instruct the drafter with the appropriate historical documents (including amending resolutions) and to ensure the document is drafted having regard to all the organisation’s obligations and regulatory frameworks.

The ORCH also recognises that some clauses were deemed valid earlier by this office, but on reconsideration with fresh eyes, further amendment was required.

### **Things to watch out for**

While many wind-up clauses had stand-alone issues, some common mistakes were:

- Including a requirement that the Housing Agency have charitable attributes. This is clearly not possible as the Housing Agency is not a charity.
- Failing to define terms, such as “community housing asset”, as per the National Law.
- When reviewing the constitution, deleting the wind-up clause altogether and failing to notify the Registrar of the change.

The wind-up provision must be clear and not open to interpretation as to where the assets can be transferred to. For the avoidance of doubt, the best approach is to adopt the following wording which will be accepted by the Registrar:

*Notwithstanding any other provision in this constitution, all remaining community housing assets in a participating jurisdiction on winding up will be transferred to another registered community housing provider or to a Housing Agency in the jurisdiction in which the asset is located.*

*The terms “community housing assets”, “Housing Agency” and “participating jurisdiction” have the same meaning given to the terms in the Appendix to the Community Housing Providers (Adoption of National Law) Act 2012 (NSW), as amended or replaced.*

## **Contact**

Please direct any requests for further information to the Office of the Registrar of Community Housing on 1800 330 940 or email [registrar@facs.nsw.gov.au](mailto:registrar@facs.nsw.gov.au).

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Registrar